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IN THE
CIRCUIT COURTS OF APPEALS AND
DISTRICT COURTS OF THE
UNITED STATES

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OF THE

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CASES REPORTED

	Page		Page
A. A. Raven, The (D. C.).....	572	Birdsall v. Delaware & H. Co. (D. C.)....	717
Abbott v. Underwood (C. C. A.).....	335	Board of Com'rs of Osage County, Okl., v. United States (C. C. A.).....	883
Actiesselskabet Ingrid v. Central R. Co. of New Jersey (C. C. A.).....	72	Booth, In re (D. C.).....	575
Actiesselskabet Ingrid v. Central R. Co. of New Jersey (C. C. A.).....	991	Borland v. Central Trust Co. of Illinois (C. C. A.).....	878
Adams v. Boston Store (D. C.).....	626	Boston Store, Adams v. (D. C.).....	626
Ajax Rail Anchor Co., P. M. Co. v. (D. C.)	634	Bowen, Colman v. (D. C.).....	911
Allen, William R. Compton Co. v. (D. C.)	537	Bowland, Central Building, Loan & Savings Co. v. (D. C.).....	526
Allison v. United States (C. C. A.).....	329	Brace v. Central R. Co. of New Jersey (D. C.).....	718
Alvord v. Smith & Watson Ironworks (D. C.).....	150	Branham, Coca-Cola Co. v. (D. C.).....	264
American Bonding Co. of Baltimore v. United States (C. C. A.).....	990	Breyer Printing Co., In re (C. C. A.)....	878
American Car & Foundry Co., Keithley v. (D. C.)	904	Broderick, Kennedy v. (C. C. A.).....	137
American Car & Foundry Co. v. Kindermann (C. C. A.).....	499	Bron, In re (C. C. A.).....	721
American Car & Foundry Co. v. Merchants' Despatch Transp. Co. (D. C.).....	904	Bryan County State Bank of Caddo, Okl., Eubank v. (C. C. A.).....	833
American Fruit Machinery Co., Robinson v. (D. C.).....	179	Bucksport Nat. Bank v. Conners (C. C. A.)	990
American Hoist & Derrick Co. v. Nancy Hanks Hay Press & Foundry Co. (D. C.)	785	Butterfield v. Woodman (D. C.).....	208
American Plate Glass Co., Hitchcock v. (D. C.)	766	C. A. Dunham Co. v. Warren Webster & Co. (C. C. A.).....	991
Ammerman v. United States (C. C. A.).....	326	Camas Prairie R. Co., Smith v. (D. C.)... 799	
Anaconda Copper Min. Co., Wall v. (D. C.)	242	Case Threshing Mach. Co., Closz & Howard Mfg. Co. v. (D. C.).....	937
Anderson v. Morris & E. R. Co. (C. C. A.)	83	Cauble v. Central Vermont R. Co. (D. C.)	712
Armour & Co. v. Zvega (C. C. A.).....	312	Central Building, Loan & Savings Co. v. Bowland (D. C.).....	526
Arthur v. Maryland Casualty Co. (D. C.)	386	Central R. Co. of New Jersey, Actiesselskabet Ingrid v. (C. C. A.).....	72
Arti-Stain Co., In re (D. C.).....	942	Central R. Co. of New Jersey, Actiesselskabet Ingrid v. (C. C. A.).....	991
Aurora, E. & C. R. Co., Economic Engineering & Construction Co. v. (D. C.)....	637	Central R. Co. of New Jersey, Brace v. (D. C.).....	718
Austrian v. Central Trust Co. of Illinois (C. C. A.).....	883	Central Trust Co., Benjamin v. (C. C. A.)	887
Automobile Supply Mfg. Co., Lovell-McConnell Mfg. Co. v. (C. C. A.).....	146	Central Trust Co., Moseson v. (C. C. A.)..	889
		Central Trust Co., Peller v. (C. C. A.)....	889
Baker, Grand Rapids Show Case Co. v. (C. C. A.).....	341	Central Trust Co. of Illinois, Austrian v. (C. C. A.).....	883
Bank of North America v. Pennsylvania Oil Refining Co. (D. C.).....	377	Central Trust Co. of Illinois, Borland v. (C. C. A.).....	878
Barrell, Fitchburg Duck Mills v. (C. C. A.)	594	Central Trust Co. of Illinois, Chicago Auditorium Ass'n v. (C. C. A.).....	308
Bates v. United Shoe Machinery Co. (C. C. A.)	140	Central Vermont R. Co., Cauble v. (D. C.)	712
Bee, The (D. C.).....	709	Charles Killam & Co. v. Monad Engineering Co. (D. C.).....	438
Beebe v. B. F. Sturtevant Co. (D. C.)....	715	Charles Killam & Co., Monad Engineering Co. v. (D. C.).....	444
Bellefontaine Building & Loan Co. v. McMaken (D. C.).....	526	Chesbrough, Robins Dry Dock & Repair Co. v. (C. C. A.).....	121
Benedetto v. W. P. Rend Collieries Co. (C. C. A.).....	143	Chicago Auditorium Ass'n v. Central Trust Co. of Illinois (C. C. A.).....	308
Benedict v. Hahlo (C. C. A.).....	303	Chicago, M. & St. P. R. Co. v. Old Colony Trust Co. (C. C. A.).....	577
Benjamin v. Central Trust Co. (C. C. A.)..	887	Chicago, M. & St. P. R. Co., Schweig v. (C. C. A.).....	750
Berry, Davis v. (D. C.).....	413	Chicago, M. & St. P. R. Co., State of Missouri v. (D. C.).....	562
Bethlehem Steel Co., Firth-Sterling Steel Co. v. (D. C.).....	755		
B. F. Sturtevant Co., Beebe v. (D. C.)....	715		

	Page		Page
Chicago & A. R. Co., State of Missouri v. (D. C.)	562	Economic Engineering & Construction Co. v. Aurora, E. & C. R. Co. (D. C.)	637
Chicago & N. W. R. Co., Ralph v. (C. C. A.)	744	Economy Fuse & Mfg. Co., Johns-Pratt Co. v. (D. C.)	639
Chopy, Humbert v. (D. C.)	549	Economy Iron Works, William Kane Mfg. Co. v. (D. C.)	932
Chotiner, In re (D. C.)	916	Edward F. Gerber Co. v. Title Guaranty & Surety Co. (D. C.)	980
Cincinnati Exhibition Co. v. Marsans (D. C.)	269	E. I. Du Pont de Nemours Powder Co. v. Masland (D. C.)	271
Circleville Light & Power Co., Holden v. (C. C. A.)	490	E. N. Rowell Co. v. William Koehl Co. (D. C.)	780
City of Amsterdam, Sanitary Street Flushing Mach. Co. v. (D. C.)	190	Erickson v. Gallagher (C. C. A.)	144
City of Chicago v. New York, C. & St. L. R. Co. (C. C. A.)	735	Eubank v. Bryan County State Bank of Caddo, Okl. (C. C. A.)	833
City of Detroit v. Grummond (C. C. A.)	273	Evans, Grand Union Tea Co. v. (D. C.)	791
City of Ft. Smith, Municipal Waterworks Co. v. (D. C.)	431	First Savings & Trust Co. v. Romadka (C. C. A.)	113
City of Grand Rapids, Warren Bros. Co. v. (D. C.)	364	Firth-Sterling Steel Co. v. Bethlehem Steel Co. (C. C. A.)	755
City of Omaha, Omaha Electric Light & Power Co. v. (C. C. A.)	848	Fitchburg Duck Mills v. Barrell (C. C. A.)	594
City of Seattle, Seattle, R. & S. R. Co. v. (D. C.)	694	Fogelsong Mach. Co., J. D. Randall Co. v. (C. C. A.)	599
Closz & Howard Mfg. Co. v. J. I. Case Threshing Mach. Co. (D. C.)	937	Fogelsong Mach. Co., J. D. Randall Co. v. (C. C. A.)	601
Coca-Cola Co. v. Branham (D. C.)	264	Frank E. Scott Transfer Co., In re (C. C. A.)	308
Cohn, Greenwald Bros. Inc., v. (D. C.)	195	Frank F. Smith Metal Window Hardware Co. v. Yates (C. C. A.)	359
Colman v. Bowen (D. C.)	911	Frank F. Smith Metal Window Hardware Co. v. Yates (D. C.)	361
Colo, United States v. (D. C.)	654	Frank Holton & Co. v. Pepper (D. C.)	368
Compton Co. v. Allen (D. C.)	537	Frear Western Union Tel. Co. v. (D. C.)	199
Conley Camera Co. v. Multiscope & Film Co. (C. C. A.)	892	Frederick, In re (C. C. A.)	990
Conner v. Craig (C. C. A.)	729	Galbraith v. Robson-Hilliard Grocery Co. (C. C. A.)	842
Connors, Bucksport Nat. Bank v. (C. C. A.)	990	Gallagher v. Erickson (C. C. A.)	144
Conrole v. Norfolk & W. R. Co. (D. C.)	823	Gans S. S. Line, Gwladys S. S. Co. v. (C. C. A.)	340
Consumers' Albany Brewing Co., In re (D. C.)	988	Geller, In re (D. C.)	558
Continuous Glass Press Co., Schmertz Wire Glass Co. v. (D. C.)	828	Gerber Co. v. Title Guaranty & Surety Co. (D. C.)	980
Copeland v. Hornik (C. C. A.)	117	Gilchrist Transp. Co., In re (D. C.)	423
Copeland v. Hornik (C. C. A.)	120	Gilmore, M. V. Moore & Co. v. (C. C. A.)	99
Copeland & Co., In re (C. C. A.)	120	Gilmore v. Vaughn (C. C. A.)	356
Cordova Shop, In re (D. C.)	818	Gladys Belle Oil Co. v. Mackey (C. C. A.)	129
Cozatsky, In re (D. C.)	920	Goldschmidt Thermit Co. v. Primos Chemical Co. (D. C.)	382
Craig, Conner v. (C. C. A.)	729	Goldstein, In re (C. C. A.)	887
Crescent Mfg. Co. v. Mickle (D. C.)	246	Goldstein, In re (C. C. A.)	889
Davis v. Berry (D. C.)	413	Goodwin Film & Camera Co. v. Eastman Kodak Co. (D. C.)	831
De Koven v. Lake Shore & M. S. R. Co. (D. C.)	955	Gordon, United States Trust Co. v. (C. C. A.)	929
Delaware, L. & W. R. Co. v. Van Santwood (D. C.)	252	Graham, Ex parte (D. C.)	813
Delaware & H. Co., Birdsall v. (D. C.)	717	Grand Rapids Show Case Co. v. Baker (C. C. A.)	341
Denver Chemical Mfg. Co. v. Lilley (C. C. A.)	869	Grand Union Tea Co. v. Evans (D. C.)	791
Deupree v. Watson (C. C. A.)	483	Greenblatt, In re (D. C.)	985
Doctor Jack Pot Min. Co. v. Humphreys (D. C.)	261	Greenwald Bros., Inc., v. Cohn (D. C.)	195
Doctor Jack Pot Min. Co. v. Marsh (D. C.)	261	Grummond, City of Detroit v. (C. C. A.)	273
Donald, Philadelphia & Reading Coal & Iron Co. v. (D. C.)	199	Gwladys S. S. Co. v. Gans S. S. Line (C. C. A.)	340
Dovey Coal Co., In re (C. C. A.)	929	Hahlo v. Benedict (C. C. A.)	303
Dunham Co. v. Warren Webster & Co. (C. C. A.)	991	Hamburgh-American S. S. Line, United States v. (D. C.)	971
Du Pont de Nemours Powder Co. v. Masland (D. C.)	271		
Durand & Co. v. Howard & Co. (C. C. A.)	585		
Eastman Kodak Co., Goodwin Film & Camera Co. v. (D. C.)	831		

	Page		Page
Hamilton Mfg. Co. v. Tubbs Mfg. Co. (D. C.)	401	Kroncke Hardware Co., United States Expansion Bolt Co. v. (D. C.)	186
Hamilton, Miller v. (C. C. A.)	131	Kryptok Co. v. Harris (D. C.)	642
Hansen v. Slick (D. C.)	164	Kryptok Co. v. Haussmann & Co. (D. C.)	196
Harris, Kryptok Co. v. (D. C.)	642	Kryptok Co. v. Haussmann & Co. (D. C.)	267
Hart, United States v. (D. C.)	374	Kryptok Co. v. Rothschild (D. C.)	198
Hartley v. Lapidus & Holub Co. (C. C. A.)	92	Kryptok Co. v. Straus (D. C.)	642
Harvey, United Kansas Portland Cement Co. v. (C. C. A.)	316	Lake Shore & M. S. R. Co., De Koven v. (D. C.)	955
Haussmann & Co., Kryptok Co. v. (D. C.)	196	La Page, Ex parte (D. C.)	256
Haussmann & Co., Kryptok Co. v. (D. C.)	267	La Page, In re (D. C.)	256
Hazelrigg, Nunn v. (C. C. A.)	330	Lapidus & Holub Co., Hartley v. (C. C. A.)	92
H. C. Copeland & Co., In re (C. C. A.)	120	Lathrop, Haskins & Co., In re (C. C. A.)	102
Heffron, In re (D. C.)	642	Laubhoff, United States Frumentum Co. v. (C. C. A.)	610
Heleker Bros. Mercantile Co., In re (D. C.)	963	Libbey Glass Co. v. McKee Glass Co. (D. C.)	172
Heller v. Teale (D. C.)	387	Liebing v. Matthews (C. C. A.)	1
Henry Siegel Co., In re (D. C.)	943	Lilley, Denver Chemical Mfg. Co. v. (C. C. A.)	869
Herman v. Youngstown Car Mfg. Co. (C. C. A.)	604	Loftus, Schwartz v. (C. C. A.)	320
Heyman v. Third Nat. Bank (D. C.)	685	Louisville & N. R. Co. v. United States (D. C.)	672
H. G. Kroncke Hardware Co., United States Expansion Bolt Co. v. (D. C.)	186	Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co. (C. C. A.)	146
Hickman v. Sawyer (C. C. A.)	281	Luken, In re (C. C. A.)	890
Hise, Western Coal & Mining Co. v. (C. C. A.)	338	McKee Glass Co., Libbey Glass Co. v. (D. C.)	172
Hitchcock v. American Plate Glass Co. (D. C.)	766	Mackey, Gladys Belle Oil Co. v. (C. C. A.)	129
Hohlfeld v. Patterson (D. C.)	183	McKey v. Steger (C. C. A.)	890
Holden v. Circleville Light & Power Co. (C. C. A.)	490	Mackey, United States v. (C. C. A.)	126
Holtan & Co. v. Pepper (D. C.)	368	McMaken, Bellefontaine Building & Loan Co. v. (D. C.)	526
Hornik, Copeland v. (C. C. A.)	117	Magid, In re (D. C.)	385
Hornik, Copeland v. (C. C. A.)	120	Mark, National Tube Co. v. (C. C. A.)	507
Howard & Co., Durand & Co. v. (C. C. A.)	585	Marsans, Cincinnati Exhibition Co. v. (D. C.)	269
Humbert v. Choppy (D. C.)	549	Marsh, Doctor Jack Pot Min. Co. v. (D. C.)	261
Humphreys, Doctor Jack Pot Min. Co. v. (D. C.)	261	Maryland Casualty Co., Arthur v. (D. C.)	386
Hutchinson v. Philadelphia & G. S. S. Co. (D. C.)	795	Masland, E. I. Du Pont de Nemours Powder Co. v. (D. C.)	271
J. D. Randall Co. v. Fogelsong Mach. Co. (C. C. A.)	599	Matthews, Liebing v. (C. C. A.)	1
J. D. Randall Co. v. Fogelsong Mach. Co. (C. C. A.)	601	Mercantile Trust Co. v. Texas & P. R. Co. (C. C.)	225
J. H. Way & Sons Co., Way v. (D. C.)	719	Merchants' Despatch Transp. Co., American Car & Foundry Co. v. (D. C.)	904
J. I. Case Threshing Mach. Co., Closz & Howard Mfg. Co. v. (D. C.)	937	Merchants' Nat. Bank, Sterne v. (C. C. A.)	862
Johns-Pratt Co. v. Economy Fuse & Mfg. Co. (D. C.)	639	Merchants' & Miners' Transp. Co. v. Seven Hundred and One Bales of Cotton (D. C.)	237
Jones, Woolfolk v. (D. C.)	807	Metropolitan Jewelry Co., In re (D. C.)	384
Kane Mfg. Co. v. Economy Iron Works (D. C.)	932	Metropolitan Jewelry Co., In re (D. C.)	385
Kansas City Southern R. Co., State of Missouri v. (D. C.)	562	Meyrowitz, In re (D. C.)	384
Karnaca, United States Gypsum Co. v. (C. C. A.)	857	Mickle, Crescent Mfg. Co. v. (D. C.)	246
Katz, In re (D. C.)	949	Midway Northern Oil Co., United States v. (D. C.)	802
Keithley v. American Car & Foundry Co. (D. C.)	904	Miller v. Hamilton (C. C. A.)	131
Kennedy v. Broderick (C. C. A.)	137	Miller Pasteurizing Mach. Co. v. Rich (D. C.)	192
Kettle River Co., St. Avit v. (C. C. A.)	872	Miner, The T. H. Symington Co. v. (D. C.)	198
Killam & Co. v. Monad Engineering Co. (D. C.)	438	Minneapolis, St. P. & S. S. M. R. Co., Rebillard v. (C. C. A.)	503
Killam & Co., Monad Engineering Co. v. (D. C.)	444	Modoc, The (D. C.)	445
Kindermann, American Car & Foundry Co. v. (C. C. A.)	499	Monad Engineering Co., Charles Killam & Co. v. (D. C.)	438
Koehl Co., E. N. Rowell Co. v. (D. C.)	780	Monad Engineering Co. v. Charles Killam & Co. (D. C.)	444
		Moore & Co. v. Gilmore (C. C. A.)	99
		Morgan v. Schwab (C. C. A.)	595

	Page		Page
Morris & E. R. Co., Anderson v. (C. C. A.)	83	Randall Co. v. Fogelsong Mach. Co. (C. C. A.)	601
Moseson v. Central Trust Co. (C. C. A.)	889	Raven, The A. A. (D. C.)	572
Motor & Mfg. Works Co., Williams v. (D. C.)	914	Rebillard v. Minneapolis, St. P. & S. S. M. R. Co. (C. C. A.)	503
Multiscope & Film Co., Conley Camera Co. v. (C. C. A.)	892	Reed, St. Louis, I. M. & S. R. Co. v. (C. C. A.)	741
Municipal Waterworks Co. v. Ft. Smith (D. C.)	431	Remembrance, The (D. C.)	651
Munroe v. United States (C. C. A.)	107	Rend Collieries Co., Benedetto v. (C. C. A.)	143
M. V. Moore & Co. v. Gilmore (C. C. A.)	99	Rich, Miller Pasteurizing Mach. Co. v. (D. C.)	192
Nancy Hanks Hay Press & Foundry Co., American Hoist & Derrick Co. v. (D. C.)	785	Rivkin, In re (D. C.)	218
National Boat & Engine Co., In re (D. C.)	208	Robins Dry Dock & Repair Co. v. Cheshbrough (C. C. A.)	121
National City Bank of Chicago, Rogers v. (C. C. A.)	473	Robinson v. American Fruit Machinery Co. (D. C.)	179
National City Bank of Chicago v. Wagner (C. C. A.)	473	Robson-Hilliard Grocery Co., Galbraith v. (C. C. A.)	842
National Tube Co. v. Mark (C. C. A.)	507	Roebuck Weather-Strip & Wire Screen Co., Vose v. (D. C.)	523
New Hampshire Sav. Bank v. Varner (C. C. A.)	721	Rogers v. National City Bank of Chicago (C. C. A.)	473
New York City R. Co., Pennsylvania Steel Co. v. (C. C. A.)	458	Romadka, First Savings & Trust Co. v. (C. C. A.)	113
New York, C. & St. L. R. Co., City of Chicago v. (C. C. A.)	735	Romadka Bros. Co., In re (C. C. A.)	113
New York, O. & W. R. Co., United States v. (D. C.)	702	Rothschild, Kryptok Co. v. (D. C.)	198
New York & O. S. S. Co., United States v. (C. C. A.)	61	Rowell Co. v. William Koehl Co. (D. C.)	780
New York & P. S. S. Co., Rainey v. (C. C. A.)	449	Ryan v. United States (C. C. A.)	13
Norfolk & W. R. Co., Connole v. (D. C.)	823	St. Avit v. Kettle River Co. (C. C. A.)	872
Nubone Corset Co., Spirella Co. v. (C. C. A.)	898	St. Louis, I. M. & S. R. Co. v. Reed (C. C. A.)	741
Nunn v. Hazelrigg (C. C. A.)	330	St. Louis Union Trust Co. v. Studebaker Corp. (D. C.)	630
Old Colony Trust Co., Chicago, M. & St. P. R. Co. v. (C. C. A.)	577	Salen, United States v. (D. C.)	420
Omaha Electric Light & Power Co. v. Omaha (C. C. A.)	848	Sanitary Street Flushing Mach. Co. v. Amsterdam (D. C.)	190
Orr, In re (C. C. A.)	883	Sawyer, Hickman v. (C. C. A.)	281
Outlook Envelope Co. v. Sherman Envelope Co. (C. C. A.)	754	Schmertz Wire Glass Co. v. Continuous Glass Press Co. (D. C.)	828
Padrosa v. Serra Oliveira & Co. (C. C. A.)	991	Schuede v. Zenith S. S. Co. (D. C.)	566
Patterson, Hohlfeld v. (D. C.)	183	Schwab, Morgan v. (C. C. A.)	595
Peller v. Central Trust Co. (C. C. A.)	889	Schwartz v. Loftus (C. C. A.)	320
Pennsylvania Oil Refining Co., Bank of North America v. (D. C.)	377	Schweig v. Chicago, M. & St. P. R. Co. (C. C. A.)	750
Pennsylvania Steel Co. v. New York City R. Co. (C. C. A.)	458	Scott Transfer Co., In re (C. C. A.)	308
Pepper, Frank Holton & Co. v. (D. C.)	368	Seattle, R. & S. R. Co. v. Seattle (D. C.)	694
Perry G. Walker, The (D. C.)	423	Serra Oliveira & Co., Padrosa v. (C. C. A.)	991
Philadelphia & G. S. S. Co., Hutchinson v. (D. C.)	795	Seven Hundred and One Bales of Cotton, Merchants' & Miners' Transp. Co. v. (D. C.)	237
Philadelphia & Reading Coal & Iron Co. v. Donald (D. C.)	199	Seybold, Wilson v. (D. C.)	975
P. M. Co. v. Ajax Rail Anchor Co. (D. C.)	634	Sherman Envelope Co., Outlook Envelope Co. v. (C. C. A.)	754
Primos Chemical Co., Goldschmidt Thermit Co. v. (D. C.)	382	Siegel Co., In re (D. C.)	943
Primrose Coal Co., United States v. (D. C.)	553	Slick, Hansen v. (D. C.)	164
Prinz Oskar, The (D. C.)	233	Smedley, The, two cases (D. C.)	927
Rainey v. New York & P. S. S. Co. (C. C. A.)	449	Smith v. Camas Prairie R. Co. (D. C.)	799
Ralph v. Chicago & N. W. R. Co. (C. C. A.)	744	Smith Metal Window Hardware Co. v. Yates (C. C. A.)	359
Randall Co. v. Fogelsong Mach. Co. (C. C. A.)	599	Smith Metal Window Hardware Co. v. Yates (D. C.)	361
		Smith & Sons Co. v. Trexler Lumber Co. (C. C. A.)	134
		Smith & Watson Ironworks, Alvord v. (D. C.)	150
		Snyder, In re (D. C.)	989
		Spirella Co. v. Nubone Corset Co. (C. C. A.)	898

	Page		Page
State of Missouri v. Chicago, M. & St. P. R. Co. (D. C.).....	562	United States, Weeks v. (C. C. A.).....	292
State of Missouri v. Chicago & A. R. Co. (D. C.).....	562	United States Expansion Bolt Co. v. H. G. Kroncke Hardware Co. (D. C.).....	186
State of Missouri v. Kansas City Southern R. Co. (D. C.).....	562	United States Frumentum Co. v. Lauhoff (C. C. A.).....	610
Steger, McKey v. (C. C. A.).....	890	United States Gypsum Co. v. Karnaca (C. C. A.).....	857
Sterne v. Merchants' Nat. Bank (C. C. A.).....	862	United States Metal Products Co., Vose v. (D. C.).....	775
Stockwell v. Supreme Court I. O. F. (D. C.).....	205	United States Trust Co. v. Gordon (C. C. A.).....	929
Straus, Kryptok Co. v. (D. C.).....	642	Urko Mendi, The (D. C.).....	427
Studebaker Corp., St. Louis Union Trust Co. v. (D. C.).....	630		
Sturtevant Co., Beebe v. (D. C.).....	715	Van Santwood, Delaware, L. & W. R. Co. v. (D. C.).....	252
Supreme Court I. O. F., Stockwell v. (D. C.).....	205	Varner, New Hampshire Sav. Bank v. (C. C. A.).....	721
Symington Co., The v. Miner (D. C.).....	198	Vaughn, Gilmore v. (C. C. A.).....	356
		Violet Blossom, The (D. C.).....	379
Taunton, In re (D. C.).....	987	Vose v. Roebuck Weather-Strip & Wire Screen Co. (D. C.).....	523
Taylor Grain Co., In re (C. C. A.).....	862	Vose v. United States Metal Products Co. (D. C.).....	775
Teale, Heller v. (D. C.).....	387		
Texas & P. R. Co., Mercantile Trust Co. v. (C. C.).....	225	Wagner, National City Bank of Chicago v. (C. C. A.).....	473
The T. H. Symington Co. v. Miner (D. C.).....	198	Walker, The Perry G. (D. C.).....	423
Third Nat. Bank, Heyman v. (D. C.).....	685	Wall v. Anaconda Copper Min. Co. (D. C.).....	242
T. H. Symington Co., The v. Miner (D. C.).....	198	Warren Bros. Co. v. Grand Rapids (D. C.).....	364
Title Guaranty & Surety Co., Edward F. Gerber Co. v. (D. C.).....	980	Warren Webster & Co., C. A. Dunham Co. v. (C. C. A.).....	991
Towanda, The (D. C.).....	270	Watson, Deupree v. (C. C. A.).....	483
Trexler Lumber Co., Smith & Sons Co. v. (C. C. A.).....	134	Watts v. United States (C. C. A.).....	991
Tubbs Mfg. Co., Hamilton Mfg. Co. v. (D. C.).....	401	Way v. J. H. Way & Sons Co. (D. C.).....	719
		Way & Sons Co., Way v. (D. C.).....	719
Underwood, Abbott v. (C. C. A.).....	335	Webster & Co., C. A. Dunham Co. v. (C. C. A.).....	991
United Kansas Portland Cement Co. v. Harvey (C. C. A.).....	316	Weeks v. United States (C. C. A.).....	292
United Shoe Machinery Co., Bates v. (C. C. A.).....	140	Western Coal & Mining Co. v. Hise (C. C. A.).....	338
United States, Allison v. (C. C. A.).....	329	Western Union Tel. Co. v. Frear (D. C.).....	199
United States, American Bonding Co. of Baltimore v. (C. C. A.).....	990	William Kane Mfg. Co. v. Economy Iron Works (D. C.).....	932
United States, Ammerman v. (C. C. A.).....	326	William Koehl Co., E. N. Rowell Co. v. (D. C.).....	780
United States v. Board of Com'rs of Osage County, Okl. (C. C. A.).....	883	William R. Compton Co. v. Allen (D. C.).....	537
United States v. Colo. (D. C.).....	654	Williams v. Motor & Mfg. Works Co. (D. C.).....	914
United States v. Hamburg-American S. S. Line (D. C.).....	971	Wilson v. Seybold (D. C.).....	975
United States v. Hart (D. C.).....	374	Woodman, Butterfield v. (D. C.).....	208
United States, Louisville & N. R. Co. v. (D. C.).....	672	Woolfolk v. Jones (D. C.).....	807
United States v. Mackey (C. C. A.).....	126	W. P. Rend Collieries Co., Benedetto v. (C. C. A.).....	143
United States v. Midway Northern Oil Co. (D. C.).....	802		
United States, Munroe v. (C. C. A.).....	107	Yates, Frank F. Smith Metal Window Hardware Co. v. (C. C. A.).....	359
United States v. New York, O. & W. R. Co. (D. C.).....	702	Yates, Frank F. Smith Metal Window Hardware Co. v. (D. C.).....	361
United States v. New York & O. S. S. Co. (C. C. A.).....	61	Youngstown Car Mfg. Co., Herman v. (C. C. A.).....	604
United States v. Primrose Coal Co. (D. C.).....	553		
United States, Ryan v. (C. C. A.).....	13	Zenith S. S. Co., Schuede v. (D. C.).....	566
United States v. Salen (D. C.).....	420	Zvega, Armour & Co. v. (C. C. A.).....	312
United States, Watts v. (C. C. A.).....	991		

CASES
ARGUED AND DETERMINED
IN THE
UNITED STATES CIRCUIT COURTS OF APPEALS
AND THE DISTRICT COURTS

LIEBING et al. v. MATTHEWS et al. †

(Circuit Court of Appeals, Eighth Circuit. July 25, 1914.)

No. 3978.

1. APPEAL AND ERROR (§ 959*)—REVIEW—DISCRETION OF LOWER COURT—DENYING LEAVE TO FILE SUPPLEMENTAL BILL.

Under old Equity Rule 57, which required leave of court to file a supplemental bill, the action of the court in granting or refusing such leave is not subject to review in the appellate court, unless for a gross abuse of discretion; and where, in a suit to redeem from conveyances alleged to be in effect mortgages, complainants had been given four separate and distinct opportunities to redeem, the last through an extension granted by the master, to which defendants made no objection, but had failed to exercise the right, an order denying leave to file a supplemental bill was within the discretion of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825-3831; Dec. Dig. § 959.*]

2. APPEAL AND ERROR (§ 977*)—REVIEW—DISCRETION OF LOWER COURT—DENIAL OF PETITION FOR REHEARING.

The ruling of a federal court of equity on a petition for rehearing cannot be reviewed by an appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

3. EQUITY (§ 415*)—DECREE—NECESSITY OF FINDINGS OF FACT.

There is no rule in equity that the court shall, in its decree, find all the facts necessary to sustain the decree, except where, in the absence of a finding of facts, it would be impossible to tell what the decree in fact meant; and where, in a suit to redeem from conveyances alleged to be in fact mortgages, by a stipulation of the parties, afterward embodied in an interlocutory decree, complainants were given the right to repurchase the property by the payment by October 1st of an amount to be determined by the master, in which case the suit was to stand dismissed, with further provisions that "under no conditions * * * shall the time to exercise said option * * * be extended * * * nor shall a further extension * * * be asked or sought," and that a failure to exercise such right to repurchase as therein provided "shall ipso facto operate as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a dismissal of this action," no finding of facts was necessary to support a decree of dismissal entered after October 1st.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 932-944, 946, 950, 951; Dec. Dig. § 415.*]

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit in equity by Mary S. B. Liebing and Frederick L. Liebing against Otho F. Matthews, Clyde L. Martin, and R. M. Miller. Decree for defendants, and complainants appeal. Affirmed.

The complainant Mary S. B. Liebing, was the wife of Frederick W. Blees, now dead, and is now the wife of her co-complainant, Frederick L. Liebing. Frederick W. Blees founded the Blees Military Academy of Macon, Mo., which was incorporated under the laws of that state. The corporation had a capital of \$250,000, all of which was owned by the complainant Mary S. B. Liebing, except three or four shares necessary to qualify directors. It owned 808 acres of land on which the Academy was located. This property was covered, early in September, 1911, by a deed of trust to William E. Griswold, as trustee for the Northwestern Mutual Life Insurance Company, to secure \$65,000 and interest, which was dated February 4, 1910. The real estate and all the personal property of the Academy was also covered by a deed of trust to John Scovern, dated November 21, 1910, to secure divers claims outstanding, about \$11,000. The Northwestern Mutual Life Insurance Company deed of trust was in default, and suit was brought to foreclose it on July 19, 1911. The Scovern deed of trust was also in default and Scovern had published notice that he would sell said property on Monday, September 11, 1911. At that time the complainants and the Academy owed other debts to the amount of between \$40,000 and \$50,000, some of it secured by pledge. Under date of September 9, 1911, complainant Mary S. B. Liebing transferred in blank her stock in the Academy Company and delivered it to the defendants Otho F. Matthews and Clyde L. Martin. Nominally on the same day, although she claims on the Sunday following, the two complainants executed and delivered to Otho F. Matthews, C. L. Martin, and R. M. Miller a bill of sale, reciting that the grantors were then insolvent and conveying substantially all their personal property, except the family pictures, wearing apparel, hogs, and poultry owned by the grantors, but including 2500 shares in the Blees Military Academy Company. About the same time Mary S. B. Liebing deeded a large number of lots in Macon, Mo., to Otho F. Matthews. Under date of September 9, 1911, Otho F. Matthews, Clyde L. Martin, and R. M. Miller agreed in writing with Frederick L. Liebing and Mary S. B. Liebing to reconvey all the property conveyed to them within any time within six months upon the payment of \$30,000 and the sums expended by Matthews, Martin, and Miller in payment of debts owing by the Liebings or the Blees Military Academy Company, with interest. Under the same date Matthews, Martin, and Miller leased to Mary S. B. Liebing for six months for the sum of one dollar all the property in the residence occupied by her. On March 1, 1912, Mr. and Mrs. Liebing commenced suit to have said bill of sale and deed of trust declared mortgages, and to be allowed to redeem therefrom, alleging that on August 21, 1911, said Otho F. Matthews was retained by said complainants as their counsel, and later said Clyde L. Martin was retained as fiscal agent, and the complainants executed said instruments through fraud and under pressure, and induced thereto by their attorney and agent. Not only was the bill filed against Matthews, Martin, and Miller, but against all parties who had any claim against any of the property through them, and against the Blees Military Academy Company.

The defendants filed separate answers, but on May 6, 1912, Otho F. Matthews, Clyde L. Martin, and R. M. Miller and G. C. Miller filed a joint answer in which they denied all fraud, and especially denied that any of them sustained, at the time of the transfers, any fiduciary relations to the complainants, and they then continued: "In order to hasten the termination of an un-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

profitable litigation and an unfortunate venture by reason of the institution of this litigation these defendants here offer and tender to the complainants all of said property mentioned in the inventory and schedule, together with all stock in Bles Military Academy Company, and the \$500 note made to Otho F. Matthews and in said bill of complaint, and all the lands conveyed to these defendants, or either of them, with the net proceeds of the receiver's sale, upon the payment to these defendants of all the moneys they have advanced and paid out for and on behalf and by reason of the said contracts and agreements and such further sum, if any, for interest, services, time, labor, and expenses of these defendants as may be determined in a summary manner by the court or a master, as the court may direct; and the complainants shall also release and relieve these defendants from all liability, of every kind whatever, that they have assumed to the Northwestern Mutual Life Insurance Company in connection with the \$65,000 deed of trust and debt, and also the note and claim of Col. George L. Byroade, hereinbefore mentioned, and the Hunter & Ohamier note and claim for \$700, set out in Schedule B, as well as all other matters mentioned and set forth in Schedule B, attached to this answer, for which these defendants, or any of them, may have become liable in whole or in part in connection with the transactions here in issue and growing out of the performance of the contracts and agreements executed September 9 and 11, 1911, and also indemnify said defendants, Matthews, Martin, and R. M. Miller, against their liabilities on appeal bonds that they have found it necessary to make on behalf of Bles Military Academy Company, since they have had charge of said academy. And complainants' acceptance of this offer must likewise contain a formal withdrawal of the allegations of fraud, covin, oppression, duress, coercion, and unfair advantage as contained in their said bill, since the same are not true, as these defendants have always maintained and still maintain; that said offer should be accepted by the 20th of May, 1912, so that these defendants may be informed of the action and intended action of the complainants, that they may arrange their business and affairs in accordance therewith, and that the said payments of moneys must be made on or before the June rules."

On May 20, 1912, complainants filed the following: "Now come the complainants, Mary S. B. Liebing and Frederick L. Liebing, and file this their written acceptance of the tender made by the defendants, Otho F. Matthews, Clyde L. Martin, and R. M. Miller, and G. C. Miller, in their answer filed hereon on May 6, 1912; and said complainants further say that they are willing to submit to the court the matter of services, time, labor, and expenses of said defendants, if any services were rendered, time given, and labor performed for the said complainants by the aforesaid defendants. Complainants deny that the said defendants rendered any services, gave any time, performed any labor, or had any expenses for said complainants; but if so be it the court should find otherwise after taking testimony on that subject, then complainants are willing to pay such reasonable, fair, and just sum as the court may fix. All of said tender to be complied with in a reasonable time, after the finding of the court, and within a time, to be named by the court."

On June 3, 1912, complainants filed their replication to the answer of Matthews, Martin, and the Millers in which they said: "They deny that they are in any manner indebted to said defendants for services performed, time given, work done, labor performed, or expenses had or incurred. Complainants, however, say they are willing to submit to the court the manner of services rendered, work done, labor performed, time expended, and expenses incurred by said defendants for the complainants. Further replying, complainants say that said defendants in their said tender demand of complainants that payment of all moneys, claimed by said defendants to be due and owing to them for the items by them alleged to have been paid out, as well as the amounts, if any, found to be due for interest, services rendered, work done, labor performed, time expended, and expenses incurred, must be paid to them by the rule day of the June term, 1912, and that such payment must be made before the amount to which said defendants are entitled for items paid out has been ascertained and verified and the amount to be allowed said defendants for services rendered and work done has been fixed or decreed by the court. Com-

plainants, further replying, say that by reason of the foregoing facts and of the short time allowed for the payment of the moneys that may be found to be due and coming to said defendants, complainants were and are unable to comply with the aforesaid tender of the defendants. And complainants further reply and state, after the amounts which said defendants are entitled to receive for the items by them paid out has been ascertained and verified, and the amount, if any, to which said defendants may be entitled for work done, services rendered, time spent, and expenses incurred, has been fixed by the court, that if a reasonable time be allowed said complainants in which to procure and produce said moneys, they will comply in all respects with the terms and conditions of said tender."

On June 6, 1912, the case was referred to F. L. Schofield, standing master. On July 8, 1912, he reported that he had heard the matter for ten days, and that the matter had been settled by the making of a stipulation, and on the same day the court entered the following decree:

"Now at this day this cause coming on for further hearing on the partial and special report of Hon. F. L. Schofield, master in chancery, which said report recommends the entrance of a judgment and decree as stipulated and agreed to by the respective parties to this action, which said stipulation is in writing and is in words and figures as follows, to wit:

"Stipulation.

"Now on this 26th day of June, 1912, come the parties hereto before the master, the Honorable F. L. Schofield, and file this stipulation signed by the solicitors of the respective parties, and it is agreed by and between the said parties to this action, as follows, to wit:

"1. This cause hereby is dismissed as to the following parties, to wit: G. A. Martin, J. M. Miller, John Scovern, State Exchange Bank of Macon, Missouri, Moberly Trust Company of Moberly, Missouri, National Bank of Commerce of Kansas City, Missouri, W. A. Wilson, G. C. Miller, R. L. Matthews, M. A. Matthews, R. S. Matthews and George Perry.

"2. It is agreed that the instrument recorded on September 11, 1911, in the office of the recorder of deeds in and for Macon county, Missouri, in Book 189, page 175, is now and has been since its execution on the 9th day of September, 1911, a valid and subsisting conveyance of the property therein described and of the property described in the schedule thereto attached, and that the same vested the title to said property in the defendants herein, to wit, Otho F. Matthews, Clyde L. Martin and R. M. Miller; and the same is true in every respect of the warranty deed of same date made by the complainants to the defendant Otho F. Matthews and recorded in Book 190, page 126.

"3. That at the time of the execution of the instrument mentioned in paragraph 2 hereof, the defendants, Otho F. Matthews, Clyde L. Martin and R. M. Miller, executed to the complainants, Mary S. B. Liebing and Frederick L. Liebing, a certain option contract granting and giving to the said complainants the right to repurchase the property conveyed by said instrument aforesaid, upon the payment to the said defendants, Otho F. Matthews, Clyde L. Martin and R. M. Miller, of certain moneys therein named, and further provided by the terms of said option that the right to repurchase the same would expire within six months after the expiration of the option, that is to say, on March 9, 1912.

"4. All the parties hereto further agree that all charges of fraud and conspiracy made and contained in complainants' bill of complaint herein shall be and are hereby withdrawn as untrue and without foundation in truth and fact.

"5. That after the execution of said bill of sale on September 9, 1911, the defendants hereto, Otho F. Matthews, Clyde L. Martin, and R. M. Miller, paid certain bills of the complainants, Mary S. B. Liebing and Frederick L. Liebing, and the defendant Brees Military Academy Company, and the said defendants Otho F. Matthews, Clyde L. Martin and R. M. Miller also assumed and personally bound themselves to pay certain obligations and debts of said complainants, Mary S. B. Liebing and Frederick L. Liebing, and the defendant

Blees Military Academy Company, amounting in the aggregate to approximately the sum of one hundred and eight thousand (\$108,000) dollars.

"6. The complainants, Mary S. B. Liebing and Frederick L. Liebing, shall have the right to exercise their option to repurchase the property conveyed by them to these defendants, Otho F. Matthews, Clyde L. Martin and R. M. Miller, upon the payment to them by these complainants of the sums of money hereinafter mentioned, upon the following terms: Said right to exercise said option shall expire on August 1, 1912, unless the said complainants shall pay to these defendants, Otho F. Matthews, Clyde L. Martin and R. M. Miller, the sum of sixteen hundred twenty-five (\$1,625.00) dollars for the purpose of paying the interest to the Northwestern Mutual Life Insurance Company, falling due in the month of August, 1912, and provided further that if the said complainants pay said sum of \$1,625.00 on or before August 1, 1912, said payment shall ipso facto extend the time for them to exercise the said option to repurchase said property to the first of October, 1912. Failure to pay said sum of \$1,625.00 on or before August 1, 1912, as above provided, shall foreclose and end any and all rights of the complainants to exercise the right to repurchase under said option, and under no condition or circumstance shall the time to exercise said option to repurchase said property be extended beyond the first of October, 1912, nor shall a further extension or a right to repurchase said property under said option be asked or sought in any way or form whatsoever.

"7. All costs of this suit shall be paid by the complainants including the costs of the receivership, stenographer's fees, etc. The receivers to make no charges for services, except actual expenses.

"8. Services rendered by the said Otho F. Matthews, Clyde L. Martin and R. M. Miller in furnishing the money and in assuming the liability therefor and in taking care of and preserving the property following the execution of the conveyance to them on September 9, 1911, are hereby admitted to be rendered by them in good faith and the master from the evidence shall determine the amount and value of said services and the amount thereof shall be fixed by him at a sum between eight and fifteen thousand dollars, the amount of which shall be ascertained by the master, as aforesaid, and shall be part of the money to be paid by the complainants upon their exercising the rights to repurchase under the option contract aforesaid.

"9. All moneys paid out by the said Otho F. Matthews, Clyde L. Martin and R. M. Miller in taking care of and looking after said property so conveyed to them by the instrument mentioned in paragraph 2 hereof, shall be paid by the complainants as a condition precedent to their right of exercising said option of repurchase.

"10. That before the said complainants, Mary S. B. Liebing and Frederick L. Liebing, shall have the right to exercise said option contract and repurchase the property, as herein provided, they shall release each and all of these defendants, Otho F. Matthews, Clyde L. Martin and R. M. Miller, and also George C. Miller from any and all obligations and liabilities which they or either of them have assumed or incurred on account of any debt or liability or any alleged debt or liability of the Blees Military Academy Company or the complainants, Mary S. B. Liebing and Frederick L. Liebing, or either of them, and the said complainants shall also before exercising the rights of said option to repurchase, pay to the said Otho F. Matthews, Clyde L. Martin and R. M. Miller all sums of money which the said Matthews, Martin and Miller expended in paying debts or liabilities or alleged debts or liabilities of the Blees Military Academy Company or either of the complainants, Mary S. B. Liebing or Frederick L. Liebing, together with seven per cent. interest thereon from the date of said option, to wit, September 9, 1911.

"11. Before exercising the rights to repurchase said property under their option, said complainants, Mary S. B. Liebing and Frederick L. Liebing, shall pay to the said defendants, Otho F. Matthews, Clyde L. Martin and R. M. Miller, any and all sums of money that the said defendants may hereafter find it necessary to pay on account of their possession and ownership of said property and in taking care of and looking after the same, as well as all debts and liabilities that they may hereafter have to pay for the said Blees Military

Academy Company, or either of the said complainants. All sums hereafter paid by the defendants shall bear interest at the rate of 7% from date of payment.

"12. One of the items of expense to be paid by the complainants to the defendants before the complainants exercise the right to repurchase under their option is that of an attorney fee due to S. H. Ellison for his services rendered in connection with the transactions in September, 1911, and shortly thereafter.

"13. It is further agreed that in event the said complainants and these defendants fail to agree upon the amount of any item herein provided to be paid as a condition precedent to the exercise of said option to repurchase, then the amount of such items shall be determined by the master, which determination shall be final and conclusive; and provided, further, that unless prevented by the failure of these defendants from hearing any contests or controversies as to the amount of any item, the master shall have no right or authority to hear or determine the amount thereof on any date after September 20, 1912, and in event the master has not determined any controversy that may arise as to the amount of an item before September 20, 1912, then the amount of the item as rendered and determined by these defendants shall be the amount agreed upon. The costs attending any hearing before the master for the purpose of determining the amount of any item shall be taxed as to the master may seem proper.

"14. The money in the hands of the receivers shall be paid out by them in accordance with the orders of the court.

"15. It is understood by the parties hereto that some of the chattel property described in the schedule attached to the instrument described in paragraph two herein never came into the possession of these defendants and that in event said complainants exercise their right to repurchase as above provided, then the complainants shall accept in lieu of the property listed in said schedule all of the property that came into the possession of the said defendants by virtue of said transaction and which is now in their possession, excepting, however, that these defendants shall not be called upon to return any property that may be lost or stolen or broken without their fault or negligence.

"16. A failure on the part of the said complainants to exercise their right to repurchase the property under the terms and conditions herein provided, shall ipso facto operate as a dismissal of this action and they shall be forever barred from instituting or prosecuting any other suit or action relative to the subject-matter herein or growing out of or connected with the same.

"17. It is hereby agreed and stipulated by and between the parties hereto that the master is hereby authorized and is respectfully requested to make at once a partial report to the court returning therewith this stipulation and recommending that the court enter a judgment affirming the same, and that he obtain permission further to make a final report as to any questions that he may adjudicate between the parties as provided under the various terms of this stipulation, which said final report shall be made on or before October 1, 1912, and that his report of what he has done in said matters shall be final and conclusive and shall not be subject to exception by either of the parties.

"Mary S. B. Liebing,

"Frederick L. Liebing,

"Complainants.

"Alfred J. Brockschmidt,

"Bernard A. Dolan,

"Mahan, Smith & Mahan,

"Solicitors for Complainants.

"Guthrie & Franklin,

"Campbell & Ellison,

"J. C. McKinley,

"Solicitors for Defendants."

"And the court, having considered said stipulation and the report and recommendation of the master, and having heard the evidence thus far adduced, doth find that the recommendation of said report ought in all things to be confirmed.

"Wherefore it is by the court ordered, adjudged, and decreed that the said recommendation of the said master be and the same is in all things hereby confirmed, and that said stipulation as hereinbefore set out be and the same is hereby affirmed in all its terms, conditions, and agreements, and established as the decree of this court in the premises.

"And it is further ordered, adjudged, and decreed that the decree herein be left open for such other, further, and final orders, modifications, directions, and judgments to be entered at the foot thereof or otherwise as the exigencies of the cause may require and equity approve.

"And it is further ordered that this cause remain open and continue to stand referred on the orders of reference heretofore entered, and that the master in chancery be and he is hereby directed to proceed and take such proofs as may be offered by the respective parties on all matters arising under the said stipulation and this decree, and report same back to this court, with his findings of fact and conclusions of law thereon, for the information of the court, all as may be needful until the final disposition of this cause."

On September 20, 1912, the master again reported that the complainants should pay \$54,169.84 in redemption of said property under the previous decree. No exceptions were ever filed to this report but on October 1, 1912, the complainants filed a petition for leave to file a supplemental bill, in which they set up many of the facts heretofore recited, and alleged:

"That, in entering into said contract of settlement with the said Otho F. Matthews, Clyde L. Martin, and R. M. Miller it was represented unto these complainants by the said Otho F. Matthews, Clyde L. Martin, and R. M. Miller that they had personally assumed and obligated themselves to pay unto the Northwestern Mutual Life Insurance Company of Milwaukee, Wis., certain large sums of money, to wit, the sum of \$65,000 and the interest accruing thereon, and that by reason of said undertaking on their part the said Otho F. Matthews, Clyde L. Martin, and R. M. Miller had become personally responsible to the said Insurance Company for the said sum of money.

"Further your petitioners represent that as an inducement to get your petitioners to enter into said contract of settlement the said Otho F. Matthews, Clyde L. Martin, and R. M. Miller represented to your petitioners that by reason of their having assumed said indebtedness of \$65,000 to the said Northwestern Mutual Life Insurance Company they thereby became and were in a position to control said indebtedness, and that if said petitioners continued to carry on said litigation, which was the subject-matter of the aforesaid cause, the said defendants, Otho F. Matthews, Clyde L. Martin, and R. M. Miller, would proceed to have the deed of trust, given by the Bles Military Academy Company to W. E. Griswold, trustee, for the benefit of the said Insurance Company, to secure said indebtedness of \$65,000, foreclosed as soon as the interest thereon came due on August 4, 1912, and that all the property conveyed by said deed of trust, which is the property in litigation in this case, would be sold, before any decree could be had in the said cause between the parties thereto in the due course of the hearing thereof.

"Your petitioners further represent that, relying wholly and entirely upon the said representations as made by the said Otho F. Matthews, Clyde L. Martin, and R. M. Miller as to the assumption on their part of the said indebtedness, which said information was wholly within the knowledge of said defendants and of which these petitioners had no means or ways of ascertaining the truth thereof, your petitioners, believing in good faith that the said representations were true and correct, entered in good faith into and executed the said contract of settlement hereinabove referred to.

"Further your petitioners represent that after said contract of settlement was entered into a report of Hon. F. L. Schofield was filed with the clerk of said court, finding the making of said stipulation between said parties, and an order of said court was duly signed herein, approving the said master's report, and the making of said contract of settlement between said parties.

"Further, your petitioners represent that, acting in good faith under said contract of settlement, these complainants requested the said defendants to furnish unto said complainants an itemized list of all the moneys that they had paid out and of the expenses that they had been put to by reason of the

contract originally executed between your petitioners and the said defendants. Your petitioners further represent that pursuant to the privileges allowed to them under the terms of said contract of settlement, they have filed exceptions to certain items of the expense and of moneys paid out by the said defendants, and that in accordance with the provisions of said contract of settlement said master in chancery passed upon each and all the items of moneys reported by said defendants as having been paid out, and of each item of expenses incurred or defrayed by said defendants under said contract of settlement, and had fixed the amounts of moneys due and coming to said defendants by his findings made herein and filed with the clerk of said court on the 20th of September, 1912.

"Your petitioners further represent that after the sums, to be paid by said complainants, had been fixed by the master, as aforesaid, your petitioners, acting in good faith, made every reasonable effort to effect a settlement with the said defendants, and for that purpose had gone to Macon, Mo., on three different occasions, and that at the occasion of their last trip to Macon on September 28, 1912, your petitioners were ready, able, and willing to pay to the said defendants, and your petitioners offered to pay to said defendants, the full amount of moneys as had been fixed by the master in the findings in said case, together with all accrued interest thereon and expenses incurred since the filing of the master's report herein on September 20, 1912.

"Further your petitioners represent that the said defendants refused to accept the payment of said moneys as fixed by the master in chancery, that they demanded the payment of other large amounts of money from your petitioners which up to that time had never been presented by said defendants or claimed of your petitioners. Your petitioners represent that said defendants, Otho F. Matthews, Clyde L. Martin, and R. M. Miller were instrumental in having four suits in attachment brought against the Bles Military Academy Company, after they had filed their said items of expenses and demands with said master in chancery, and have also been instrumental in having brought, after the filing of their said demands, five suits against the complainant Mary S. B. Liebing, wherein the said defendants who have heretofore been appointed receivers of this court, and are now acting as such, and are now holding all the chattel property which is in part the subject of this litigation, in their possession, as such receivers, and have caused themselves to be garnisheed in the said five suits brought against the said Mary S. B. Liebing, in order that said chattel property now held by them may not be recovered from them, by your petitioners, except after further long and continued litigation.

"And your petitioners further represent that the said defendants, Otho F. Matthews, Clyde L. Martin, and R. M. Miller, have represented to your petitioners that they have in their possession and know of various other claims upon which suits will be brought against your petitioners and the said Bles Military Academy Company, which they refuse to disclose to your petitioners, and which they insist that your petitioners must settle and pay off before they will reconvey to your petitioners the property which they now have in their possession. And your petitioners further represent that by their acts, their conduct, and the demands made the said defendants Otho F. Matthews, Clyde L. Martin, and R. M. Miller have sought to make and are presently trying to make it impossible for your petitioners to procure from them the property now in their possession by redeeming the same.

"Your petitioners further aver that the representations made by the said Otho F. Matthews, Clyde L. Martin, and R. M. Miller, to the effect that they have become personally responsible for said indebtedness to the Northwestern Mutual Life Insurance Company, and upon the strength, correctness, and truth of which representations your petitioners entered into and made said contract of settlement, are false and not correct. Your petitioners further represent that on the 28th of September they learned for the first time that all such representations made by the said defendants, relative to the assumption on their part of said indebtedness of \$65,000 to said Northwestern Mutual Life Insurance Company and the liability which said defendants claimed they were under to said Insurance Company relating to said indebtedness of said \$65,000 were false and are not the truth.

"And that said defendants are not responsible to said Insurance Company for said indebtedness and no part thereof, and that they never assumed the same, and that the said Insurance Company at this time holds no claims, demands, or obligations of any kind against the said defendants.

"Further your petitioners represent that the averments made in paragraph 5 of said contract of settlement, wherein the said defendants Otho F. Matthews, Clyde L. Martin, and R. M. Miller assumed and personally bound themselves to pay certain obligations and debts of your petitioners, Mary S. B. Liebing and Frederick L. Liebing, and of the Brees Military Academy Company, amounting in the aggregate to about the sum of \$108,000, which includes said indebtedness of \$65,000, are false and not true, and that these petitioners did not know such to be the fact, and had no means of knowing such facts until they learned to the contrary on the 28th of September, 1912. Your petitioners aver and represent that the said contract of settlement was procured from them by the said defendants by misrepresentation and fraud and by circumvention, and that had your petitioners known such facts they would never have assented to and entered into the said contract of settlement.

"And your petitioners therefore pray that leave may be granted to them by this honorable court to file a supplemental bill against the said Otho F. Matthews, Clyde L. Martin, and R. M. Miller for the purposes of having the said contract of settlement entered into between your petitioners and the said defendants, Otho F. Matthews, Clyde L. Martin, and R. M. Miller, vacated and set aside and for naught held, and also for the purposes of having vacated and set aside the order of this court approving the first and second report of the facts and findings, as filed herein by the master in chancery, and also for the purposes of obtaining such other and further relief in the premises as equity may require and as to your honor shall seem meet and proper."

On October 11, 1912, the defendants filed a motion to dismiss the action, and on October 22d the following was filed:

"Now comes Frederick L. Liebing, one of the complainants in the above entitled cause, by his solicitor, W. H. Douglass, and represents to the court that he no longer wishes to prosecute the petition signed and verified by him on the 1st day of October, 1912, for the purpose of securing leave to file a supplemental bill in this cause, because he says that while said matters and facts may be true as in said petition set forth, yet subsequent investigation has induced him to believe that they are more or less doubtful, and he has also been advised that in all probability they will turn out to be insufficient to support such supplemental bill; that if the matters and things in said petition are true and would be sufficient to support such a supplemental bill, the amount involved is not sufficient to justify a continuance of this litigation, which amount is less than \$1,600, which represents the difference in the amount tendered and the amount demanded, which said amount this complainant is willing to be paid out of his interest in said property; that at the time complainant signed said petition, he did so at the request and upon the advice of A. J. Brockschmidt, who at the time was one of the complainant's solicitors, and complainant believed from the advice of his said solicitor that it was to complainant's best interest to sign said petition and continue this litigation. But subsequent investigation induces complainant to believe it is to his best interest to settle this whole matter as provided in the stipulation of June 26, 1912.

"Complainant has therefore dismissed his former counsel A. J. Brockschmidt, Bernard A. Dolan, and Mahan, Smith & Mahan, who no longer represent him in this matter, and this complainant has retained W. H. Douglass, who will henceforth be his sole solicitor in this action. Complainant says he is willing and anxious to accept the tender of settlement made in defendants' notice, but asks the court to give him ten (10) days to comply therewith, and that the court will make such orders and decrees as may protect complainant in his rights, and he will ever pray."

On December 2, 1912, the master filed his third and final report as follows:

"After the coming in of the master's second special report herein, filed on September 20, 1912, it appears that, a controversy having arisen between the parties, complainants and defendants, as to the matter and manner of carry-

ing out the provisions of the stipulation for compromise referred to in and filed with my first special report herein, the provisions of said stipulation for compromise were not carried out at or before the time fixed therein, viz., October 1, 1912. Thereupon on October 1, 1912, the complainants filed in the office of the clerk of this court their application for leave to file in the cause a supplemental bill, based upon the matters set out in their said application. Afterwards, on October 22, 1912, the defendants filed with the clerk of the court their motion to dismiss the complainants' bill.

"Pending the above application of complainants and motion of defendants, it appeared from the declarations of all parties that they were still willing and able to carry out the provisions of said stipulation for compromise; they came before me on October 25, 1912, with the view of reconsidering and taking the master's views upon their differences arising on the said matter; both parties complainants and defendants, however, disclaiming any waiver of their rights, respectively, to bring on for hearing their said application for leave to file a supplemental bill and said motion to dismiss. At such hearing before me on October 25, 1912, as expressive of the master's views in respect of said pending differences, I made the following directions:

"First. That on or before the 8th of November, 1912, the complainants, in and by way of a full payment to defendants of the amount for which they were liable under said stipulation for compromise, in order to be entitled to a reconveyance and delivery of all the property in controversy, should deposit in any bank in Macon City to the credit of the defendants, Matthews, Martin, and Miller, the sum of \$54,980.94 (less the sum of \$262.05 and \$1,649.95, being the amount of funds remaining in the hands of defendants as receivers); that is to say, the net sum of \$53,068.94, with 7 per cent. interest per annum thereon from October 28, 1912, until the day of payment.

"Second. That on or before the same date the complainants should also deliver to defendants, or one of their counsel, full release and acquittance to defendants of all liability on certain claims now pending, or on which judgments have been entered in the circuit court of Macon county or before justices of the peace as per a list of said claims in suit or judgment exhibited to the master, or in lieu of such acquittance the complainants might pay, either to the claimants or to defendants, the amount of any said claims, or by deposit of cash in some bank for that purpose fully indemnify the defendants against liability on account of any of such claims as are not so released or paid.

"Third. That contemporaneously with the performance of the above by complainants, the defendants are to transfer and deliver to complainants, or to any other person designated by them in writing, all the personal property involved in this controversy, including all the capital stock of the Bles Military Academy Company and the record books and other books and papers relating to same, and also adequate deeds of conveyance of all the real estate likewise involved.

"Fourth. That defendants should also at the same time procure to be canceled and deliver to complainants or their counsel, or to said person so designated by them, two certain promissory notes executed by the said Academy Company, one to Guthrie & Franklin, and the other to Campbell & Ellison, each being for the sum of \$500."

On December 16, the court entered a decree adjudicating that the property in question was the property of the defendants, denying the application to file a supplemental bill, and dismissing the original bill. On January 3, 1913, the complainants filed a petition for rehearing without leave of court and on January 11, 1913, the court denied the petition, and the complainants appeal.

Alfred J. Brockschmidt and Louis H. Berger, both of Quincy, Ill., for appellants.

M. D. Campbell, of Kirksville, Mo., and Ben Eli Guthrie, of Macon, Mo. (Guthrie & Franklin, of Macon, Mo., and Campbell & Ellison, of Kirksville, Mo., on the brief), for appellees.

Before SANBORN and SMITH, Circuit Judges, and POPE, District Judge.

SMITH, Circuit Judge (after stating the facts as above). There are nine assignments of error. The first, second, third, and fourth are that the court erred in denying and dismissing the application of complainants for leave to file a supplemental bill. The fifth is that the court erred in dismissing the complainants' original bill without making a finding of facts. The sixth is that the court erred in dismissing the complainants' bill without finding that it did not show any equity. The seventh and eighth are that the court erred in refusing to grant a rehearing and in overruling the prayer of such petition for rehearing. The ninth the court erred in entering a judgment against the complainants.

It appears that the complainants were given four separate and distinct opportunities to redeem. First, under the original option at any time before March 12th. Instead of availing themselves of this option they commenced this suit on March 1, 1912, for the May term of that year. On May 6th the defendants voluntarily offered the complainants until the June rules, 1912, to make such redemption. Two weeks later this was accepted, but on June 3d in their reply they said they were not able to comply by the June rules. Third, on June 26th, they signed an agreement extending the right of redemption to October 1st, and on that date complainants filed a petition asking to be allowed to file a supplemental bill, and on October 25th the parties all appeared before the master, who extended the time for redemption to November 8th, but although no exceptions were filed to the master's action, the complainants failed for the fourth time to redeem.

[1] All the proceedings in this case took place prior to February 1, 1913, and they were therefore governed by the rules in equity which existed from 1866 to 1913. Rule 57 expressly contemplated leave of court to file a supplemental bill. The question at once arises, when leave of court is thus required, To what extent can the court's action be reviewed by an appellate court?

It has repeatedly been held that there can be no review of the exercise of the discretion of the lower court in allowing or refusing to permit amendments. *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800; *Gormley v. Bunyan*, 138 U. S. 623, 11 Sup. Ct. 453, 34 L. Ed. 1086.

In *Walden v. Craig*, 9 Wheat. 574, 6 L. Ed. 164, the Supreme Court pursued the rather unusual course of first pointing out that the action of the court below was erroneous in this respect and then concluded: "But the course of this court has not been in favor of the idea, that a writ of error will lie to the opinion of a circuit court, granting or refusing a motion like this." See *Dietz v. Lymer*, 61 Fed. 792, 10 C. C. A. 71; *Philip Schneider Brewing Co. v. American Ice Machine Co.*, 77 Fed. 138, 23 C. C. A. 89, and *Lange v. Union Pacific R. Co.*, 126 Fed. 338, 62 C. C. A. 48.

A supplemental bill is a mere adjunct to the original bill. *Shaw v. Bill*, 95 U. S. 10, 24 L. Ed. 333.

And the rule with reference to amendments has been applied to applications to file supplemental pleadings. *Sawyer v. Piper*, 189 U. S. 154, 23 Sup. Ct. 633, 47 L. Ed. 757; *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102, 6 Ann. Cas. 253; *Oregon & Transcontinental Co. v. Northern Pac. R. Co.* (C. C.) 32 Fed. 428; *Sheffield & B. Coal, Iron & Railway Co. v. Newman*, 77 Fed. 787, 23 C. C. A. 459. And to a bill of review. *Ricker v. Powell*, 100 U. S. 104, 25 L. Ed. 527.

These and others cited in them vary as to the terms of the rule, some saying the subject cannot be considered in the appellate court, others that in the absence of gross abuse of discretion in the trial court it cannot be so considered. In any event we cannot consider the first, second, third, and fourth assignments of error because, in view of the fact that complainants had been accorded four separate opportunities to redeem, we cannot say that in refusing the application to file a supplemental bill the court was guilty of any gross abuse of discretion. By this, however, we do not intimate that the District Court was in error at all in his rulings. This disposes of the first four assignments of error.

[2] Turning now to the seventh and eighth assignments, which are in relation to the petition for rehearing, Mr. Justice Field, in *Giant Powder Co. v. Cal. Vigorit Powder Co.* (C. C.) 5 Fed. 197, said: "Rehearings are then granted * * * only upon such grounds as would authorize a new trial in an action in law." Bearing this in mind, it has been so long settled that the ruling on a motion for a new trial cannot be reviewed in an appellate court as to scarcely require the citation of authorities. *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854; *Wright v. Hollingsworth*, 1 Pet. 165, 7 L. Ed. 96; *United States v. Buford*, 3 Pet. 12, 7 L. Ed. 585; *Philip Schneider Brewing Co. v. American Ice Machine Co.*, 77 Fed. 138, 23 C. C. A. 89.

It follows that these assignments, Nos. 7 and 8, cannot be considered.

[3] Turning now to the fifth, it was expressly stipulated between the parties that:

"Under no condition or circumstance shall the time to exercise said option to repurchase said property be extended beyond the first of October, 1912, nor shall a further extension or a right to repurchase said property under said option be asked or sought in any way or form whatsoever."

And further:

"A failure on the part of the said complainants to exercise their right to repurchase the property under the terms and conditions as herein provided, shall ipso facto operate as a dismissal of this action and they shall be forever barred from instituting or prosecuting any other suit or action relative to the subject-matter herein or growing out of or connected with the same."

There is no rule in equity that the court shall in its decree find all the facts necessary to sustain the decree except where, as in *Peirsoll v. Elliott*, 6 Pet. 95, 8 L. Ed. 332, in the absence of a finding of facts, it would be impossible to tell what the decree in fact meant.

Turning now to the sixth and ninth assignments, the evidence upon

which the court acted is not before us, nor is there anything to show there was any such evidence, but if the evidence failed to show that complainants had paid the money required by October 1st, then under the express terms of the stipulation just quoted the bill was to be dismissed.

There is no error apparent, and the decree of the District Court is affirmed.

RYAN et al. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 6, 1914. On Rehearing, June 3, 1914.)

No. 1975.

1. CRIMINAL LAW (§ 673*)—OFFENSES—STATE AND NATIONAL JURISDICTION—EVIDENCE.

Where certain members of a labor union were indicted for conspiracy to commit a crime against the United States, to wit, the transportation in interstate commerce of dynamite and nitroglycerin in passenger cars and trains, to be used in blowing up buildings and works constructed by "open shop" concerns, and in transporting, aiding, and abetting the transportation of such substances, in violation of the federal statutes, evidence of a chain of explosions throughout the United States, alleged to have occurred by means of dynamite and nitroglycerin so transported, while admissible as circumstantial evidence to support the charges specified in the indictments, should be limited to that purpose; since the offenses involved in the explosions themselves were offenses against, and punishable only under, the laws of the states by the state courts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1597, 1872-1876; Dec. Dig. § 673.*]

2. CRIMINAL LAW (§ 1167*)—APPEAL—INDICTMENT—DIFFERENT COUNTS—OBJECTIONS.

Where sentences under several counts of an indictment for imprisonment within the term fixed by statute are made to run concurrently, and one of the counts is good, it is immaterial that the others are defective.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3101, 3103-3106; Dec. Dig. § 1167.*]

3. CONSPIRACY (§ 27*)—STATUTORY OFFENSE—ELEMENTS—SUCCESS.

"Conspiracy" to commit a crime against the United States denounced by Rev. St. § 5440 (Cr. Code [Act March 4, 1909, c. 321, 35 Stat. 1096; U. S. Comp. St. Supp. 1911, p. 1600] § 37) is distinguished from the common-law offense, in that it requires for completion and conviction that one or more of the conspirators do any act to effect the object of the conspiracy, and, when so carried forward by any overt act, it constitutes an offense entirely irrespective of its success, or of the ultimate objects sought to be accomplished by conspiring, and the conspiracy so denounced may either intend and be accomplished by one or several acts which complete the offense, or it may be made by the parties a continuing conspiracy for a course of conduct in violation of law to effect its purposes.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 38, 39; Dec. Dig. § 27.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1454-1461; vol. 8, p. 7613.]

4. CONSPIRACY (§ 43*)—CONTINUING CONSPIRACY—INDICTMENT—TRANSPORTATION OF EXPLOSIVES—FEDERAL OFFENSES.

An indictment charged that certain defendants named, on December 1, 1906, conspired with others to commit an offense against the United

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

States, to wit, to transport dynamite and nitroglycerin in interstate commerce in vehicles used by common carriers in transporting passengers by land for hire. It then averred that such carriage was not within the exceptions named in Cr. Code, § 232 et seq., and that the conspiracy was continuously in existence and in process of execution throughout all the time from and after December 1, 1906, and at all of the times mentioned in the indictment, and particularly at the time of the commission of each of the overt acts subsequently set forth. Overt acts were then averred in furtherance of the conspiracy and to carry out its objects, with specifications, alleged to have been committed by the different defendants, the first committed January 20, 1908, and the last August 27, 1911. *Held*, that such indictment averred a continuing conspiracy to commit a continuous offense against the United States in the carriage of prohibited explosives as described.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84-99; Dec. Dig. § 43.*]

4. CONSPIRACY (§ 28*)—CRIMES AGAINST UNITED STATES—PURPOSE OF CONSPIRACY.

Where defendants were indicted for conspiracy to commit an offense against the United States, to wit, the transportation of explosives in interstate commerce in passenger cars and trains, in violation of Cr. Code, § 232 et seq., and the carriage of such explosives as charged was made the subject-matter of the conspiracy in any measure, its violation of the federal statutes would establish a basis for a conspiracy to commit an offense against the United States in violation of Cr. Code, § 37, irrespective of the fact that the ultimate purpose of such transportation was to destroy "open shops" steel construction in the various states—an object not within federal cognizance.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 40, 41; Dec. Dig. § 28.*]

6. CRIMINAL LAW (§ 150*)—CONTINUING CONSPIRACY—LIMITATIONS.

Where defendants were charged with conspiracy to commit a crime against the United States, to wit, the transportation of prohibited explosives in passenger cars and trains in interstate commerce, in violation of Cr. Code, §§ 37, 232, et seq., and the first overt act was alleged to have occurred January 20, 1908, and the last August 27, 1911, and the indictments were filed February 6, 26, 1912, the prosecution was not barred by limitations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 274, 275; Dec. Dig. § 150.*]

7. CONSPIRACY (§ 28*)—TO COMMIT CRIME—EXPLOSIVES—TRANSPORTATION IN INTERSTATE COMMERCE—STATUTES—ALTERATION.

Where defendants were indicted for conspiracy to commit an offense against the United States, to wit, the transportation of dynamite and nitroglycerin in interstate commerce in passenger trains and cars, continuously from and after December 1, 1906, and the first overt act was alleged to have been committed January 20, 1908, and the last August 27, 1911, it was sufficient to sustain a conviction that the carriage of nitroglycerin had been continuously prohibited since Act July 3, 1866, c. 162, § 1, 14 Stat. 81, as preserved in Rev. St. 1874, § 5353 (U. S. Comp. St. 1901, p. 3637), re-enacted, with dynamite expressly named as one of the prohibited explosives in Act May 30, 1908, c. 234, §§ 1, 4, 5, 35 Stat. 554, 555, and Cr. Code, §§ 232, 235; it being immaterial that dynamite was not expressly named in the earlier enactments in force at the date of the inception of the conspiracy, nor was it material that Rev. St. § 5353, had been amended both in respect of additional enumerations and the punishment for the offenses, since such changes could not affect the un-

lawfulness of the undertaking for the carriage of nitroglycerin as averred in the primary conspiracy.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 40, 41; Dec. Dig. § 28.*]

8. CONSPIRACY (§ 43*)—OFFENSES AGAINST UNITED STATES—TRANSPORTATION OF DYNAMITE AND NITROGLYCERIN—EVIDENCE.

Where defendants were charged with a continuing conspiracy to transport nitroglycerin and dynamite in passenger trains and cars in interstate commerce, beginning on December 1, 1900, the last overt act having been committed August 27, 1911, it was not necessary for the government to prove extension of the conspiracy to the transportation of dynamite after May 30, 1908, when Rev. St. § 5353, prohibiting the transportation of explosives in interstate commerce, was amended to include dynamite, though such proof was admissible.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84–89; Dec. Dig. § 43.*]

9. EXPLOSIVES (§ 2*)—TRANSPORTATION—INTERSTATE COMMERCE—STATUTES—APPLICATION.

Cr. Code, §§ 232, 235, prohibiting the transportation of nitroglycerin, dynamite, etc., on passenger trains and cars in interstate commerce, were not limited to common carriers, but extended as well to passengers, or persons traveling on trains; the intention being to prohibit the carriage in any manner of the explosives named on passenger trains engaged in interstate commerce, in a "vehicle" thereof carrying passengers for hire, including the carriers, their employés, or any person traveling on such vehicle.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 1; Dec. Dig. § 2.*]

10. EXPLOSIVES (§ 5*)—TRANSPORTATION IN INTERSTATE COMMERCE—OFFENSES—INDICTMENT.

Counts of an indictment charging that certain defendants named, unlawfully, knowingly, willfully, and feloniously did then and there transport and carry dynamite and nitroglycerin in a vehicle, to wit, and feloniously alleged in different counts as a passenger car or passenger train, and that other defendants were aiders and abettors therein, sufficiently alleged a violation of Cr. Code, § 232, prohibiting such transportation.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 2; Dec. Dig. § 5.*]

11. CRIMINAL LAW (§ 619*)—SEPARATE COUNTS IN INDICTMENTS—DIFFERENT OFFENSES—CONSOLIDATION FOR TRIAL.

Where counts of several indictments charged a conspiracy to commit a crime against the United States, to wit, the transportation of dynamite and nitroglycerin in interstate commerce in passenger cars or trains, and other counts charged defendants either as principals or aiders and abettors with so transporting dynamite and nitroglycerin in interstate commerce in such cars, or trains, such offenses were separate and distinct and not interdependent, nor susceptible of proof by the same evidence, and hence a consolidation of the indictments for trial was properly ordered and was not objectionable as carving several offenses out of one.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1376; Dec. Dig. § 619.*]

Consolidation of and trial of indictments together, see note to Dolan v. United States, 69 C. C. A. 287.]

12. CRIMINAL LAW (§ 195*)—JEOPARDY—FORMER TRIAL FOR SAME OFFENSE.

Whether a conviction or acquittal on one indictment is a bar to a sentence or conviction on another depends, not on whether a defendant has before been tried for the same act, but whether he has been put in jeopardy for the same offense, since a single act may constitute an of-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fense against two statutes, and, if each requires proof of an additional fact which the other does not, an acquittal or conviction under either will not exempt the defendant from prosecution and punishment under the other.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 382, 383; Dec. Dig. § 195.*]

13. CRIMINAL LAW (§ 1036*)—APPEAL—QUESTIONS NOT RAISED AT TRIAL.

An objection to the testimony of a witness not raised at the trial cannot be considered on a writ of error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1631-1640, 2639-2641; Dec. Dig. § 1036.*]

14. CRIMINAL LAW (§ 508*)—TESTIMONY OF CODEFENDANT—COMPETENCY.

Codefendants who had pleaded guilty were competent to testify for the government against their codefendants in the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1099-1123; Dec. Dig. § 508.*]

15. CONSPIRACY (§ 47*)—OFFENSES AGAINST UNITED STATES—INTERSTATE COMMERCE—TRANSPORTATION OF EXPLOSIVES—EVIDENCE.

In a prosecution for conspiracy to commit a crime against the United States, to wit, the transportation in interstate commerce in passenger trains or cars of nitroglycerin and dynamite in violation of Cr. Code, §§ 37, 232, et seq., and for transporting, aiding, and abetting in such transportation of nitroglycerin and dynamite, evidence held sufficient to sustain a conviction of certain of the defendants, and insufficient to sustain a conviction of certain others.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 105-107; Dec. Dig. § 47.*]

In Error to the District Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

Frank M. Ryan and twenty-nine others were convicted of conspiracy to commit a crime against the United States, and of transporting, aiding, and abetting the transportation of dynamite and nitroglycerin in interstate commerce in passenger trains and cars between the several states of the United States, and they bring error. Reversed in part, and affirmed in part.

The following are the instructions to the jury, given by Anderson, District Judge:

It is your duty to observe and follow the law as given to you by the court.
* * * In order that you may the better understand the case and apply the facts established by the proofs to the law governing it, it is proper that the court should give you a brief explanation or definition of the offenses with which the defendants stand charged.

Section 5440 of the Statutes of the United States provides that if two or more persons conspire to commit any offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to punishment.

By acts of Congress in force during all the times mentioned in this indictment it was made an offense for any person to transport, carry, or convey any dynamite, gunpowder, liquid nitroglycerin, or other explosive, between a place in one state of the United States and a place or places in another state or territory of the United States on any vehicle of any description operated by a common carrier and engaged at the time in the transportation of passengers, unless such explosives so being transported consisted of small arms or ammunition, munitions of war, signal devices intended to promote the safety in operation of said car or train, or samples for laboratory examination.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

By an order of consolidation the separate indictments and the various counts thereof have been consolidated into one indictment consisting of 52 counts. These counts are very lengthy, and it is only necessary that I refer at this time to the substance of them. You will have the indictment with you when you come to deliberate upon your verdict, and you can then examine the several counts upon which the defendants are on trial, so far as you may find it necessary to do so.

The counts of this consolidated indictment upon which the defendants are on trial, are as follows:

The first two counts, numbered 15 and 20, charge in different ways a conspiracy to commit an offense against the United States. The remaining counts, numbered 63 to 96 both inclusive, and 113 to 128 both inclusive, each charge one or more of the defendants with the unlawful transportation of liquid nitroglycerin or dynamite from a place in one state to a place or places in other states of the United States in violation of law, and that the other defendants named in the indictment aided and abetted such unlawful transportation of explosives.

Count 15 charges in substance that the defendants on or about the 1st day of December, 1906, did conspire, combine, confederate and agree together and with certain divers other persons whose names are unknown to the grand jurors, to commit an offense against the laws of the United States defined and made punishable by the laws of the United States, to wit, to transport, carry, and convey explosives, to wit, dynamite and nitroglycerin, between a place in one state of the United States and places in other states of the United States, upon and in vehicles then and there used and employed in transporting passengers by land from state to state, said vehicles being then and there engaged in the transportation of passengers for hire, and said vehicles being operated by common carriers in the transportation of passengers by land; that said dynamite and nitroglycerin was not, nor was any part thereof, then and there intended to be small arms or ammunition, or fuses, torpedoes, rockets, or other signal device or devices intended to promote the safety of operation of said or any passenger car or train, nor was the same intended to be a sample for laboratory examination, nor was the same intended to be a munition of war by the defendants; that said conspiracy was continuously in existence throughout all the time from and after the 1st day of December, 1906, and at all times in the indictment mentioned, and particularly at the time of the commission of each of the overt acts in said indictment set forth. This count of the indictment then specifies as overt acts, or acts done in furtherance of the conspiracy and to carry into effect its object and purpose, the writing, mailing, and delivery of certain letters by various defendants, and various acts done by certain of the defendants aside from the actual unlawful transportation of explosives, which acts are charged to have been committed and done in furtherance of the conspiracy and to effect its object and purpose.

Count 20 is substantially the same as count 15, except that the specific places to and from which the explosives were to be illegally transported in pursuance of the conspiracy and the acts of Congress prohibiting such transportation are specifically named.

The next 34 counts, being counts 63 to 96 both inclusive, charge 17 separate and distinct transportations of liquid nitroglycerin in violation of the statute by Ortie E. McManigal, John J. McNamara, and James B. McNamara, or one or more of them, and all the other defendants are charged as aiders and abettors in such violations of the statute. The several acts of transportation are charged in separate counts in two different ways, namely: In 17 of the 34 counts it is charged that a passenger car was the vehicle upon and in which the liquid nitroglycerin was carried from state to state, while in the remaining 17 counts it is charged that the vehicle used was a passenger train.

The remaining 16 counts, being counts 113 to 128 both inclusive, relate to the transportation of dynamite, and charge in separate counts in two different ways, namely, upon a passenger car as the vehicle, and upon a passenger train as the vehicle, eight separate transportations of dynamite in violation of

the statute, by Ortie E. McManigal, John J. McNamara, and James B. McNamara, or one or more of them, and all the other defendants are charged as aiders and abettors.

The charge in the first two counts of this indictment, as consolidated, namely, in counts 15 and 20, is such a conspiracy as is made punishable by section 5440, namely, a conspiracy to commit an offense against the United States, which offense is the transportation of dynamite and nitroglycerin from state to state upon a vehicle operated at the time of such transportation by a common carrier in the transportation of passengers, contrary to the statute of the United States. The questions to be determined upon this branch of the case are: First, was the alleged conspiracy formed by any two or more of the defendants to willfully and unlawfully transport, carry, and convey dynamite and nitroglycerin upon passenger trains or cars operated by a common carrier, from a place in one state to a place or places in another state or states? Second, if such conspiracy was formed, did any or either of the parties thereto, with intent to effect the object of the conspiracy, do either or any of such of the acts charged in the indictment as constituting acts to carry into effect such object? Third, if you find that such conspiracy was formed, and that any one of the parties to the conspiracy intentionally did any act to effect its purpose and object, then the further question for you to determine is: What ones of the defendants now on trial, if any, were parties to the conspiracy either at the time of its formation, or became parties thereto at any time during the continuance of the conspiracy?

A "conspiracy" is formed when two or more persons agree to do an unlawful act; in other words, when they combine to accomplish, by their united action, a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means; and the offense is complete when one or more of the parties so agreeing together does any act to effect the object of the conspiracy. If two or more persons agree together that they will commit a certain offense against the United States, as that of transporting, carrying, and conveying dynamite, and liquid nitroglycerin from one state to another upon passenger trains or cars engaged at the time in the carrying of passengers, contrary to the statutes of the United States, and one or more of the persons so agreeing does any act to effect the object of such agreement, they are all guilty of the offense of conspiracy.

To constitute a "conspiracy" it is not necessary that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, in words or in writing, state what the unlawful scheme is to be, or the details of the plan or means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance come to a mutual understanding to accomplish the common and unlawful design. Where an unlawful end is sought to be effected, and two or more persons, actuated by a common purpose of accomplishing that end, work together in furtherance of the unlawful scheme, such persons become conspirators, although the part which any one of them is to take in the conspiracy is a subordinate one, or is to be executed at a remote distance from the other conspirators.

In determining the question of the existence of a conspiracy, you will take into consideration the relation of the parties to one another, their personal and business association with each other, and all the facts in evidence that tend to show what transpired between them at or before the time of the alleged combination as well as the acts performed by each party subsequent to such alleged combination in respect to the subject-matter of the alleged conspiracy; and from these facts and circumstances you will determine whether a combination in fact existed, and whether such combination was illegal in its inception, or became illegal at any subsequent time.

A conspiracy is rarely, if ever, proved by positive testimony. When a crime of high magnitude is about to be committed by a combination of individuals, they do not act openly, but covertly and secretly. The purpose of the combination is known only to those who enter into it, and their guilt can generally be proved only by circumstantial evidence. The common design is of the essence of the charge, and this may be made to appear when the defend-

ants steadily pursue the same object, whether acting separately or together, by common or different means, all leading to the same unlawful result.

In determining the question of the formation or existence of the conspiracy, the acts and declarations of the persons accused may, among other circumstances, be considered by you. Statements of one, and in some instances of two or more of the defendants in the absence of the other defendants, and conversations with some of the witnesses on the part of one or more of the defendants in the absence of the others, have been given in evidence. The individual letters and telegrams of different defendants have also been introduced. These declarations, statements, and communications tend to show the existence of the alleged conspiracy and the alleged connection of the persons making the same therewith. Acts or declarations of individual defendants are not to be considered by you as affecting any other defendant, unless you find from the evidence the existence of such conspiracy, that such other defendant was a member thereof, and that such acts were done and such declarations were made in pursuance of the common purpose set out in the indictment and to effectuate the same. The same rule applies to the acts and declarations of persons, if any, who may be shown by the evidence to have joined in the conspiracy, but who are not named as defendants in the indictment.

To constitute the offense of "conspiracy" which is made punishable by the statute, there must be not only the conspiring together by the parties, but the formation of the conspiracy must be followed by an act done by one or more of the parties to the conspiracy to effect its object. So, if you should find that the defendants or some of them conspired together, as charged in the indictment, to commit the offense of unlawfully transporting dynamite and nitroglycerin from state to state upon passenger trains or cars, you will then inquire whether the defendants or either of them did any of the acts charged in the indictment as constituting acts to effect the object of the conspiracy.

The act must be one, you will observe, to effect the object of the conspiracy. It must not be one of a series of acts constituting the agreement, or the conspiring together, but it must be a subsequent, independent act following a completed agreement, and done to carry into effect the object of the combination. Such acts constitute what are known as overt acts in the law of conspiracy.

Various kinds of overt acts are alleged in the two conspiracy counts to have been performed by one or more of the parties to the conspiracy to carry the object of the conspiracy into execution and effect, including correspondence passing between parties to the alleged conspiracy, the procurement by purchase and otherwise of dynamite and nitroglycerin, the purchase of carrying cases and boxes, the renting and procurement of storage places and the storage therein of large quantities of dynamite and nitroglycerin.

The question upon this part of the case is: Were any of these acts done by any or either of the defendants, and, if so, were they acts to carry into effect a conspiracy formed by the defendants to transport, carry, and convey dynamite and nitroglycerin from one state to another upon passenger cars or trains, contrary to the statute of the United States?

If you find that a conspiracy existed, as alleged in the indictment, and that some one or more of the overt acts were committed, as alleged, the question then follows: Were the defendants on trial, or some of them, connected with that conspiracy as parties thereto? Mere passive knowledge of the illegal action of others is not sufficient to show complicity in the conspiracy. Some active participation is necessary. Co-operation in some form must be shown. There must be intentional participation in the transaction with a view to the furtherance of the common design and purpose. To establish the connection of either of the defendants with the conspiracy, such connection must be shown by facts or circumstances, independent of the declarations of others; that is, by his own acts, conduct, or declarations. And until this fact is thus established he is not bound by the declarations or statements of others. The principle of law and rule of evidence is that when once a conspiracy or combination is established, and a defendant is shown by independent evidence to be a party thereto, then he is bound by the acts, declarations, and statements

of his co-conspirators done and made in furtherance of the conspiracy, because in that event each is deemed to assent to or command what is done by any other in furtherance of the common object. Where a body of men assume the attribute of individuality, whether for commercial business or the commission of a crime, the combination is bound by the acts of one of its members, in carrying out the design.

So, in considering the testimony given as to the acts, declarations, and statements of either one of the defendants when other defendants were not present, you are to understand that that testimony was submitted to you for the purpose of showing in the first instance that there was a conspiracy formed and existing, and that the person or persons making the declarations, statements, or communications were parties to it; that the alleged connection of any one of the defendants with the alleged conspiracy, if any existed, must be shown by facts or circumstances independent of statements of other defendants in his absence; and that, when once that connection is thus shown, then he becomes affected and bound by the declarations and acts of other parties to the conspiracy, if any, made and done in furtherance of the common enterprise and during his connection therewith.

It was not unlawful for the structural iron workers to organize the union to which they belong. It is not unlawful for the defendants to be members of that or any other labor organization. Men have the right to use their combined power through such organizations to advance their interests in any lawful way; but they have no right to use this power in the violation of the law. Organized labor is not on trial here, nor is the right of labor to organize in issue; but members of labor organizations owe the same obedience to the law and are liable to the same punishment for its violation as persons who are not members of such organizations.

The defendants are not on trial for causing the various explosions, and the consequent loss of life and property throughout the United States, shown by the evidence. They are on trial for the offenses charged in the indictment. Evidence of these explosions, together with the facts and circumstances surrounding them, were permitted to go in evidence before you, because they tend to show the community of purpose, the concert of mind and action, which is an essential ingredient of the offenses charged, and they should be considered by you upon that issue alone.

The evidence in this case shows that in August, 1905, there was a controversy between the International Association of Bridge and Structural Iron Workers and the American Bridge Company over the open and closed shop question; that in said month of August, 1905, the International declared a general strike against the American Bridge Company; and that this strike has never been settled. If you find from the evidence that, in order to carry out the purposes of the International, the defendants, or two or more of them, entered into a conspiracy to destroy with dynamite and nitroglycerin the property of the American Bridge Company and other open shop concerns, or the structures which they were erecting in various states of the Union, and if you find that such conspiracy to destroy such property included as a necessary step in the accomplishment of such destruction the unlawful transportation of dynamite and nitroglycerin upon the vehicles of common carriers engaged at the time in the transportation of passengers, from a place in one state to a place or places in another or other states of the United States, and if you further find that such destruction of property was accomplished by explosions of dynamite and nitroglycerin in various places throughout the United States, and that the dynamite and nitroglycerin with which such explosions were produced were as a matter of fact transported from state to state in suit cases and carrying cases upon the vehicles of common carriers, engaged at the time in the carrying of passengers, as averred, then you will be authorized to find that a conspiracy was formed to transport dynamite and nitroglycerin unlawfully, as charged in the indictment.

The indictment charges a continuing conspiracy. The law considers that, whenever any of the co-conspirators does any act to effectuate the common design, the parties to the conspiracy renew, or, to speak more properly, they continue, their agreement, and this agreement is renewed or continued as to

all whenever any one of them does an act in furtherance of their common design. Any person who, after a conspiracy is formed, and who knows of its existence, joins therein by some act intentionally done in furtherance of its object, becomes as much a party thereto from that time on as if he had originally conspired.

The law regards the act of unlawful combination and confederacy as dangerous to the peace of society, and declares that such combination and confederacy of two or more persons to commit crime requires an additional restraint to those provided for the commission of the crime, and makes criminal the conspiracy, with penalties and punishments distinct from those prescribed for the crime which may be the object of the conspiracy. You will readily understand why this is true. A conspiracy becomes powerful and effective in the accomplishment of its illegal purpose, in proportion to the numbers, power, and strength of the combination to effect it. It is also true that, as it involves a number in a lawless enterprise, it is proportionally demoralizing to the well-being and character of the men engaged in it, and, as a consequence, to the safety of the community to which they belong.

I now direct your attention to the counts of the indictment charging violations of the statute of the United States by the unlawful transportation of explosives from state to state. The counts of the consolidated indictment numbered 63 to 96 both inclusive, and 113 to 128 both inclusive, charge the defendants who are on trial with unlawfully, knowingly, willfully, and feloniously aiding and abetting Ortie E. McManigal, James B. McNamara, or John J. McNamara, one or more of them, in the unlawful transportation of explosives from state to state upon passenger cars or passenger trains, in violation of the statute of the United States.

Section 332 of the Criminal Code provides as follows: "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

A person accused is a principal under this statute if he directly commits the crime charged, or aids, abets, counsels, commands, induces, or procures the commission of the crime charged. Aiding, abetting, counseling, commanding, inducing, or procuring are affirmative in their character.

If the said Ortie E. McManigal, or McManigal and James B. McNamara, or McManigal and John J. McNamara, knowingly and purposely, and with the intent charged, did the acts charged against them in the several counts of the consolidated indictment numbered 63 to 96 both inclusive, and 113 to 128 both inclusive, and the defendants who are on trial before you, with the like intent, unlawfully and knowingly did or said something showing their consent to and participation in the said criminal acts of Ortie E. McManigal, James B. McNamara, and John J. McNamara, and contributing to their execution, then you will be justified in finding that such defendants aided and abetted the said McManigal, James B. McNamara, and John J. McNamara in the doing of said acts, and that such defendants are guilty as principals upon such count or counts as you find so proved.

If the defendants, or two or more of them, entered into a conspiracy, as defined in that portion of these instructions relating to that subject, to unlawfully transport dynamite or nitroglycerin as charged, and any one or more of the defendants thereafter, in pursuance of such conspiracy, unlawfully transported such dynamite or nitroglycerin as alleged, you would be justified in finding all the defendants who entered into such conspiracy guilty of all such transportations as took place after they severally entered into said conspiracy.

You may find the defendants guilty upon all of the counts of the indictment upon which they are now upon trial, if you are satisfied beyond a reasonable doubt that the proofs justify it. Or you may find the defendants guilty upon any one or more of the counts of the indictment and not guilty upon the others. You may find any defendant guilty or not guilty, or you may find one or more of them guilty and the others not guilty. Before you can find any of the defendants guilty, you must be satisfied of his guilt in manner and form as charged in some one of the counts of the indictment upon which they are on trial, beyond a reasonable doubt.

Witnesses have been called in the course of the trial who have testified to their own participation in criminal practices, two of whom are under indictment in this court for such practices, and have pleaded guilty to the charges preferred against them. There has been criticism of their testimony, and considerable discussion in argument before you as to the weight to which their testimony is entitled. The court instructs you upon this subject that it is the settled rule in this country that accomplices in the commission of crime are competent witnesses, and that the government has the right to use them as witnesses. It is the duty of the court to admit their testimony, and that of the jury to consider it. It should be received with caution and scrutinized with care. The degree of credit which should be given such testimony is a matter exclusively within the province of the jury. You may as a matter of law convict a person accused of a grave crime upon the uncorroborated testimony of an accomplice. In this case a large amount of evidence has been introduced tending to corroborate the testimony of the witnesses Ortie E. McManigal and Edward Clark, and in determining the weight which you shall give to the testimony of these witnesses you should take into consideration the facts and circumstances in evidence which tend to corroborate them upon the material facts about which they have testified. If you find that they are substantially corroborated by independent evidence with respect to material parts of their testimony, you should then give their entire testimony such weight as in your opinion it deserves.

The witness William J. Burns, while on the witness stand, detailed a conversation that he had with the defendant Hockin in which he made statements to Hockin about the defendant Tveitmoe having been in prison and having a prison record. Such statements made by Burns are not to be considered by you in any way in determining the guilt or innocence of the defendant Tveitmoe as to the charge laid in this indictment.

Some of the defendants have offered evidence before you touching their good character for peace and quietude. Evidence of this sort is competent to be taken into consideration by you in determining the guilt or innocence of such defendants. If such defendants have, in the communities where they live, by their incomes and outgoings among their neighbors built up a good reputation among them for peace and quietude, you should give that fact such weight as you think it entitled to, taking into consideration all the other facts and circumstances established by the evidence.

The burden of proving each defendant guilty, as charged, rests upon the government, and this burden does not shift from it.

The defendants are presumed to be innocent until their guilt in manner and form as charged in some count of the indictment is proved beyond a reasonable doubt. To justify you in returning a verdict of guilty, the evidence should be of such a character as to overcome this presumption of innocence, and to satisfy each one of you of the guilt of the defendants as charged, to the exclusion of every reasonable doubt. If therefore you can reconcile the evidence with any reasonable hypothesis consistent with the innocence of the defendants, it is your duty to do so and in that case find the defendants not guilty. And if, after weighing the proofs in the light of the presumption I have mentioned, you impartially and honestly entertain the belief that the defendants may be innocent of the offenses charged against them, they are entitled to the benefit of that doubt, and you should acquit the defendants. It is not meant by this that the proof should establish their guilt to a certainty, but merely that you should not convict unless from the evidence you find the defendants guilty beyond a reasonable doubt. Speculative notions or possibilities arising upon mere conjecture, not arising or deducible from the proof or from the want of it, should not be confounded with a reasonable doubt. A doubt suggested by the ingenuity of counsel, or by your own ingenuity, not legitimately warranted by the evidence, or the want of it, or one born of a merciful inclination to permit the defendants to escape the penalty of the law, or one prompted by sympathy for them or those connected with them, is not what is meant by a reasonable doubt. A reasonable doubt, as that term is employed in the administration of the criminal law, is an honest, substantial misgiving, generated by the proof or the want of it; that is, such a state

of the proof as fails to convince your judgment or conscience, and satisfy your reason of the guilt of the accused. If the evidence, when carefully examined, weighed, compared, and considered, produces in your minds a settled conviction or belief of the guilt of the defendants—such an abiding conviction as you would be willing to act upon in the most weighty and important affairs of your own life—you may be said to be free from any reasonable doubt, and may find a verdict in accordance with that conviction or belief.

You are the sole judges of the weight and credit to be given to the testimony of the witnesses. You ought fairly and impartially to consider and weigh all the testimony and proofs given in the case. To determine the weight and credibility of the testimony of any witness, you have a right to consider his bias or prejudice, if any is shown, his interest or want of interest in the result of the case, his intelligence and candor, and the knowledge which he is shown to possess touching the matters about which he testifies. You should especially look to the interest which the respective witnesses have in the suit or in its result. Where the witness has a direct, personal interest in the result of the suit, the temptation is strong to color, pervert, or withhold the facts. The law permits the defendants, at their own request, to testify in their behalf. Some of the defendants have availed themselves of this privilege. Their testimony is before you, and you must determine how far it is credible. The deep personal interest which they may have in the result of the suit should be considered by the jury in weighing their evidence, and in determining how far or to what extent, if at all, it is worthy of credit. Some of the defendants have not testified in this cause. You will not consider their failure to testify, nor draw any inference to their prejudice from such omission.

Carefully weigh all the evidence in the case, and from it, under the rules of law which I have given you, determine the guilt or innocence of the defendants. With you, and not with the court, rests the responsibility of finding and determining the facts. The views of the court on questions of fact are not controlling upon you. You have nothing to do with the case except to determine the single question of the guilt or innocence of the defendants. If you should return a verdict of guilty, the measure of punishment to be inflicted upon the defendants is committed to the court. When you retire to deliberate on your verdict, select one of your number to act as a foreman. When you have agreed upon a verdict, let your foreman sign it and then return it into court. Forms of verdict will be furnished for your use.

The facts are stated as follows by SEAMAN, Circuit Judge:

The plaintiffs in error, 30 in number (hereinafter specifically named), have brought several writs of error, for review of several judgments of conviction, under 52 counts of an indictment charging them (together with other defendants) with violations of criminal statutes of the United States. For the purposes of trial several indictments were consolidated, various counts thereof were eliminated, and the District Court overruled motions entered on behalf of the plaintiffs in error for separate trials and required trial together (inclusive of other defendants) under the consolidated indictment and counts preserved therein. The 52 counts involved in the conviction are of two classes—two counts charging (in substance) the defendants named therein with conspiracy and overt acts to commit an offense against the United States, described in each thereof, and 50 counts charging (in substance) the commission of distinct offenses, of the nature described in the conspiracy counts as the purpose thereof, and by defendants named therein, and that the plaintiffs in error and other defendants named were aiders and abettors in such commission. As referred to in the record, the conspiracy counts are designated as counts 15 and 20, and the others on which the plaintiffs in error were found guilty were counts 63 to 96 inclusive and counts 113 to 128 inclusive.

The averments of "conspiracy count 15" may be summarized as follows: It charges that the plaintiffs in error and other defendants named, on the 1st day of December, 1906, unlawfully, knowingly, willfully, and feloniously did conspire, combine, confederate, and agree together and with certain divers other persons whose names are unknown to the grand jurors, to commit an

offense against the laws of the United States, to wit, to transport, carry, and convey explosives, to wit, dynamite and nitroglycerin, between a place in one state of the United States and a place in another state of the United States, to wit, various places in various states of the United States which are therein named, and divers and sundry places in divers and sundry states unknown to the grand jurors, upon and in vehicles then and there used and employed in transporting passengers by land from state to state, said vehicles being then and there engaged in the transportation of passengers for hire and said vehicles being operated by common carriers in the transportation of passengers by land; that said dynamite and nitroglycerin were not, nor was any part thereof, then and there intended to be small arms or ammunition or fuses, torpedoes, rockets, or other signal devices, or devices intended to promote the safety of operation of said or any passenger car or train; nor were the same intended to be samples for laboratory examination; nor were the same intended to be a munition of war by the defendants. It avers that such transportation was prohibited and made an offense against the law of the United States by act of Congress, and specifies an act of Congress approved July 3, 1866, entitled "An act to regulate the transportation of nitroglycerin or glonoin oil, and other substances therein named," and an act of Congress approved May 30, 1908, entitled "An act to promote the safe transportation in interstate commerce of explosives and other dangerous articles, and to provide penalties for its violation," and an act approved March 4, 1909, entitled "An act to codify, revise and amend the penal laws of the United States." It avers that said conspiracy was continuously in existence throughout all the time from and after the 1st day of December, 1906, and at all times in the indictment mentioned, and particularly at the time of the commission of each of the overt acts in the indictment set forth. It then specifies as overt acts and acts done in furtherance of the conspiracy and to carry into effect its object and purpose, the writing, mailing, and delivery of certain letters by various defendants named, and various acts done by certain other defendants aside from the actual unlawful transportation of explosives, all of which acts are charged to have been committed and done in furtherance of the conspiracy and to effect its purpose and object.

The first overt act so averred is exhibited in a letter purporting to be written by the defendant Ryan and sent to the defendant John J. McNamara, and the last overt act specified is a purported letter from the defendant Pennell to the defendant John J. McNamara, March 4, 1911.

Count 20 is substantially like 15, except that it does not specify the places to and from which the explosives were transported, nor the specific acts of Congress which prohibited such transportation.

The other 50 counts charge 25 distinct transportations of explosives in violation of the statute referred to, by Ortie E. McManigal, John J. McNamara, and James B. McNamara, or one or more of them, and that the plaintiffs in error and other defendants named were aiders and abettors in such violation. Counts 63 to 96 inclusive charge 17 several transportations of liquid nitroglycerin with the transportation described in two different ways, namely: In the counts bearing even numbers it is charged that the vehicle of transportation was a passenger train, while in the counts bearing odd numbers a passenger car is named as the vehicle; and each avers that the vehicle upon which the transportation was made was being used by the common carrier named in transporting passengers and articles by land and was then and there engaged in transporting passengers and articles of commerce by land; and counts 113 to 128 inclusive aver eight distinct transportations of dynamite, with eight counts charging that a passenger car was the vehicle of transportation and the other eight counts charging that a passenger train was the vehicle. In reference to counts 63 to 96 inclusive, the first transportation is charged as occurring April 17, 1910, and the last one as occurring March 18, 1911; and the first transportation of dynamite charged in counts 113 to 128 inclusive is January 22, 1911, and the last one April 7, 1911.

The evidence preserved in the bill of exceptions makes several printed volumes, and it is notable that no error is assigned for reception or rejection of testimony throughout the extended trial, except as to the admissibility of the testimony of two witnesses, McManigal and Clark, who were defendants un-

der the indictment, but testified on behalf of the prosecution. In so far as reference to the evidence becomes needful for consideration of the assignments of error, mention thereof is reserved for the opinion; but the bill of exceptions recites certain facts to be established by the evidence—as quoted in the statement of the case and argument submitted on behalf of the plaintiffs in error—and such recitals may well be incorporated in this statement (for their bearing upon particular evidence discussed in the opinion), as follows:

"It was proven by the government on the trial that in 1905 there was a contest between the American Bridge Company, a concern engaged in the erection of structural iron, and the International Association of Bridge and Structural Iron Workers, of which association all of the defendants except two, that were convicted, were members. The contest between the International Association of Bridge and Structural Iron Workers and the American Bridge Company was over the 'open' and 'closed shop' question; the Bridge Company having declared its purpose to conduct its affairs on the 'open-shop' basis. On the 10th day of August, 1905, the International Association of Bridge and Structural Iron Workers declared a general strike against the American Bridge Company. This strike was approved by the convention of the International Association of Bridge and Structural Iron Workers that was held in September of the same year, and later the strike was extended by the International Association of Bridge and Structural Iron Workers to all 'open shop' concerns in any way connected or affiliated with, or subsidiary to, the American Bridge Company throughout the United States. This strike was never declared off and was in existence at the time of the trial.

"In the early months of the strike it was attended by incidents of picketing, slugging, and rioting where work was being done by 'open shop' concerns; numerous acts of violence in the nature of assaults, and assaults with intent to kill, followed in various places where the work of such concerns was widely distributed throughout the United States.

"In the year 1906 the contest grew in intensity, and dynamite was next used to blow up and destroy buildings and bridges that were being erected by 'open shop' concerns, without reference to whether the firms or corporations that were erecting such buildings and bridges were members of an association or independent contractors. That explosions first took place in the eastern part of the United States and extended from the Atlantic to the Pacific, continuing until the arrest of the McNamaras and McManigal in April, 1911. That almost 100 explosions damaging and destroying buildings and bridges in process of erection, where the work was being done by 'open shop' concerns, took place, and no explosions took place in connection with work of a similar character that was being done by 'closed shop' concerns. That from the 17th day of February, 1908, until the 22d day of April, 1911, 70 of said explosions occurred, of which number 43 were in connection with structural iron work that was being done by members of the National Erectors' Association, of which the American Bridge Company and other companies affiliated with it were members, and 27 explosions occurred in connection with the work of independent concerns in no way connected with the National Erectors' Association or the American Bridge Company, or any of its affiliated organizations; that dynamite was first used, together with fuse and fulminating caps; the fuse generally used in connection with a charge of dynamite was about 50 feet in length, and when lighted the explosion would occur in about half an hour. That nitroglycerin was next brought into use and a clock and battery and necessary attachments provided, to be used together with dynamite and nitroglycerin, constituting what was termed an infernal machine, to be used in connection with the dynamite and nitroglycerin in the destruction of buildings and bridges of 'open shop' concerns. That the clock and battery and necessary attachments from this time forward were used in connection with charges of dynamite and nitroglycerin in the destruction of life and property. That the infernal machines composed of the clock, batteries, caps, and attachments, were so made and arranged that they could be and were set to cause the explosion to take place several hours after it was set, so that the person setting the explosion could be hundreds of miles away when the explosion took place.

"That the headquarters of the International Association of Bridge and Structural Iron Workers at the time that the strike was declared against the American Bridge Company was in Cleveland, Ohio, and continued to be in Cleveland, Ohio, until removed to Indianapolis, Ind., in the early part of 1906. That certain of the defendants were located at Boston and Springfield, in the state of Massachusetts; others in the cities of New York, Syracuse, and Buffalo, in the state of New York; Philadelphia, Scranton, and Pittsburgh in the state of Pennsylvania; Detroit, in the state of Michigan; Cleveland and Cincinnati in the state of Ohio; Muncie and Indianapolis in the state of Indiana; Chicago, Springfield, Mt. Vernon, and Peoria in the state of Illinois; Milwaukee in the state of Wisconsin; Duluth in the state of Minnesota; Omaha in the state of Nebraska; Kansas City and St. Louis in the state of Missouri; Davenport in the state of Iowa; New Orleans in the state of Louisiana; Salt Lake City in the state of Utah; and San Francisco in the state of California. That dynamite and nitroglycerin were transported in passenger cars on passenger trains of common carriers, engaged in the transportation of passengers for hire, into, over, and across the states of Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Ohio, Michigan, Indiana, Illinois, Wisconsin, Minnesota, Kansas, Nebraska, Maryland, Missouri, Montana, Utah, Idaho, Nevada, Washington, Oregon, Colorado, and California, and were used in the destruction of buildings or bridges that were being erected by 'open shop' concerns at places in the states named. That explosions took place in all of the states named and a number of times in some of them. That explosions by dynamite and nitroglycerin were planned to be made in the states of Kentucky, Texas, and Louisiana, in connection with work that was being done in said states on the 'open shop' plan.

"That in connection with the work of destruction of buildings and bridges that were being erected by 'open shop' concerns and in connection with the destruction of material to be used therein and therewith, dynamite and nitroglycerin was purchased and stolen, and various storage places arranged to conveniently store such explosives that were to be used in the destruction of property in the various states where work of 'open shop' concerns was in process of erection, and such explosives were carried and taken on passenger trains from such storage places in the various states to various places in other states where structural iron work was in process of erection. That some of such storage places were located at Muncie and Indianapolis, Ind.; Tiffin, Ohio; Rochester, Pa.; and San Francisco, Cal. That large quantities of dynamite and nitroglycerin were at various times stored in vaults of the Association of Bridge and Structural Iron Workers on the fifth floor of the American Central Life Building, at Indianapolis, Ind., and the basement of said building. That the storage places were so arranged that dynamite and nitroglycerin could be readily obtained and transported from such place of storage to a place in any other state, to be used in the destruction of the property of 'open shop' concerns. That clocks and batteries were purchased by the dozens at various times, at various places throughout the country. That fuse and fulminating caps were also purchased in large quantities, all to be used in connection with the dynamite and nitroglycerin for the destruction of property. That some of such clocks and batteries, fuse and fulminating caps and attachments were also stored in the vaults of the American Central Life Building at Indianapolis, Ind., so that the same would be accessible for immediate use in connection with any explosion desired at any other place in the United States. That to facilitate the transportation and carrying of dynamite and nitroglycerin on passenger trains from such storage places to other places in the United States where work was to be destroyed, suit cases and carrying cases were obtained and purchased in which such dynamite and nitroglycerin, clocks, batteries, fuse caps, and attachments could be conveniently placed and carried by persons going from the place of storage to a place in another state, on passenger trains of common carriers, engaged in the transportation of passengers for hire. That all of said explosions in different parts of the United States were accomplished with the materials, including the nitroglycerin and dynamite, stored in the storage

places above mentioned, and said materials were transported from said storage places to the various places throughout the United States where such explosions occurred, in suit cases and carrying cases by persons traveling upon the passenger trains of common carriers, engaged in the transportation of passengers for hire.

"That four explosions occurred in one night at the same hour in Indianapolis, Ind., and explosions were planned to take place on the same night two hours apart at Omaha, Neb., and Columbus, Ind., and the explosions so planned did occur on the same night and at about the same time, instead of two hours apart, owing to the fact that one clock was defective. One explosion was in connection with the courthouse that was being erected at Omaha, Neb., by Caldwell & Drake, and the other explosion was in connection with the plant of the same firm at Columbus, Ind., which firm at that time was an independent concern, engaged in conducting its business upon the 'open shop' plan. That the infernal machines composed of the clocks, batteries, and necessary attachments, and the nitroglycerin with which the explosions at the courthouse in Omaha, Neb., and the plant of Caldwell & Drake at Columbus, Ind., were taken from the storage places of said materials above set forth. That the Times Building at Los Angeles was destroyed by the use of dynamite on the 1st day of October, 1910, and 21 people killed, and immediately after the happening of this event arrangements were made to have an explosion in the eastern part of the United States as an 'echo' in the East of what had occurred at Los Angeles. That it was contemplated and planned prior to the arrest of the McNamaras and McManigal for seven or eight explosions to take place in different parts of the country, widely separated, on the same night. That all the dynamite and nitroglycerin except the dynamite that was stolen, the batteries, clocks, caps, fuse and attachments, suit cases and carrying cases, as well as the expense and work of carrying the explosives and articles to be used in connection therewith, including the expense incident to the stealing of dynamite, were paid out of the funds of the International Association, and these funds were drawn from the Association upon checks signed by the secretary-treasurer, John J. McNamara, and by the president, Frank M. Ryan."

The assignments of error which are relied upon for reversal are thus summarized, in substance, in the brief for plaintiffs in error:

(1) For error in overruling demurrers and motions to quash filed by plaintiffs in error; that the conspiracy counts are bad in substance and the carriage counts are insufficient in the same particulars.

(2) For error in consolidating the indictments for trial and in overruling the motion to vacate such order.

(3) For error in permitting the defendant McManigal "to be employed by the government as a witness against the plaintiffs in error."

(4) For like error in permitting the defendant Clark to be so employed as a witness.

(5) For error in overruling motions made in the nature of demurrers to the evidence at the close of the government's case in chief and for overruling like motion made at the close of the whole case.

(6) For error in refusing to require the government to elect at the close of the entire case upon which charge of conspiracy it would further proceed in the trial; also, for error in refusing to order an election between the conspiracy counts and the aiding and abetting counts; also, for failure to direct the jury to ignore the conspiracy counts as requested.

(7) For error in each of the following instructions given to the jury: "The indictment charges a continuing conspiracy. The law considers that whenever any of the co-conspirators does any act to effectuate the common design the parties to the conspiracy renew, or, to speak more properly, they continue, their agreement, and this agreement is renewed or continued as to all whenever any one of them does any act in furtherance of their common design. Any person who, after a conspiracy is formed, and who knows of its existence, joins therein by some act intentionally done in furtherance of its object, becomes as much a party thereto from that time on as if he had originally conspired."

And the following, to wit: "If you find from the evidence that, in order to carry out the purposes of the International, the defendants, or two or more of them, entered into a conspiracy to destroy with dynamite and nitroglycerin the property of the American Bridge Company and other open shop concerns, or the structures which they were erecting in various states of the Union, and if you find that such conspiracy to destroy such property included as a necessary step in the accomplishment of such destruction the unlawful transportation of dynamite and nitroglycerin upon the vehicles of common carriers engaged at the time in the transportation of passengers from a place in one state to a place or places in another or other states of the United States, and if you further find that such destruction of property was accomplished by explosions of dynamite and nitroglycerin in various places throughout the United States, and that the dynamite and nitroglycerin with which such explosions were produced were as a matter of fact transported from state to state in suit cases and carrying cases upon the vehicles of common carriers, engaged at the time in the carrying of passengers, as averred, then you will be authorized to find that a conspiracy was formed to transport dynamite and nitroglycerin unlawfully, as charged in the indictment."

The following is a list of the plaintiffs in error, together with their respective places of residence and relation to the International Association of Bridge and Structural Iron Workers, as described in the brief submitted on their behalf, together with the terms of imprisonment imposed respectively:

(1) Frank M. Ryan resided in Chicago and was president of the International Association. Sentence: 19 months imprisonment on counts 15 and 20 concurrently; 13 months on transportation counts 63 and 64; 13 months on counts 65 and 66; 13 months on counts 67 and 68; 13 months on counts 69 and 70; and 13 months on counts 71 to 96 and counts 113 to 128; making the aggregate imprisonment 7 years. (2) John H. Barry resided at St. Louis, Mo., and was second vice president of the association. Sentence: Aggregate imprisonment 4 years. (3) Eugene A. Clancy resided in San Francisco, Cal., and was vice president of the association. Sentence: On "conspiracy" counts, imprisonment 20 months, and on "carriage" counts, imprisonment 52 months. (4) Michael J. Young resided in Boston, Mass., and was a member of the executive board of the International Association. Sentence: On "conspiracy" counts, 20 months; on "carriage" counts, 52 months; aggregate imprisonment, 6 years. (5) Olaf A. Tviemoe resided in San Francisco, Cal., but did not belong to the International Association. Sentence: On "conspiracy" counts, 20 months; on "transportation" counts, 52 months; aggregate imprisonment, 6 years. (6) Frank C. Webb resided in Hoboken, N. J., was a member of the executive board of the association, and held official relations to his local union. Sentence: on "conspiracy" counts, 20 months; on "transportation" counts, 52 months; aggregate imprisonment, 6 years. (7) Philip A. Cooley resided in New Orleans, La., and was a member of the executive board. Sentence: On "conspiracy" counts, 20 months; on "transportation" counts, 52 months; aggregate imprisonment, 6 years. (8) John T. Butler resided in Buffalo, N. Y. Prior to the alleged conspiracy he had been president of the association and was second vice president thereof from September, 1909, to September, 1911. Sentence: On "conspiracy" counts, 20 months; on "transportation" counts, 52 months; aggregate imprisonment, 6 years. (9) J. E. Munsey resided in Salt Lake City, Utah, and was financial secretary and business agent to Local No. 37 of the association. Sentence: On "conspiracy" counts, 20 months; on "transportation" counts, 52 months; aggregate imprisonment, 6 years. (10) Peter J. Smith resided in Cleveland, Ohio, and was business agent to Local No. 17. Sentence: Aggregate imprisonment, 4 years. (11) Charles N. Beum resided in Minneapolis, Minn., and was for a time member of the executive board. Sentence: Aggregate imprisonment, 3 years. (12) Henry W. Legleitner resided in Pittsburgh, Pa., and was a member of the executive board. Sentence: Aggregate imprisonment, 3 years. (13) Edward Smythe resided in Peoria, Ill., and was financial secretary of Local No. 113. Sentence: Aggregate imprisonment, 3 years. (14) George Anderson resided in Cleveland, Ohio, and was a member of Local No. 17. Sentence: Aggregate imprisonment, 3 years. (15) Ernest G. W. Basey resided in Indianapolis, Ind.,

and was financial secretary and business agent of Local No. 33. Sentence: Aggregate imprisonment, 3 years. (16) W. Bert Brown resided in Kansas City, Mo., and was financial secretary of Local No. 10. Sentence: Aggregate imprisonment, 3 years. (17) Wm. J. McCain resided in Kansas City, Mo., and was business agent of Local No. 16. Sentence: Aggregate imprisonment, 3 years. (18) Paul J. Morrin resided in St. Louis, Mo., and was business agent of Local No. 18 and president of the Local at one time, and was organizer for the International Association. Sentence: Aggregate imprisonment, 3 years. (19) William E. Reddin resided in Milwaukee, Wis., and was president, financial secretary, and business agent of Local No. 8. Sentence: Aggregate imprisonment, 3 years. (20) Michael J. Cunnane resided in Philadelphia, Pa., and was business agent of Local No. 13. Sentence: Aggregate imprisonment, 3 years. (21) Michael J. Hannon resided in Scranton, Pa., and was financial secretary and business agent of Local No. 17. Sentence: Aggregate imprisonment, 3 years. (22) Murray L. Pennell resided in Springfield, Ill., and was president of Local No. 46; also financial secretary for a time. Sentence: Aggregate imprisonment, 3 years. (23) Frank J. Higgins resided in Boston, Mass., was president of Local No. 7 and also a special organizer for the International Association. Sentence: Aggregate imprisonment, 2 years and 2 days. (24) Frank K. Painter resided in Omaha, Neb., and was president of Local No. 21 and business agent thereof. Sentence: Aggregate imprisonment, 2 years and 2 days. (25) Richard H. Houlihan resided in Chicago, Ill., and was financial secretary of Local No. 1. Sentence: Aggregate imprisonment, 2 years and 2 days. (26) Fred Sherman resided in Indianapolis, Ind., and was president of Local No. 2. Sentence: Aggregate imprisonment, 2 years and 2 days. (27) William Bernhardt resided in Cincinnati, Ohio, and was financial secretary of Local No. 44. Sentence: 1 year and 1 day. (28) James E. Ray resided in Peoria, Ill., and was president of Local No. 112. Sentence: Aggregate imprisonment, 2 years and 2 days. (29) William Shupe resided in Chicago, Ill., and was business agent of Local No. 1. Sentence: Aggregate imprisonment, 1 year and 1 day. (30) Fred J. Mooney resided in Duluth, Minn., and was financial secretary of Local No. 33. Sentence: Aggregate imprisonment, 1 year and 1 day.

E. N. Zoline, of Chicago, Ill., and Chester H. Krum, of St. Louis, Mo., for plaintiffs in error.

Charles W. Miller, of Indianapolis, Ind., for the United States.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). These writs of error are brought by the plaintiffs in error respectively for review of the several verdicts and judgments against them, rendered upon their trial together (inclusive of other defendants), as joined in an indictment embracing numerous counts. Each judgment rests on the same counts in the indictment (with like verdicts of conviction in each instance), which are 52 in number, charging violations of criminal statutes of the United States. In two of the counts, designated in the record as counts 15 and 20, the plaintiffs in error and other defendants are charged with conspiracy (in violation of section 5440, R. S., preserved in section 37 of the Criminal Code) to commit an offense against the United States in the transportation and carriage of explosives interstate, in violation of statutes of the United States as described; and in 50 thereof designated as counts 63 to 96 inclusive and counts 113 to 128 inclusive, commission of distinct offenses in such transportation and carriage of explosives by defendants named is averred and described, together with charges that the plaintiffs in error were aiders and abettors in each of these alleged

violations of the statute—aggregating 25 offenses averred, with each stated in two counts in succession, varied only in description of the vehicle employed. Thus, the charges are, not only necessarily but in truth, limited to offenses against the United States, which are alone within federal cognizance, and if the primary contentions on behalf of all the plaintiffs in error are tenable, as stated by counsel at the outset of their argument for reversal, it is plain that none of the convictions can be upheld. As there stated they contend:

“That neither in the indictments, nor in the evidence adduced under them, can there be found the faintest suggestion of a case of which a national court can have jurisdiction, and that there cannot be found in this record, anywhere, warrant for the claim that it shows a conspiracy to carry prohibited explosives between states in the specific manner essential to the operation of the statute”; and that “the record does not show a carriage of such explosives for which they were responsible as aiders or abettors of him who made such carriage.”

Other important questions are raised by the assignments of error and elaborately discussed in the arguments of counsel (both printed and oral), but the arguments for and against reversal are mainly directed to the above propositions in one and another of their various phases; and it may well be mentioned, by way of further premise for discussion of the questions of law presented and the distinction to be observed for their solution—particularly in reference to the contention of insufficient evidence to authorize submission of the case to the jury—that a leading consideration for reversal is forcefully urged throughout the argument, in the effect either given to or caused by the uncontroverted array of facts (as recited in the bill of exceptions) proving the chain of outrages perpetrated in the long course of the nation-wide strike in evidence, inaugurated and supported by the International Association of Bridge and Structural Iron Workers. The propositions thereupon are, in substance: That the systematic destruction of property through the conveyance and use of explosives—involving instances of murderous destruction of human life—in many places and various states, and the facts proving or tending to prove criminal means employed therein (as set forth), in the service and at the expense of the above-mentioned International Association, which tend alone to prove commission of criminal acts against the states respectively or conspiracy to that end (not within federal jurisdiction) operated to confuse the issues under the indictments, so that this line of evidence was accepted and treated by the jury as sufficient for conviction of the plaintiffs in error, in the absence of proof to charge them with the federal offenses averred in the several counts of the indictment.

[1] The admissibility of the facts referred to, as circumstantial evidence which may tend to support the charges against them in connection with other facts introduced (as hereinafter pointed out), is unquestionable if not in effect conceded, but it was and is obvious that it became needful (as recognized by the trial court) to limit consideration of such facts to their legitimate purpose, and that any crimes imputable thereunder to parties accused in the case at bar could not serve as independent evidence for their conviction, nor in any measure authorize

conviction without proof of complicity in the particular offenses charged in the indictment. Under our systems of criminal jurisdiction the requirement is elementary that federal cognizance is strictly limited to violations of the federal criminal statutes; and offenses against the state, either statutory or common law, are within the exclusive jurisdiction of the state courts respectively.

The assignments of error which are relied upon and pressed in the argument raise important questions of law for determination under these writs, and we proceed in their consideration in accord with their arrangement by counsel. All are applicable alike to each of the plaintiffs in error, except the special assignments under each of the writs of want of evidence for submission of the case to the jury as against such plaintiff in error; and for the reason that due exceptions are preserved and error is assigned and relied upon for insufficiency of the evidence as against any of the plaintiffs in error, consideration of its tenability becomes needful, as a general contention of important bearing on the issues. Review of the testimony under these assignments has required diligent examination through the several volumes of transcript of record, but the aids to that end furnished by counsel respectively in their voluminous printed statements and briefs with constant references to the record, have fairly minimized the extent of labor and time thus involved. And it may justly be remarked, both in reference to the briefs and the oral arguments (for which liberal extensions of time were granted as requested), that each has impressed us to be clearly and strictly devoted to an instructive presentation of the various propositions of law and of the authorities upon which their solution must hinge.

The questions raised which are equally applicable to all of the plaintiffs in error are each fundamental as presented, and are so taken up severally for primary consideration.

Challenges of the So-Called Conspiracy Counts.

The sufficiency of each and all counts of the indictment involved in these convictions was challenged by demurrers, motions to quash, and motions in arrest of judgment, and we understand that each of the questions discussed thereupon arises for decision.

[2] The two conspiracy counts (designated as counts 15 and 20) are alike in substance, differing only in the omission from count 20 of specifications contained in count 15: (a) As to particular places to and from which the explosives were to be carried, and (b) of the particular acts of Congress which prohibited such carriage. As the sentences under both counts were made concurrent, for imprisonment within the term fixed by the statute, in all instances material to the inquiry, the special objection raised to count 20, for want of the specification of places above mentioned as contained in count 15, if tenable, would not constitute reversible error; but we believe the objection to be unsupported by the authorities as a substantial defect, and proceed accordingly to consideration of the various contentions of defect in both counts.

These counts are founded on section 5440, Revised Statutes—now section 37 of the Criminal Code—providing punishment for conspiracy

"to commit any offense against the United States." Each charges in apt terms that the plaintiffs in error and other defendants named, on December 1, 1906, conspired with others and entered into a conspiracy to commit an offense against the laws of the United States, "to wit, to transport, carry, and convey explosives, to wit, dynamite and nitroglycerin, between a place in one state of the United States and a place in another state of the United States, upon and in vehicles then and there used and employed in transporting passengers by land between a place in one state of the United States and places in other states of the United States; said vehicles aforesaid being then and there engaged in the transportation of passengers for hire" and "operated by common carriers in the transportation of passengers by land." It properly avers that such carriage was not within exceptions named in the statute, and then further avers:

"That said conspiracy was continuously in existence and in the process of execution throughout all of the time from and after the said 1st day of December, 1906, and at all of the times in this indictment mentioned, and particularly at the time of the commission of each of the overt acts in this indictment hereinafter set forth."

Overt acts are averred in furtherance of the conspiracy and to carry into effect its object and purpose, with specifications thereof in numerous letters written and sent by various defendants named, and various acts done by other defendants, apart from the actual unlawful transportation of explosives. The first overt act thus specified is a letter from the defendant (plaintiff in error) Ryan to the defendant John J. McNamara, bearing date January 20, 1908, and the last act is specified as committed August 27, 1911.

The indictment embracing count 15 was filed February 6, 1912, and that embracing count 20 was filed February 26, 1912.

In the argument the contentions of substantial defects in these counts are summarized in effect: (1) That conspiracy to commit an offense is not properly averred (with or without "enumeration of places, covering a period of six years"), because "there is no such offense as the promiscuous carriage of prohibited explosives between enumerated points in different states"; (2) that the counts can neither be upheld "as stating a conspiracy to commit various or many offenses," nor "as stating many conspiracies in one count"; (3) that the statute referred to as defining the offense to be committed had long been repealed, and none of the existing statutes were applicable to the charges; (4) that there can be no "continuing offense" of conspiracy under the statute (section 5440); and (5) that each count "shows on its face that it is barred by limitation."

We believe these propositions coalesce in so far that they may be considered together, and that none of them recognizes the rightful definition of the unlawful conspiracy averred, nor of the violation of statute which was to be committed and carried out in its execution.

[3] The authorities concur, as we understand their import, in these definitions of the conspiracy denounced by section 5440, R. S. (as preserved in section 37 of the Criminal Code), namely: That it is distinguishable from the common-law offense of conspiracy, in that

it requires for completion and conviction that "one or more of such parties do any act to effect the object of the conspiracy"; that, when so carried forward by any overt act, it constitutes an offense entirely irrespective, either of its success or of the ultimate objects sought to be accomplished by conspiring "to commit any offense against the United States"; that "liability for conspiracy is not taken away by its success, that is, by the accomplishment of the substantive offense at which the conspiracy aims"; and that the conspiracy so denounced may either intend and be accomplished by one or several acts which complete the offense, or it may be made by the parties a continuing conspiracy for a course of conduct in violation of law to effect its purposes. For citations in support of the propositions thus stated it is deemed sufficient to refer to these recent decisions: *United States v. Kissel*, 218 U. S. 601, 605, 31 Sup. Ct. 124, 54 L. Ed. 1168; *United States v. Barber*, 219 U. S. 72, 31 Sup. Ct. 209, 55 L. Ed. 99; *Hyde v. United States*, 225 U. S. 347, 367, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614; *Brown v. Elliott*, 225 U. S. 392, 400, 32 Sup. Ct. 812, 56 L. Ed. 1136; *Heike v. United States*, 227 U. S. 131, 144, 33 Sup. Ct. 226, 57 L. Ed. 450; *Breese v. United States*, 203 Fed. 824, 827, 122 C. C. A. 142 (C. C. A., 4th Circuit). It is uncontroverted that a long line of prior cases, both in the Supreme Court and in subordinate courts, uphold the above proposition of a continuing conspiracy as applicable under section 5440; but the contention is pressed throughout the argument, not only that the above mentioned *Kissel* decision is inapplicable to the present inquiry, but that *Hyde v. United States*, supra, "determined for the first time that section 5440 is not a conspiracy statute at all," for the reason that the opinion states and upholds the doctrine that a conspiracy thereunder "cannot alone constitute the offense. It needs the addition of the overt act. Such act is something more, therefore, than evidence of a conspiracy. It constitutes execution, or part execution of the conspiracy, and all incur guilt by it, or rather complete their guilt by it." That this ruling appears to disaffirm the definition stated in *U. S. v. Britton*, 108 U. S. 199, 204, 2 Sup. Ct. 531, 534 (27 L. Ed. 698), and other cases in line therewith, that the "offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy," is undoubted; but we believe the contention predicated thereon to be untenable, in the light both of the entire trend of authorities above referred to interpreting the statute to embrace continuing conspiracies, and of express reaffirmance of such interpretation, as subsequently stated in the opinion.

The propositions in support of the contention are, in substance: That there can be no continuing offense of conspiracy under section 5440, within the interpretation thereof settled by the *Hyde* Case; that such interpretation is controlling, as the latest ruling of the Supreme Court, for the reason that the jurisdictional question there presented for decision rests thereon; and that the further statement in the opinion (and ruling accordingly) that the case presented a continuing conspiracy and offense within the statute, so that it was not barred by limitation as contended, must be disregarded, either as obiter or as rest-

ing on a misapprehension of the ruling in the Kissel Case, cited therefor, wherein the conspiracy involved was in violation of the so-called Sherman Act, which required no overt acts for completion of the offense. True it is that the above-quoted definition of the relation of the overt act for completion of the offense is stated in the opinion by way of support for the ruling that commission of overt acts in the District of Columbia afforded ground for indictment and trial there for the conspiracy, although the conspiracy was entered into in California; but we understand the theory ultimately stated in the prevailing opinion to be that such action of the conspirators carried the conspiracy into the district, within authorities referred to both at common law and under the statute, and thus established constructive presence of all the conspirators therein. In any view, however, of the logic of that portion of the opinion and force of the ruling upon the question of venue for the conspiracy, we believe it to be unmistakable, not only that it was not intended to disturb the long-settled interpretation of the statute as applicable to a continuing conspiracy and continuous offenses thereunder, but that the immediate ruling upon the merits of the case is decisive against the present contention that this pre-existing doctrine was set aside. It was both necessarily and in express terms reaffirmed in such subsequent ruling which directly involved that doctrine. Moreover, it was likewise reaffirmed in the contemporaneous case of *Brown v. Elliott*, supra, and by the subsequent unanimous decision of the court in *Heike v. United States*, supra. The distinction above referred to of the conspiracy involved in the Kissel Case does not, as we believe, detract from its authority for definition of and ruling upon a conspiracy which is made a continuous "partnership in criminal purposes."

[4, 5] Both conspiracy counts, therefore, plainly aver a continuing conspiracy to commit continuous "offense against the United States," in the carriage of prohibited explosives as described. The contention that the dominating conspiracy, presumptive under the averments and established by the evidence, was the destructive purpose for which the explosives and their incidental carriage were to be used—an object not within federal cognizance—is entirely beside the issue. If the carriage, as averred, was made the subject-matter of the conspiracy in any measure, its violation of the federal statute would establish a conspiracy within the terms of section 5440, irrespective of any purpose involved in such prohibited carriage. So, neither the fact nor the magnitude of the primary conspiracy, however disclosed, can make the indictment defective or defeat liability thereunder.

The case of *Pettibone v. United States*, 148 U. S. 197, 202, 13 Sup. Ct. 542, 37 L. Ed. 419, which is cited in a supplemental brief as decisive in favor of the further contention that the charge of conspiracy must be interpreted as one for commission of offenses against the states, and not against the federal statutes, we believe to be plainly distinguishable, both in its facts and ruling, and inapplicable to the present inquiry.

[6-8] The objection that the statute of limitation bars prosecution under the averments is clearly untenable under the above-mentioned doctrine and authorities; and the further several objections to the

force and applicability of the statutes which are relied on to render unlawful the carriage of explosives as described in the counts, do not impress us to merit extended discussion. It is sufficient for the present inquiry that such carriage of nitroglycerin has been continuously prohibited from, and since the Act of July 3, 1866, 14 Stat. L. 81, as preserved in section 5353, R. S. 1874, and re-enacted—with dynamite expressly named as one of the prohibited explosives—in the Act of May 30, 1908 (part 1, 35 Stat. L. 554) and in the Criminal Code, sections 232–235 (part 1, 35 Stat. L. 1134). Neither the fact that dynamite was not expressly named in the earlier enactments, in force at the date averred as the inception of the conspiracy, nor the fact of changes made in the act of 1908 and the Criminal Code of 1909, both in respect of additional enumerations and of punishment for the offenses, can affect the unlawfulness of the undertaking for carriage of nitroglycerin, as averred, in the primary conspiracy. For evidence of such conspiracy it was not needful to prove extension thereof to the carriage of dynamite after May 30, 1908; but we believe such proof could well be authorized under the averments of either count.

[9] The contention that these enactments were intended to be applicable to the common carriers only, and not to passengers or persons traveling on the trains, is untenable, as we believe, both under the language of each of the provisions and in view of their obvious purpose, to prohibit carriage in any manner of the explosives named on a passenger train engaged in interstate commerce, in a “vehicle” thereof “carrying passengers for hire.” That each is applicable alike to possible cases of such carriage endangering the lives of passengers, either by common carriers or employes thereof, or by any person traveling on such vehicle, cannot be doubted; and it is equally clear, as we believe, that a conspiracy “to commit any offense” thereunder is denounced alike, whether it extends to a single offense or to a course of many offenses.

We are of opinion, therefore, that all the challenges directed against the above-mentioned counts must be overruled.

As to Sufficiency and Joinder of the So-Called “Carriage Counts.”

[10] The numerous counts, referred to as “carriage counts,” are all challenged for insufficiency. They are of two general classes, one charging carriages of nitroglycerin and the other carriages of dynamite. Counts 63 to 96 inclusive relate to nitroglycerin and counts 113 to 128 inclusive relate to dynamite. They are arranged in pairs throughout the array of counts, so that each pair of counts in succession charges in effect one offense, with the averments varied only in description of the vehicle of carriage, and are so treated in each of the sentences imposed under the verdicts. The first-mentioned class of counts, 34 in number, charge 17 distinct offenses, the first committed April 17, 1910, and the last March 18, 1911; and the other class, 16 in number, charge 8 offenses, the first on January 22, 1911, and the last on April 7, 1911. Thus both classes are brought within the scope of the above-cited sections of the Criminal Code, which became operative January 1, 1910. In each of these counts it is averred, in apt terms, that defendants named “unlawfully, knowingly, willfully, and

feloniously, did then and there transport" and carry the prohibited explosive described, in a vehicle plainly described within the language of the statute, and that the plaintiffs in error (and other defendants named) were aiders and abettors therein.

We believe the foregoing summary of the character of the counts and their averments, not only meets each of the several contentions of their insufficiency, as independent counts charging commission of the statutory offense, but furnishes from the record complete answer to the objections so interposed, and that each thereof must be overruled as not well founded.

[11] Another contention of error in respect to these counts, however, is far more serious, both in its import and in the propositions and authorities called to attention for its support—namely, that joinder of such charges with the conspiracy counts and convictions accordingly, was unauthorized. The premise and propositions advanced in the strong argument for reversal on this ground are thus formulated: That such joinder presented for trial and conviction "a charge of conspiracy coupled with a charge of the consummation of the act to do which the conspiracy was devised; the doing of the consummated act, as far as the plaintiffs in error were concerned, upon a theory of aiding and abetting expressly averred in the carriage counts, and the only suggestion of aiding and abetting was found in the fact of conspiracy to violate the law, evidenced by the designs of the alleged conspirators"; that all the counts, if not otherwise bad, "are interdependent" and "the case must fall upon either hypothesis of the government"; that "if there was a continuing conspiracy there was only one offense," and, "if there was a conspiracy separable from the actual carriage, the consolidation was wholly improper because of the different rule of evidence applicable to the respective counts." And again: That "the record shows that out of the same state of facts, in the same jurisdiction, a multitude of so-called separate offenses were carved; plaintiffs in error were unlawfully tried for these offenses, were convicted and have been punished for them all—thus having been tried and punished many times for the same offense, in violation of" the fifth amendment of the Constitution.

We are of opinion that each of these propositions is untenable, for the reason that each is predicated on the erroneous interpretation of the statutory offense of conspiracy hereinbefore considered and overruled, under the consensus of authorities. They ignore the established distinction between the conspiracy, as a separate statutory offense, and the commission of other offenses, either by the conspirators or by other persons in execution of the purposes of the conspiracy; that the one offense consists of the inhibited combination of the conspirators to commit the unlawful acts, together with any "act to effect the object" thereof, so that conviction neither requires nor involves commission of any offense for which the conspiracy was formed—in no measure depends either on accomplishment or failure of its purposes—but requires only averment and proof of any overt act to carry the conspiracy into effect; and that offenses committed in violation of the other statute (whether in execution of the conspiracy or otherwise) constitute distinct offenses, not involved in conviction under

the conspiracy statute. Thus the counts for conspiracy on the one hand, and those for aiding and abetting unlawful carriage of explosives on the other hand, cannot rightly be defined as "interdependent," nor were both charges either proved or provable by the same evidence, as contended; and the further contention, that commission of the offenses averred in the last-mentioned counts was relied upon and involved for conviction under the conspiracy counts, is unsupported by the averments in such counts, wherein neither of such commissions of offense is set forth in the specification of overt acts, so that no question arises whether their averment therein as overt acts would affect the rule above stated as to the independent nature of the other counts. Undoubtedly, the evidence introduced in support of the conspiracy charge may well serve as evidence tending to support the charges of aiding and abetting commission of the offenses averred in the other counts; but this coincidence in part gives no support to either contention of identity of the offenses charged, or of identity of the evidence involved for conviction. It is obvious that proof to convict of commission of the unlawful carriages, as aiders and abettors, must extend beyond the requirements for proof of the conspiracy.

For the definition and distinction of these two classes of statutory offense, the decisions of the Supreme Court heretofore referred to must be accepted as controlling, and the numerous cases cited from other jurisdictions are inapplicable, in the light of such controlling precedents. Two citations of early federal opinions, which may be pertinent in one aspect of the argument, are relied upon and well deserve mention. *U. S. v. McKee*, 4 Dill. 128, 26 Fed. Cas. No. 15,688, and *Ex parte Joyce*, 13 Fed. Cas. No. 7556. The opinion in the McKee Case (in 1877) is by Mr. Justice Miller, sitting at the circuit, with Judge Dillon concurring therein, overruling a demurrer interposed to defenses set up in a civil suit, brought by the United States to recover double the amount of taxes of which the government had been defrauded by the unlawful removal of whisky from distilleries. The defense in question averred prior indictment and conviction "for the same offenses." It is stated in the opinion that the indictment so pleaded was for conspiracy to defraud the government out of the taxes due, "and that in pursuit of that conspiracy other" conspirators "did unlawfully remove said whisky"; and that in the civil case the defendant "is charged with aiding and abetting the same removal, and, if convicted, will be punished for the same removals." It then holds that joining the conspiracy as described "was aiding and abetting the removal which was effected by means of the conspiracy"; and that, "if the specific acts of removal" in suit "are the same which were proved in the indictment, the former judgment and indictment is a bar to the present action." In the Joyce Case, petitioner was released on writ of habeas corpus from further imprisonment under convictions upon four counts of an indictment—three charging violations of the revenue law and the fourth charging conspiracy to defraud the United States, and the opinion is by Judge Krekel, in the same year and in the District Court of the same district of the foregoing decision. Its rulings are substantially stated in accord with the theory of Mr. Justice Miller's opinion, although about a month prior in date, so that three

eminent jurists appear to have concurred, at that date, in such theory of identity in the charges involved for decision. For consideration of both opinions we assume (without so ruling) that both cases presented a state of facts which would make them applicable to the present inquiry, but thus viewed, we are constrained to believe that their doctrine is inconsistent with the rule now established by the tribunal of ultimate authority, as hereinbefore stated.

[12] The above-recited contentions, therefore, of improper joinder and double punishment through such joinder of the two classes of counts must be overruled, in conformity with the rule and authorities referred to, together with the statutory provision for joinder of charges (section 1024, R. S. [U. S. Comp. St. 1901, p. 720]) and authorities applicable thereto. *Logan v. United States*, 144 U. S. 263, 295, 12 Sup. Ct. 617, 36 L. Ed. 429; *Pointer v. United States*, 151 U. S. 396, 400, 403, 14 Sup. Ct. 410, 38 L. Ed. 208; *Williams v. United States*, 168 U. S. 382, 390, 18 Sup. Ct. 92, 42 L. Ed. 509; *Burton v. United States*, 202 U. S. 344, 358, 377, 378, 26 Sup. Ct. 688, 50 L. Ed. 1057. As further authority against the contention of double punishment, the opinion in *Gavieres v. United States*, 220 U. S. 338, 340, 342, 31 Sup. Ct. 421, 55 L. Ed. 489 (and authorities cited), is well in point. It quotes and approves the test stated in *Morey v. Commonwealth*, 108 Mass. 433, 434, for ascertaining whether offenses are identical, which plainly answers the present contention, as follows:

"A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

The various assignments of error for consolidation of the indictments and counts thereof and for denial of motions for separate trials, must be overruled under this line of authorities. Not only was the course thus adopted by the trial court within the exercise of judicial discretion, but we are impressed with the view that no other course could justly have been directed.

Is Error Well Assigned for Reception of the Testimony of McManigal and Clark, Codefendants?

[13, 14] Both of these witnesses were called on the part of the government, and McManigal committed most of the offenses charged in the unlawful carriage counts and directly caused most of the destruction in evidence by use of explosives so conveyed by him. Both were codefendants with plaintiffs in error in the consolidated indictment, and both pleaded guilty to all the counts—McManigal before commencement of the trial and Clark before any evidence was introduced. When tendered as witnesses for the prosecution, the only objection to the competency of either was thus stated: "That he is a codefendant with defendants on the record," and by reason thereof "is not a competent witness against any of the defendants." Another objection is now

urged, namely, that it does not appear of record that either witness was called "at his own request"; but this is without force (if otherwise material) for the reason that it was not raised at the trial, when any defect (if defect there were in such omission) could have been brought to the attention of the trial court or corrected. The right of any defendant, either to refuse or refrain from testifying under the charge, or to testify "at his own request, but not otherwise," is not only secured by statute, but well recognized and undisputed. The assignment of error, however, rests alone on the objection thus preserved to his competency as a witness against his codefendant in the indictment, and it must be overruled on the authority of *Benson v. United States*, 146 U. S. 325, 329, 333, 13 Sup. Ct. 60, 36 L. Ed. 991, which is deemed decisive of such competency. In reference to the essentials of corroboration of testimony so received, the rule is well settled and will be considered in reviewing the evidence, pursuant to the various assignments for insufficiency to support submission of the issues.

Instructions to the Jury.

The instructions given by the court on submission of the issues to the jury are preserved as an entirety in the bill of exceptions (Record, vol. 4, pp. 3677-3692), and no exceptions appear thereto, aside from the two paragraphs quoted in the statement of facts which precedes this opinion. Thus review is neither sought nor authorized of other instructions so submitted, but reference to the context of the paragraphs challenged is authorized, as of course, and we have examined the entire charge in that view. Its precision, correctness, and thoroughness in the instructions which are unchallenged are notable, in effect as follows: That the various essential propositions of law involve in the issues are well pointed out and defined in clear language, not open to doubt of their meaning for application to the evidence; that limitation of the issues to the specific charges of the indictment was directed in plain terms, alike unmistakable in definition of the issues; that all references to the evidence were not only dispassionate, but exceedingly fair throughout the charge; that the jury were carefully instructed and cautioned as to the sole purpose and bearing of the evidence relating to the International Association and destruction of property in the long course of the strike referred to, and that neither that association nor the rights of "organized labor" were on trial; and they were further charged, in express terms, that "the defendants are not on trial for causing the various explosions, and the consequent loss of life and property throughout the United States" in evidence.

In the light of instructions thus given, we are of opinion that the criticisms urged against the two paragraphs in question are unfounded, and that error is not well assigned thereupon.

As to the General Motion to Direct Acquittal "Upon the Whole Case" in Evidence.

[15] The contentions in support of this challenge are of the utmost importance for just solution and are strongly pressed, with frank recognition of the enormity of criminal offenses, not of federal cognizance, which are in evidence. For basic grounds of the argument

against the sufficiency of proof for submission to the jury to convict any of the plaintiffs in error of an offense of federal cognizance, the propositions heretofore considered and overruled as challenges of both classes of counts in the indictment—the one for conspiracy and the other for aiding and abetting the unlawful carriage of explosives—are relied upon, together with the further proposition that the entire array of evidence in the case is directed and tends alone to prove commission of offenses against the several states. The contentions that either or both classes of counts in the indictment are insufficient do not require further discussion for the present inquiry, but the last-mentioned proposition is nevertheless of vital concern and demands careful analysis and consideration of the evidence. It rests on these broad contentions as framed in the course of the argument: (1) That “the whole case depends upon the conspiracy indictment”; (2) that “there was no evidence that the conspiracy, if there was one, was the conspiracy laid in the indictment,” namely, “to transport, interstate, between 25 different places in different states, dynamite and nitroglycerin” in passenger cars as averred; (3) that the testimony of the defendant McManigal, if it be assumed that it tended to prove both classes of averment—both of such conspiracy and of aiding and abetting commission of the transportation offenses by any of the plaintiffs in error, which is denied—is without corroboration to charge any plaintiff in error with commission of the offense averred.

Undoubtedly, the charges of aiding and abetting hinge, mainly if not entirely, on the evidence introduced to prove conspiracy to that end and that the plaintiffs in error were conspirators therein, so that the first-mentioned contention may justly be conceded for the present inquiry, and we proceed to consideration of the other two which coalesce in large measure. It is plain that submission of the case to the jury was erroneous, if both are well founded.

In the brief of argument for these contentions, it is stated that they are made “upon a record which is utterly wanting in proof of essential and necessary facts,” and that “nothing can more fully or clearly state the whole case than the recital of the bill of exceptions, which, of course, omits everything exculpatory of the plaintiffs in error.” It thereupon quotes the general recitals referred to, making nearly six printed pages of excerpt (as set forth in the statement which precedes this opinion). The facts thus recited as “proven by the government on the trial” may be mentioned in part as follows:

The nature of the contest between the International Association of Bridge and Structural Iron Workers, of which “all of the defendants, except two, that were convicted, were members,” and the American Bridge Company and of the ensuing general strike declared and supported by the Association “throughout the United States,” extending from 1905 continuously down to “the time of the trial,” is described. In the early months it was attended by “numerous acts of violence” in various places, and commencing in 1906 dynamite was brought into use “to blow up and destroy buildings and bridges that were being erected by ‘open shop’ concerns,” and such explosions started in the eastern part of the country and “extended from the Atlantic to the Pacific” in many places. This course continued “until the arrest of

the McNamaras and McManigal in April, 1911." Almost 100 explosions thus occurred, "damaging and destroying buildings and bridges in process of erection where the work was being done by 'open shop' concerns." And "no explosions took place in connection with work of a similar character that was being done by 'closed shop' concerns." From February 17, 1908, until April 22, 1911, 70 of such explosions occurred, 43 of which were in connection with work either of the National Erectors' Association or American Bridge Company and affiliated concerns, and 27 of the explosions occurred in connection with the work of independent concerns in no way connected with either thereof. Dynamite was first used together with fuse and fulminating caps, the fuse being generally about 50 feet in length "and when lighted the explosion would occur in about half an hour." Nitroglycerin was next brought into use provided with a clock and battery and attachments "to be used together with dynamite and nitroglycerin, constituting what was termed an infernal machine, to be used in connection with the dynamite and nitroglycerin in the destruction of buildings and bridges of 'open shop' concerns"; and "from this time forward the clock and battery was used in connection with charges of dynamite and nitroglycerin in the destruction of life and property." These infernal machines "were so made and arranged that they could be and were set to cause the explosion to take place several hours after it was set, so that the person setting the explosion could be hundreds of miles away when the explosion took place." The headquarters of the International Association was at the outset in Cleveland, Ohio, but was removed to Indianapolis, Ind., early in 1906, and there remained. The various places in which the several defendants were located are mentioned in various states. The dynamite and nitroglycerin which were used for the explosions mentioned "were transported in passenger cars on passenger trains of common carriers engaged in the transportation of passengers for hire into and over and across" various states named. Explosions took place "in all of the states named and a number of times in some of them" and "were planned to be made" in other states named. In connection with this work of destruction, "dynamite and nitroglycerin was purchased and stolen and various storage places arranged to conveniently store such explosives that were to be used in the destruction of property in the various states" referred to; and "such explosives were carried and taken on passenger trains from such storage places in the various states to various places in the other states where structural iron work was in process of erection," and the various locations are named. "Large quantities of dynamite and nitroglycerin were at various times stored in vaults of the Association" in Indianapolis and also in the basement of the building. These storage places "were so arranged that dynamite and nitroglycerin could be readily obtained and transported from such place of storage" to other places for their use in destruction of property, also clocks and batteries, as described, and fuse and fulminating caps, as well, in large quantities, "all to be used in connection with the dynamite and nitroglycerin for the destruction of property"; and some thereof were stored in the vaults of the Association at Indianapolis, "so that the same would be accessible for immediate use in connection with any explosion desired at any

other place in the United States." For the purpose of carrying such explosives, "suit cases and carrying cases were obtained and purchased, in which such dynamite and nitroglycerin, clocks, batteries, fuses, caps and attachments could be conveniently placed and carried by persons going from a place of storage to a place in another state on passenger trains of common carriers, etc." All the explosions mentioned "were accomplished with the materials, including the nitroglycerin and dynamite," so stored, and were transported "from said storage place to the various places throughout the United States, where such explosions occurred, in suit cases and carrying cases by persons traveling upon the passenger trains of common carriers," etc. "Four explosions occurred in one night at the same hour in Indianapolis," and "explosions were planned to take place on the same night two hours apart at Omaha, Neb., and Columbus, Ind., and the explosions so planned did occur on the same night at about the same time, instead of two hours apart, owing to the fact that one clock was defective. The explosions referred to at Omaha and Columbus were all 'open shop' concerns, and the infernal machines used therein were taken from the storage places of said materials above set forth." The "Times Building at Los Angeles was destroyed by the use of dynamite" on October 1, 1910, and 21 persons killed, "and immediately after the happening of this event arrangements were made to have an explosion in the eastern part of the United States, as an echo in the East of what had occurred at Los Angeles." Prior to "the arrest of the McNamaras and McManigal," seven or eight explosions were planned "to take place in different parts of the country, widely separated, on the same night." All the expenses of dynamite and nitroglycerin, "except the dynamite that was stolen, the batteries, clocks, caps, fuse and attachments, suit cases and carrying cases, as well as the expense and work of carrying the explosives and articles to be used in connection therewith, including the expense incident to the stealing of dynamite, were paid out of the funds of the International Association, and these funds were drawn from the association upon checks signed by the secretary-treasurer, John J. McNamara, and by the president, Frank M. Ryan," plaintiff in error.

In reference to these facts the brief states:

"Gruesome as this recital is, as evidencing a reprehensible series of individual acts depending upon matters of state cognizance, there is nothing in it even suggestive of a matter of national cognizance, of which a national court could have jurisdiction. There is nothing tending to prove the charge laid in the indictments" as consolidated and tried.

We infer from the argument that the contention of entire want of force in these facts, as tending to prove either one or both classes of averment—the one of conspiracy to transport the explosives as averred and the other of complicity of the plaintiffs in error, or any thereof, in the actual transportation so proven—is predicated on the twofold theories asserted throughout the discussion on behalf of the plaintiffs in error, in effect: (a) That any conspiracy thus appearing so differs in its scope and purposes, that it cannot tend to prove the averred conspiracy; and (b) "that any persons could have conspired to do what the indictment says these plaintiffs agreed to do was in itself an im-

possibility and the allegation is absurd." So, it is argued: "There was no proof of such a conspiracy and not a suspicion of such proof." Both of these theories have entered into consideration and are in effect overruled in reference to objections raised to the indictment, and we believe them to be alike untenable upon the present inquiry. That other facts than those above recited must appear in evidence for support of the charge of conspiracy under the indictment, as against the various plaintiffs in error, is unquestionable; but we have no doubt of the admissibility and probative force of the facts recited as circumstantial evidence tending to prove the averred conspiracy, when connecting facts and circumstances to that end are in evidence. Nor do we perceive any warrant for the contention that the averred conspiracy was either impossible of creation or execution, or inconsistent in any sense with the primary conspiracy which may be deduced from the above recitals.

The general challenge for insufficiency, therefore, must rest on failure of evidence of connecting facts to authorize submission of the charges, and the solution must be obtained through examination of the mass of additional evidence preserved in the record. Although the rule upon writs of error places the burden on the plaintiffs in error to support their assignments, it is obviously impracticable for counsel on their behalf to furnish aid in such research for this inquiry, except in a negative way, by calling attention to alleged infirmities in the testimony. Proceeding in that view, the further evidence pertinent to the inquiry has been carefully examined—aided therein by helpful references in the brief submitted by counsel for the government—and we are impressed with no doubt of its adequacy for overruling this general challenge upon both of its branches above stated. The great extent and wide range of evidence applicable to the inquiry render it difficult to attempt, within reasonable limits, any useful specification of probative facts so appearing, and the numerous specific references to and mention of such facts—as required for consideration of each of the individual challenges for like cause and hereinafter reviewed—are equally pertinent for this general inquiry and will suffice for details, so that we are content to mention here the leading features and tendency of the additional evidence which authorized the submission. Such evidence is applicable as well to each of the individual motions to direct acquittal, except in respect of the vital inquiry as to identification of the plaintiffs in error respectively as parties to the averred conspiracy and offenses committed thereunder.

The premises of fact which are settled by the above recitals—laying out of view the far more serious course of crimes which appear in evidence as committed pursuant to the primary conspiracy—may be recapitulated as follows: Executive officers, members, and agents of the International Association of Bridge and Structural Iron Workers, were engaged in a joint undertaking—rightly charged as a conspiracy—to use dynamite, nitroglycerin, and so-called "infernal machines," in required quantities, at many places in various states, either in succession or simultaneously as planned, through agents not residing in such places. For such use these explosives were provided and stored at various storage places, arranged for the purpose in various states, to

be carried by the agents for use as required, in special carrying cases provided for the purpose, to distant places with needful dispatch and secrecy, so that interstate carriage on passenger cars as averred in the counts, was made necessary for use thereof in other places and states as constantly ordered by the conspirators; and all expenses for such explosives and for their storage and carriage as described "were paid out of the funds of the International Association," and "drawn upon checks signed by the secretary-treasurer, John J. McNamara, and by the president, Frank M. Ryan" (plaintiff in error). In 25 instances proven such interstate carriages were performed by an agent, as averred in the counts respectively, for designated use of the explosives. Furthermore, the twofold fact of conspiracy for use of the explosives, and that the defendants McManigal, both McNamaras and Hockin were conspirators therein is, in substance, conceded in the argument to be established by the evidence; and it is undisputed that the evidence proves the defendant Edwin Clark to be another member of such conspiracy.

These basic facts directly bearing upon the issues are followed up with connecting evidence of the following nature: Written correspondence on the part of many of the plaintiffs in error, both between one and another thereof and with other defendants, inclusive of the above-mentioned conspirators, together with letters from one and another of such conceded conspirators to one of the plaintiffs in error and to other defendants, properly identified, constitute one volume of printed record; and these letters furnish manifold evidence, not only of understanding between the correspondents of the purposes of the primary conspiracy, but many thereof convey information or directions for use of the explosives, while others advise of destruction which has occurred, and each points unerringly not only to the understanding that the agency therein was that of the conspirators, but as well to the necessary step in its performance of transporting the explosives held for such use. This line of evidence clearly tends to prove and may well be deemed convincing of the fact of conspiracy on the part of many, if not all, of the correspondents; and many, if not all, of the uses of explosives therein referred to are established by other evidence to have occurred, together with direct evidence of carriage of explosives for such use, as charged.

The president of the association was the plaintiff in error Ryan, and John J. McNamara was its secretary and treasurer, up to his conviction and sentence (for crimes committed in California) in 1911, thus covering the entire period embraced in the present charges. Under its organization provision was made for monthly reports to show all expenditures of association funds and publication thereof in the official journal. On December 13, 1905, Ryan wrote to McNamara, that it was best to discontinue such publication "while this trouble is on," and in February ensuing the official magazine published a notice by the "executive board" of the association that publication of such reports would cease "during our strike" and until further instructions. The last letter in evidence, written by John J. McNamara, April 13, 1911—

the day after his arrest and the concurrent arrest of McManigal—may well be mentioned in this connection both for its general bearing and for its statements that “some organization matters must be surrounded with the utmost secrecy,” and that, “even after something has been accomplished, experience has proven the least said about it the better”; also a circular, entitled “Important Warning,” dated June 16, 1911, signed jointly by plaintiff in error Ryan and by Hockin (who was one of the original plaintiffs in error and the undisputed director of the explosions), and sent to the officers and members of the association, in effect cautioning all members to keep silent on all actions of the officers thereof of which they may have information, in the view that “traitors will be more active than ever at this particular time.” The executive board of the association constituted the managing directors of its policy and affairs, and one of their duties was examination and audit of all expenditures for payment out of its funds. President Ryan and several other plaintiffs in error (as hereinafter specified) constituted this board and held frequent meetings at the headquarters in Indianapolis (aside from their respective visits to “fields of operation”), throughout the period during which explosives were purchased, stored, and transported as proven, in performance of their various duties and purposes. We do not understand that minutes of their meetings are in evidence showing their action upon any expenditures during this period, nor does it appear whether record of the fact or items was preserved in any form other than the checks therefor; but the fact of payments from such funds of the association (with many of the checks in evidence) for all expenditures involved herein, is established, as recited in the bill of exceptions, together with the fact that checks therefor were signed by Ryan and McNamara. While it is true that Ryan testifies for the defense, in substance, that he signed such checks in blank, leaving them with McNamara for use in payments, and was unacquainted with the items or purpose entering therein when completed, his credibility in such version was for determination by the jury. So the question was plainly presented for their determination, whether Ryan and other members of the executive board performed their duties in respect of such expenditures and were advised of their purpose, as a just deduction from all circumstances in evidence pertinent to that inquiry. Plainly the absence of direct proof of affirmative action by the board cannot foreclose an inference of such action, in the light of the above-mentioned order in reference to expenditures made during the “trouble,” together with another official statement of proceedings of the board (produced from a publication in its recognized official organ, “Bridgemen’s Magazine” of April, 1910), embracing various matters ruled upon, wherein the published minutes, signed by the secretary-treasurer, conclude as follows:

“The items set forth above do not include all the matters considered by the executive board. It goes without saying that many questions were presented and acted upon that are not deemed of sufficient importance to be recorded in these columns. Such items, however, were of vital interest to the persons directly interested and were of necessity presented to and considered by the executive board.”

Many witnesses, who appear to be disinterested, testify to facts and circumstances which tend strongly in support of one and the other class of charges under the indictment, but specific mention of their testimony is not deemed needful. One feature of circumstantial evidence is brought out by the testimony and justly pressed for consideration, as tending to prove the conspiracy in all its phases, namely: That use of explosives for destruction of property as described embraced exclusively "open shop concerns" and was continuous and systematic from the commencement of such course up to the time of the above-mentioned arrest of the McNamaras and McManigal, and then ceased throughout the country.

The chief direct testimony in the record, however, is that of the defendant Ortie E. McManigal, which is plainly subject to the challenge of its independent force, by way of proving the charges, under his relations of record and confessed course of criminality, and thus requires special mention and reference, as well, to the extraordinary array of corroborating evidence furnished in support thereof, as an indispensable requisite for its consideration as proof against the plaintiffs in error. His testimony is remarkable, both for its story of wicked conduct in a systematic course of crimes committed by himself, from the time of his alleged employment in 1907 by Herbert S. Hockin (one of the plaintiffs in error, who has withdrawn his writ) to carry out the objects of the conspiracy, down to the time of his arrest at Detroit, April 12, 1911, and for its directness and completeness upon both classes of issue, inclusive of identification of several of the plaintiffs in error as actors in the conspiracy. In each of the 25 transactions of unlawful carriage of explosives charged in these counts, he testified that the explosives were taken by himself from the storage places, and were personally carried on passenger cars in trains as described, for use in destroying property, and were so used by him. In each instance the transactions are set forth with abundant details of date, places and incidents (on direct and cross-examination), which afford the utmost of reasonable opportunity to test their verity; and the extent and comprehensiveness of the evidence introduced in corroboration of this testimony impress us to be not only extraordinary, but thorough for all requirements to authorize its submission to the jury, under proper instructions for testing its force and credibility, upon which no error is assigned. The elements of corroborative evidence are numerous, including records of telegraph, telephone, railroad, and express companies, hotel registers in many places, testimony of trainmen and many other witnesses for identification of the various trips and carriages, letters and many exhibits of explosives and "infernal machines," identified as taken from various storage places disclosed by McManigal and other witnesses.

We are of opinion, therefore, that the general challenge for insufficiency of evidence must be overruled; that support for the charge of conspiracy, to say the least, by no means rests on the testimony of McManigal; and that no error appears in submission of his testimony for consideration by the jury.

As to the Sufficiency of Evidence to Charge the Individual Plaintiffs in Error Respectively.

The error assigned on behalf of each plaintiff in error for want of evidence to justify submission of the case as against him presents the single further inquiry in each instance, whether evidence appears—direct, circumstantial, or both—which tends to establish his engagement in the conspiracy and his aiding and abetting the taking and carriage of explosives as charged in the indictment; evidence of the existence of such conspiracy must be treated as settled by the foregoing rulings. This crucial question of law in each case differs fundamentally from the far more complicated question of fact for exclusive determination by the jury when it arises for submission, whether the evidence proves the charge of his complicity in the offenses beyond reasonable doubt. While it is the duty of the court—both for submission at the trial and for review thereof on these assignments—to determine whether substantial evidence is presented which tends to prove such charge, and rule accordingly for or against submission thereof as an issue of fact, it is not within the province of this court to weigh or determine the sufficiency of the proof otherwise than above stated. If competent and substantial evidence appears in the record plainly tending to prove commission of the offenses by the plaintiffs in error respectively, the assignment of error in such case must be overruled as settled by the jury within their elementary province. The test in each case for this remaining inquiry is thus resolved into one of identification with the conspiracy heretofore defined, in such manner that his understanding of the procurement and storage of explosives for use in its objects, requiring conveyance thereof by the users to various distant places designated by the conspirators for explosions to ensue, may reasonably be inferred. So, the contentions in respect of various plaintiffs in error of their distant locations from other parties and of improbability (as well as denials) of acquaintance with the particular unlawful carriages charged, or with McManigal, are without force in view of the nation-wide conspiracy and purposes in evidence, if their active and continuous engagement therein is proven.

We proceed, therefore, with the inquest in each case as to the evidence presented in the line above indicated, and state our conclusions and rulings thereupon in reference to the plaintiffs in error respectively, as named and specified below:

1. Plaintiff in error Frank M. Ryan:

This plaintiff in error was president of the association and of its executive board and was active manager and leader of the contest and policies carried on throughout the years of the strike and destructive explosions in evidence. Letters written and received by him at various stages of the contest clearly tend to prove his familiarity with and management of the long course of destroying "open shop" structures, however guarded in expression. He was at the headquarters of the association for supervision of operations periodically, usually two or three days each month, uniformly attended the meetings there of the executive board, and made frequent visits to the field of activities. As previously stated, Ryan wrote the

letter suggesting that reports of expenditures be discontinued while "our trouble is on," and presided at the board meeting adopting such course; and presided as well at all subsequent meetings referred to wherein all expenditures for allowance out of association funds "were of necessity presented." He signed all of the checks in evidence (as recited) for payments of expenditures for purchase, storage and conveyance of explosives. One of Ryan's letters (January 20, 1908) to McNamara in reference to obnoxious work in course of erection at Clinton, Iowa, was followed up by destruction of the bridge (February 17, 1908) by explosives carried there and applied by McManigal (under direction of plaintiff in error Hockin) and the expense was paid through a check signed by Ryan. Letters received by Ryan from the defendant Edward Clark, who resided at Cincinnati, one of the places of bitter contest, and was an active manager in that field, bring home to the former plain information of "needs" for "other kinds of methods," which were carried out in explosions; and many other letters in evidence, both from and to him, however disguised in terms, may well authorize an inference of his complete understanding of and complicity in the explosions, both in plans and execution. Edward Clark testifies of a meeting with Ryan in Cincinnati to examine the work of "open shop" concerns, and that Ryan called his attention to a location where a "shot could be placed to advantage." McManigal testifies of meetings and conversations with him in reference to explosions caused by the witness, on two occasions, at least, and corroborative testimony appears for one of these interviews. Ryan's own testimony admits visits and conferences tending to confirm the foregoing inferences of complicity.

The assignments on behalf of plaintiff in error Ryan are overruled and the judgment against him must be affirmed.

2. Plaintiff in error Eugene A. Clancy:

This plaintiff in error, as stated by his counsel, was first vice president of the International Association and a member of the executive board, resided at San Francisco and was business agent of "Local No. 38," of that place. And they also rightly state that he "does not appear to have been a voluminous letter writer, so we have little in the shape of 'admissions' from him." His participation in the meetings and action of the executive board is proven, so that his familiarity with the expenditures designated under the heading of "Emergency Fund" may justly be inferred. His activity in direction of the primary conspiracy, both on the Pacific Coast and elsewhere in other fields of explosions, plainly appears. Several of his letters are in evidence which are clearly indicative of his familiarity with the explosions and their purposes. Witness Mary C. Dye, bookkeeper for the association, testifies of a conversation with Clancy at the headquarters wherein he was inquiring for the defendant John J. McNamara, and when informed by the witness that he had gone away and had taken with him a check for \$700, which might indicate where he was as Clancy knew of the drawing of such an amount by him, that Clancy replied, "that the information did not enlighten him any, because the executive board had given McNamara the right to use the money without explaining

at the time the use of it." Also, that Clancy remained at the office for several days until the return of McNamara.

McManigal testifies that on July 15, 1910, on his return from one of the explosions he had caused, he met the McNamara brothers at the headquarters in Indianapolis and James B. McNamara informed him that he was "getting ready to go to the coast"; that he was then shown a telegram from Clancy from the coast asking whether "Jim had left for the coast or not"; that John J. McNamara informed the witness that the witness when he went to the coast was to "go to Clancy for directions; he will make you acquainted with the bunch out there and you are to work under his instructions." The witness further testifies that on this occasion John J. McNamara made arrangements for the witness to cause certain explosions in the East, saying:

"I want an echo in the East, so that when the explosions come off in the West there will be an echo in the East and it will keep them guessing."

Subsequently the witness went to San Francisco after his destruction of the Llewellyn Iron Works at Los Angeles, December 25, 1910 (which was stated by the witness to be directed by McNamara as a "Christmas present" to Tveitmoe, the "old man of the coast"), and at San Francisco he met Clancy, who stated to him, "I was expecting the Llewellyn Iron Works explosion." He also mentioned a previous meeting between them at Chicago in which the plaintiff in error Hockin participated. At the later interview the witness states that Clancy said to him:

"When you go back to Indianapolis you tell John J. McNamara that he had better look out for the Salt Lake guy; I think there is a leak there"—referring to the plaintiff in error Munsey who resided at Salt Lake City.

He also asked the witness if he knew Mike Young (referring to plaintiff in error Young), and on his answering that he did know him, Clancy said: "Young told me about you." This testimony of McManigal is corroborated by many circumstances. Furthermore, on June 3, 1910, Clancy wrote to John J. McNamara from Los Angeles in reference to the Llewellyn Iron Works and other obstacles there, closing with this significant message: "Now, Joe, what I want here is Hockin"—Hockin being the director of the dynamiting work. On July 12, 1910, Clancy wrote to McNamara to have the plaintiff in error Barry sent to Los Angeles; that "Barry was badly needed." Clancy's telegram above mentioned to J. J. McNamara, inquiring whether Jim had left for the coast, is in evidence. Clancy telegraphed from Boston to the San Francisco headquarters to "clean house," immediately after reading of the Times explosion at Los Angeles, manifestly referring to removal of all traces of connection with the explosions. Much other evidence appears which tends to show his complete understanding of and part in the conspiracy.

The assignments on behalf of plaintiff in error Clancy are overruled and the judgment against him must be affirmed.

3. Plaintiff in error Michael J. Young:

This plaintiff in error resided at Boston, Mass., and was active in performance of duties in connection with the International Associa-

tion, attending the meetings of the Board during all of the allowances of expenditures and was in charge, as well, of all operations carried on in Massachusetts. Letters written and received by him clearly tend to show his complicity in explosions in evidence which occurred at Boston, Springfield, Fall River, and Somerset. And the testimony of McManigal, which is strongly corroborated in many of its particulars in reference thereto, constitutes direct proof of complicity and directions by this plaintiff in error for such explosions. We believe evidence of his complicity by no means rests alone on McManigal's testimony, as his counsel contends, but that the circumstantial evidence is exceedingly strong against him.

The assignments on behalf of plaintiff in error Young are overruled and the judgment against him must be affirmed.

4. Plaintiff in error Frank C. Webb:

This plaintiff in error resided in Hoboken, N. J., and was an active member of the association and one of the executive board. Within his jurisdiction ten explosions are in evidence, and numerous letters written by him and other letters received by him furnish abundant evidence in connection with undisputed circumstances tending to prove his complicity in these explosions. He is directly identified therewith by the testimony of McManigal. We believe the proof was ample for submission of the issues to the jury.

The assignments on behalf of plaintiff in error Webb are overruled and the judgment against him must be affirmed.

5. Plaintiff in error Phillip A. Cooley:

This plaintiff in error was an active member of the executive board, who attended its meetings and, alike with the other members, was chargeable with notice of the expenditures in connection with the explosives used; and his activity in reference to the explosions and their purpose appears from many circumstances in evidence and from many letters from him to McNamara and other conspirators, which are replete with unmistakable references both to plans for carrying them out and of execution thereof. He resided at New Orleans but his activity in various places is in evidence.

The assignments on behalf of plaintiff in error Cooley are overruled and the judgment against him must be affirmed.

6. Plaintiff in error John T. Butler:

This plaintiff in error lived in Buffalo, was second vice president of the association, and a member of the executive board throughout the period in question. His name was appended to the notice of discontinuance of publication of expenditures and his attendance upon the meetings of the Board appears and his knowledge of the expenditures and their purpose may justly be inferred. His particular jurisdiction embraced the territory covered by several explosions in evidence at Buffalo and one at Erie, Pa., and his activity therein appears from numerous letters written by him to John J. McNamara and others in evidence, containing references which leave no doubt of his complete acquaintance with these explosions as executions of the conspiracy. His testimony in the case leads to like inference.

The assignments on behalf of plaintiff in error Butler are overruled and the judgment against him must be affirmed.

7. Plaintiff in error John H. Barry:

This plaintiff in error resided at St. Louis, was business agent of "Local No. 18" and was a member of the executive board up to September, 1909. His name was appended to the magazine notice referred to for withholding publication of expenditures and he assisted personally in auditing the books of the association during the period of his service on the board, which covered a large portion of the expenditures described in the recitals. Explosions are in evidence to the number of about 75 during the period of his service with the board. Letters written and received by him extending up to July, 1910, prove his familiarity with and sanction of the work of destruction. Several witnesses identify his presence at several places directing operations where explosions subsequently occurred, and we believe that complicity therein may justly be inferred from the circumstances in evidence, together with his own testimony.

The assignments on behalf of plaintiff in error Barry are overruled and the judgment against him must be affirmed.

8. Plaintiff in error Charles N. Beum:

This plaintiff in error resided at Minneapolis and became a member of the executive board of the association in September, 1909, serving for about one year thereafter and considerable of the expenditures in question were audited and allowed during his service, which included service as a member of the auditing committee. His correspondence with McNamara and others in evidence shows his acquaintance with and activity in the purposes of the conspiracy, and we believe authorized inference of his complicity therein.

The assignments on behalf of plaintiff in error Beum are overruled and the judgment against him must be affirmed.

9. Plaintiff in error Henry W. Legleitner:

This plaintiff in error resided at Pittsburgh (which was the scene of various explosions in evidence) and was a member of the executive board throughout. He was also active in visiting various localities where explosions subsequently occurred, and his correspondence with McNamara and others in evidence contains references thereto which plainly indicate his complicity. A witness testifies to the fact that Legleitner brought from Pittsburgh and delivered to John J. McNamara at Indianapolis one of the special carrying cases used for carrying nitroglycerin packages, as described in the evidence, and this carrying case was identified by McManigal as the one used by him for carriage of nitroglycerin on his trip to blow up the Llewellyn Iron Works at Los Angeles. The evidence referred to, together with his own testimony, authorized the inference of complicity charged in the indictment.

The assignments on behalf of plaintiff in error Legleitner are overruled and the judgment against him must be affirmed.

10. Plaintiff in error Ernest G. W. Basey:

This plaintiff in error was financial secretary and business agent of "Local No. 22" at Indianapolis and was constantly employed by the executive board or its auditing committee in examination of accounts of expenditures covering the period in question. Four explosions occurred in Indianapolis and the testimony tends to show his connection

with those explosions; that he made threats against the contractors who were engaged in the work as "open shop" concerns, and was present when John J. McNamara threatened them, just prior to the explosions, that "We are going to put you out of business"; that on Saturday night, just prior to the explosion, Basey stated in the presence of two of the workmen named, as follows, "Them sons of bitches won't work there on Monday morning"; also, that the day after the explosion Basey exclaimed, in presence of several witnesses, "I thought something like that would happen and it ought to happen." Two witnesses further testified that Basey stated to other independent contractors after the explosion, "You know what we done to Van Spreckelson," referring to the contractor whose work was destroyed. The testimony of another witness who was in the employ of Basey is of like effect as to his understanding that the explosions were to occur.

The assignments on behalf of plaintiff in error Basey are overruled and the judgment against him must be affirmed.

11. Plaintiff in error J. E. Munsey:

This plaintiff in error was also designated as "Jack Bright" in the testimony and resided at Salt Lake City. His participation with James B. McNamara in the explosions which occurred at Salt Lake City and complicity in other explosions appear from many circumstances in evidence and may justly be inferred from numerous letters sent by him to and received by him from John J. McNamara; also from an article published by him in the Official Magazine in the same issue containing an account of the explosions at Salt Lake City. He is clearly identified by one witness in conference with James B. McNamara, who caused the explosions referred to. He subsequently concealed James B. McNamara on his return from the coast after the fearful Times explosion which was caused by McNamara. We believe the identity of this plaintiff in error with the conspiracy and explosions to be well established.

The assignments on behalf of plaintiff in error Munsey are overruled and the judgment against him must be affirmed.

12. Plaintiff in error Peter J. Smith:

This plaintiff in error was business agent of "Local No. 17" at Cleveland, Ohio. Numerous explosions are in evidence which were within his field of activity and his direction and activity in producing the explosions appear from testimony, both direct and circumstantial. McManigal testifies to deliveries to him of nitroglycerin on two occasions, which were followed up by explosions, and he is identified by several witnesses in direct connection therewith. He is also well identified as the leader in numerous criminal acts in connection with the strike.

The assignments on behalf of plaintiff in error Smith are overruled and the judgment against him must be affirmed.

13. Plaintiff in error Paul J. Morrin:

This plaintiff in error was business agent of "Local No. 18" of St. Louis, and subsequently president of that local, and was constantly active in execution of the purposes of the International Association, and was expressly delegated by Ryan to look after matters at Mt. Ver-

non where an explosion occurred, although the explosion took place just prior to his visit. In connection with the fearful explosions which are in evidence as caused at Indianapolis, his correspondence with John J. McNamara in evidence clearly indicates his concurrence therein and in various subsequent explosions which occurred and are plainly referred to in the correspondence. His activity in the conspiracy cannot be doubted under the evidence and many of his admissions on the witness stand tend to support that view in connection with undisputed circumstances.

The assignments on behalf of plaintiff in error Morrin are overruled and the judgment against him must be affirmed.

14. Plaintiff in error William E. Reddin:

This plaintiff in error resided in Milwaukee and was in charge of operations of the association in that vicinity, and during his administration three explosions occurred in the state. McManigal testifies of his actual participation in two of these explosions, one at Milwaukee and the other at Superior. His correspondence with McNamara clearly points out his complicity in these explosions, aside from the direct testimony of McManigal of his part therein.

The assignments on behalf of plaintiff in error Reddin are overruled and the judgment against him must be affirmed.

15. Plaintiff in error Michael J. Hannon:

This plaintiff in error resided at Scranton, Pa., and was business agent of "Local No. 23" and was a member of the auditing committee of the International Association accounts in 1909 under a large salary. His letters in evidence contain repeated references to affairs which are "to come off" and of promise that "the goods will be delivered" when means are provided. In one letter to McNamara he says, "I am prepared to do anything, but you know how careful a man must be in a case of this kind." His explanations of these letters on the witness stand leave no room for doubt that he was actively engaged in the conspiracy.

The assignments on behalf of plaintiff in error Hannon are overruled and the judgment against him must be affirmed.

16. Plaintiff in error Murray L. Pennell:

This plaintiff in error resided at Springfield, Ill., and was active in that locality for the association, in connection with "Local No. 46" at that place. Two explosions occurred simultaneously at Springfield, which were caused by James B. McNamara. Pennell had previously demanded that the work be unionized where these explosions occurred. His previous correspondence with John J. McNamara of need for help in reference to "open shop" work that was going on there, and calling for the presence of "Brother Hockin," who was the manager of the work of explosions as hereinbefore stated, clearly authorizes inference, to say the least, that he was calling for the nefarious work which was subsequently carried out.

The assignments on behalf of plaintiff in error Pennell are overruled and the judgment against him must be affirmed.

17. Plaintiff in error W. Bert Brown:

This plaintiff in error resided at Kansas City and was business agent of "Local No. 10" when several explosions occurred (in 1909 and

1910) of "open shop" work in course of erection. His correspondence in evidence to and from J. J. McNamara and Ryan tends to show calls for action on the part of the International Association to prevent these works from going on; as expressed in McNamara's letter to Brown "to hinder their operations in every possible way." Two witnesses for the government, Charles Brown and Roy Cowan, testify to conversations with this plaintiff in error which clearly implicate the latter in the explosions which ensued, and their testimony, in connection with the letters and other circumstances in evidence, authorized submission of the issue as against him, notwithstanding the contention on his behalf that the witness Charles Brown was discredited "by witnesses introduced to impeach the story." The question of credibility of these witnesses was rightfully submitted for determination by the jury.

The assignments on behalf of plaintiff in error Brown are overruled and the judgment against him must be affirmed.

18. Plaintiff in error Edward Smythe:

This plaintiff in error resided at Peoria, Ill., and was business agent for "Local No. 112." The testimony which implicates him in the explosions in evidence of "open shop" bridge work at Peoria and East Peoria, in 1910—one caused by James B. McNamara and the other two by McManigal—impresses us to be overwhelming. It consists of voluminous correspondence with John J. McNamara, his personal attendance with the latter and Herbert S. Hockin when Hockin notified the General Manager of the Railway Company that their contractor for the bridge work "must employ union men on that job"; that if they did not "there was to be something doing. Something is going to happen." Soon after refusal to meet his demand the explosion was caused by James B. McNamara. In reference to the later explosions caused by McManigal, the latter testifies of Smythe's complicity therein; also, that Smythe attended with Hockin a meeting with contractors doing work at Newcastle, to arrange "for unionizing the job," and, when they so arranged, Hockin stated to the contractor, "You are now in no danger of any further explosions." Other evidence of complicity appears, but the above references suffice.

The assignments on behalf of plaintiff in error Smythe are overruled and the judgment against him must be affirmed.

19. Plaintiff in error George Anderson:

This plaintiff in error resided at Cleveland and was clearly identified by three witnesses as associated with the above-named plaintiff in error Peter J. Smith in his visit to North Randall, Ohio, when an explosion occurred there through the use of nitroglycerin, which the evidence tends to prove was the nitroglycerin delivered to Smith for such use by McManigal and Hockin. Other circumstances appear tending to show Anderson's complicity.

The assignments on behalf of plaintiff in error Anderson are overruled and the judgment against him must be affirmed.

20. Plaintiff in error Frank J. Higgins:

This plaintiff in error was designated as "special organizer for New England" of the International Association, and his activity in reference to the explosions which occurred in that region clearly appears from

the testimony and some of his letters in evidence; and one witness, Samuel Gallagher, a newspaper reporter, testifies to a conversation with Higgins in reference to the explosion that had occurred at Springfield in the work of the municipal tower, in which Higgins stated, "The explosion that took place at the tower cost our Union \$300," and he further said:

"I went to Hartford the day before the explosion in order to prove an alibi if I should be charged with this depredation. It is likely, too, that Young went away on his trip, so that he would be in a position to prove an alibi. The party that actually produced the explosion immediately went west."

We believe the testimony and circumstances in connection therewith clearly authorized submission as against him.

The assignments on behalf of plaintiff in error Higgins are overruled and the judgment against him must be affirmed.

21. Plaintiff in error Frank K. Painter:

This plaintiff in error was president of "Local No. 21" at Omaha, Neb., and was also its business agent. His correspondence with McNamara shows his part in the explosions which occurred at Omaha and his association with Hockin in reference thereto. He took part in the threats to compel the work on the court house to be unionized and his complicity in the explosion which subsequently occurred may well be inferred from all the circumstances; also his complicity in another explosion directed against the Wisconsin Bridge Company. We believe the testimony to be ample for submission against him.

The assignments on behalf of plaintiff in error Painter are overruled and the judgment against him must be affirmed.

22. Plaintiff in error Fred J. Mooney:

This plaintiff in error was financial secretary of "Local 32" of Duluth, Minn., during the time that explosions occurred at Superior, Wis., and Green Bay, Wis., which were within his sphere of activity. His letter to McNamara on the day following the explosion at Superior reads:

"We had some real dynamiters here. Not the kind we had a year ago, but the real thing was done. The damage was not great but it was luck the leg landed where it did; otherwise the bridge would have come down which would have been large damage. I am inclosing clippings."

In another letter to McNamara, he says, "I cannot see where we are going to win unless we try some new tricks." His participation in the conspiracy may well be inferred from the letters and circumstances in evidence.

The assignments on behalf of plaintiff in error Mooney are overruled and the judgment against him is affirmed.

23. Plaintiff in error William Shupe:

This plaintiff in error resided at Chicago and was business agent of "Local No. 1," and at all times in question active in the proceedings of the International Association, as shown by the testimony and by his correspondence with Ryan in evidence. In reference to an explosion caused by McManigal between Pine and Gary near Chicago, McManigal was sent by McNamara for that purpose, with

directions to obtain instructions from Shupe about the location of the job. McManigal testifies that he called on Shupe who described the location to him; that he (McManigal) returned to Indianapolis to obtain his explosives and came back to Chicago, but was at a loss to fix the location, and again called upon Shupe and one Coughlin, when he obtained the information and exploded the works. We believe this testimony to be sufficiently corroborated by various undisputed circumstances to authorize the submission as against Shupe.

The assignments on behalf of plaintiff in error Shupe are overruled and the judgment against him must be affirmed.

24. Plaintiff in error Michael J. Cunnane:

This plaintiff in error resided at Philadelphia and was business agent of "Local No. 13," and his correspondence with McNamara establishes his activity in the matters of the conspiracy. He received from McNamara a check of \$500 for use in response to his calls for money, and attached to his request were newspaper clippings showing an explosion. An explosion occurred at Philadelphia, January 22, 1909, of "open shop" work going on at "Pier No. 46." On January 29, 1909, Cunnane replied to a request of McNamara, "What has been done with the \$500 donation made to No. 13?" as follows: "The money sent to Philadelphia was spent in fighting scab labor and more too. How do you like that"? Attached to this was a newspaper clipping giving an account of the explosion on "Pier No. 46." Other circumstances appear proving his activity in reference to explosions, and we believe the evidence authorized submission to the jury.

The assignments on behalf of plaintiff in error Cunnane are overruled and the judgment against him must be affirmed.

The plaintiffs in error not embraced in the foregoing recitals and conclusions are the following named: (1) Olaf A. Tveitmoe, (2) William J. McCain, (3) James E. Ray, (4) Richard H. Houlihan, (5) Fred Sherman, and (6) William Bernhardt.

On investigation of the testimony and circumstances pointed out by counsel for the government for upholding the convictions respectively of these last-named plaintiffs in error, we are of opinion that the evidence is insufficient to establish a prima facie case of copartnership in the offenses charged in the indictment, as against any of them. All except Tveitmoe were affiliated with the International Association, as officers or members of local organizations, and their sympathy and participation in its general objects and policies may rightly be assumed from the evidence, but we are not advised of proof to charge any thereof with actual participation in the conspiracy for commission of offenses averred in the indictment.

In reference to Tveitmoe, the fact that he was not a member of the association is, of course, not of controlling import. Nor, on the other hand, can the evidence of his undoubted sympathy with and co-operation in the great strike, nor any leading part therein in California which does not involve complicity in the averred conspiracy, serve to uphold his conviction, without evidence of his personal identification with that conspiracy. So, neither the fact nor the concession of counsel for plaintiffs in error, that "Tveitmoe was active and

a leader in local controversies going on in California," and that "naturally he earnestly and unceasingly desired a union victory," can be regarded as prejudicial for the present inquiry. Review of the extended references to the testimony presented on the part of the government is not deemed essential, beyond the statement that no competent testimony appears therein to identify Tveitmoe with complicity in any offense charged in the indictment. The testimony of McManigal of references by McNamara to Tveitmoe as the "old man of the coast," who wanted "a Christmas present and that he had agreed to give him one," is not competent for his identification with the conspiracy, as the statement of a co-conspirator, in the absence of proof to establish Tveitmoe as a conspirator; and McManigal had no meeting with him at any time. It is true that a letter appears in evidence from Tveitmoe to McNamara, dated December 19, 1910, which closes with this expression:

"Trusting Santa Claus will be as kind and generous to you with surprises and presents of the season, as he is to us in the Golden State, we beg to remain."

But neither the context thereof nor circumstances in evidence are indicative of reference therein to matters involved in the charges.

The testimony cited against the other plaintiffs in error above mentioned as not chargeable does not require specification, as we believe, except in reference to Ray and Sherman. In each of these cases we have found cause for hesitation upon the issue of identity. The testimony shows that Ray was present with Edward Smythe (both of Peoria) at the meeting in which Hockin notified the General Manager of the railway company that "something is going to happen," if union labor is not employed for the job, as above mentioned in reference to Smythe. In respect of Sherman the testimony shows that he was business agent of Local No. 22 at Indianapolis and that he visited French Lick Springs and notified the contractor engaged in work upon the hotel: "You will have to use union labor here"; and again urged such employment at a later meeting. About two weeks thereafter a dangerous explosion was produced by James B. McNamara, destroying much of the work and placing the lives of many persons in the hotel in great peril. Examination of the further testimony offered against one and the other of these parties discloses no evidence otherwise of complicity in the explosion which ensued, nor of activity or complicity in other operations of the conspirators, so that our conclusions are that the circumstances referred to, although they may well arouse suspicion, are insufficient to charge either party as a conspirator for commission of the offenses in question.

In conformity with the foregoing view, the judgments respectively against the plaintiffs in error Tveitmoe, McCain, Ray, Houlihan, Sherman, and Bernhardt must be reversed.

The judgments respectively, therefore, against the plaintiffs in error Ryan, Clancy, Young, Webb, Cooley, Butler, Munsey, Barry, Smith, Beum, Legleitner, Basey, Morrin, Reddin, Hannon, Pennell, Brown, Smythe, Anderson, Higgins, Painter, Mooney, Shupe, and Cunnane are each hereby affirmed.

The judgments respectively against the plaintiffs in error Tveitmoe, McCain, Ray, Houlihan, Sherman, and Bernhardt are each reversed, and the cause in respect of each thereof is remanded to the District Court for a new trial as to each such defendant below.

On Rehearing.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

On petition of the defendant in error rehearing has been granted in the above-entitled cause, upon the several writs of error therein brought by the plaintiffs in error Olaf A. Tveitmoe, Richard H. Houlihan and William Bernhardt, and the conclusions of this court on the original hearing reversing the judgment against each of such plaintiffs in error, for cause stated in the opinion, and remanding as to each thereof for a new trial.

SEAMAN, Circuit Judge. Rehearing having been concluded upon the evidence applicable respectively to the plaintiffs in error Olaf A. Tveitmoe, Richard H. Houlihan and William Bernhardt, we are of opinion that no change or modification of our former rulings is authorized as to plaintiffs in error Tveitmoe or Houlihan.

In the case of Tveitmoe, the circumstances relied upon for support of the charges—together with his letter of December 19, 1910, containing the mention of "Santa Claus" and "surprises and presents of the season," referred to in our original opinion—are not connected by the evidence with any circumstance tending to prove his violation of the federal statute as charged, and we believe no comment to be proper upon their alleged tendency to prove complicity in the Los Angeles outrages of October 1, 1910, wherein no interstate transportation of explosives was involved under the evidence. Without facts of probative force to establish this missing link—for which grounds for mere suspicion cannot serve as proof—the charges in question are unsupported. So, while the above-mentioned expressions in Tveitmoe's letter of December 19th may well be understood as referring to the antecedent course of strife and attendant explosions "in the Golden State," within his jurisdiction and knowledge, they are neither applicable in terms as referring (by way of anticipation) to the ensuing explosion at the Llewellyn Iron Works, in Los Angeles, December 25, 1910, caused by McManigal under the International Association conspiracy charged, nor is the contention supported by evidence, that such occurrence was "anticipated by the writer for Christmas." No proof appears direct or circumstantial, that he was then advised or had reason to believe, that such explosion was either intended by the conspirators, or planned as a "Christmas present," or that any hostile act against open shop concerns was to be accomplished by means in violation of the federal statute.

The contentions of sufficiency of proof against Houlihan are, in substance: (a) That he was "financial secretary" of Local No. 1, Chicago, whereof Ryan and McManigal were members; (b) that McManigal (codefendant) testifies to payment of money for his crim-

inal services received from Houlihan inclosed in an envelope, and of conversations between them tending to prove complicity on the part of Houlihan, in each particular controverted by the accused as a witness; (c) that Local No. 1 contributed \$25 per week for the benefit of the wife of McManigal, after the arrest of her husband, and the payments were made by Houlihan. We believe each of these propositions to be without force to uphold conviction. Plainly neither the first nor the last-mentioned circumstance, without other proof of complicity, lends support to the charge. His payments to Mrs. McManigal (if otherwise reprehensible) appear alone as contributions by Local No. 1, through the hands of Houlihan as its financial secretary, and in no sense as his personal contributions. The question of sufficiency, therefore, must hinge on the legal effect of the testimony of McManigal, as above stated, to establish the charge against Houlihan. It appears (and is conceded as well) that such testimony stands without corroborative evidence, either as to the transaction with Houlihan or the several conversations with him, and it is thus brought within the rule (stated and recognized in the original opinion) which renders the testimony insufficient. The fact that McManigal was corroborated in other testimony affecting other defendants cannot cure the infirmity of the instant testimony under such rule.

Pursuant to the foregoing conclusions, the orders heretofore pronounced in favor of the plaintiffs in error Tveitmoe and Houlihan stand undisturbed on rehearing.

In the case of the plaintiff in error William Bernhardt, evidence in the record of undoubted probative force is brought to our consideration, which escaped notice in reviewing the evidence applicable to the charges against him. While the leading correspondence (hereinafter mentioned) between Bernhardt and J. J. McNamara was then examined, together with a great array of testimony as to explosions caused at Dayton and Cincinnati, referred to in support of the charges, it was not understood that competent proof appeared of Bernhardt's complicity in any of these explosions, or other offenses committed by the conspirators. In the light, however, of pertinent and cogent facts in evidence advanced upon rehearing, we are constrained to believe that our ruling for reversal upon such review was not well advised and requires correction.

Bernhardt was financial secretary of Local No. 44 of Cincinnati, Ohio, from March, 1907, until August, 1910, and his activity there in furtherance of the great strike and intimate association therein with his codefendant, Edwin Clark, "business agent" of the local, are established facts. On October 22, 1907, Bernhardt's letter to J. J. McNamara, reporting upon matters at Cincinnati, contains the following references to the Grainger Company, then engaged in work there on the "open shop" plan in the erection of "Harrison Ave. viaduct":

"The traveler was turned over on the Grainger job, one killed and one injured they accused the bridgemen of putting acid on the lines of cables which they claimed caused the wreck. Some of our members have been arrested twice for a little skirmish which we succeeded in getting them out of it. I have footed several of the bills personally, as it could not be brought up.

* * * I will state from the information I can get, the Grainger is getting

kind of wobbly on his pins about this job and ain't far from throwing up. Now if some stranger could come around the back way on the Q. T. and ditch the balance the jig is up. * * * The police judge said, 'For God's sake don't come around again with that bunch or I will have to do something.'"

Again, on October 21st, Bernhardt wrote to McNamara of delays and trouble brought about in Grainger's work, "so at present * * * it would be a waste of time and money to have some one down on business."

On February 15, 1908, Bernhardt wrote to J. J. McNamara:

"I wish to inform you that Brother Edw. Clark, Bus. agent of Local 44 has been instructed to appear before the board by Local 44 to explain our situation here. There may be several items that would not do to put in writing. So anything that may or can be done for the best interests of this locality will be appreciated very much."

Pursuant to this letter, Clark reported in person to McNamara and was informed by the latter that Hockin would be sent to Cincinnati to investigate matters; and McNamara notified Bernhardt, in letters dated February 28th and 29th, of such arrangement, which was carried out by Hockin in March, in an address before Local 44 and in an agreement between Clark and Hockin, performed by Clark, to dynamite work of the American Bridge Company at Dayton, which Hockin said was more important "than the Grainger job, because Grainger was a small fellow." Although Bernhardt states in his testimony that he had a brief interview with Hockin on that visit, he denies any information of the conspiracy, and no direct evidence of his participation appears. Clark, who testified at length on behalf of the government in reference to all of the above-mentioned transactions, neither names nor implicates Bernhardt therein. But on March 14, 1908, Bernhardt received a letter from McNamara which contains the following remarks plainly directed to the Hockin conference:

"* * * Brother Hockin was at headquarters and he reports to me relative to conditions at Cincinnati and Hamilton. Relative to the latter place, wish to say I am under the impression that this job is worth going after and I believe that the executive board of 44 should take same in hand and make an effort to control it.

"While I do not approve of the local union going on record as being in favor of any proposition that is not strictly O. K. I am in favor of the executive board of any organization taking a job in hand and trying out temporary arrangements. My experience has been that these are in a great many instances successful. It would be well for you to take this matter up with Brother Clark and also with the executive board of 44. I am referring Brother Hockin's recommendation to President Ryan and shall write you as soon as I hear from him."

Thus the only direct evidence of the discussion and arrangement of matters of the alleged conspiracy, both with McNamara at Indianapolis and by Hockin at Cincinnati, appears in the testimony of Clark, the codefendant, so that were the contention on behalf of Bernhardt well founded, that no independent proof is furnished of overt acts under such conspiracy which may be attributable to invitations or suggestions contained in his above-mentioned letters, it may be conceded that failure of such proof would constitute ground for reversal.

But that contention is plainly untenable under the further facts established by the evidence.

The work of the Grainger Company on the Harrison avenue viaduct in Cincinnati (referred to in Bernhardt's letters) was destroyed by explosion caused by the conspirators in August, 1908; and this was followed by other like explosions in Cincinnati of "open shop" work of the Pittsburgh Company. Proof is abundant that each of these explosions was so caused in furtherance of the conspiracy in evidence, both direct and circumstantial, and does not rest on the testimony of the perpetrators as accomplices therein. For instance, the testimony of the witness Frank Eckhoff furnishes both competent and convincing evidence of this purpose and performance. That the Grainger explosion first mentioned was within the meaning and object of Bernhardt's letters to McNamara cannot be doubted under the uncontroverted facts, and their attempted explanations otherwise by Bernhardt, as a witness for the defense, may well have been rejected by the jury as unreasonable and frivolous.

We are therefore impressed with no doubt of the sufficiency of evidence for support of the conviction of the plaintiff in error William Bernhardt. The order heretofore granted for reversal of the judgment against him and remand of the cause is set aside, and instead thereof it is further ordered that such judgment be affirmed.

UNITED STATES v. NEW YORK & O. S. S. CO., Limited.

(Circuit Court of Appeals, Second Circuit. April 26, 1914.)

No. 153.

1. COURTS (§ 314*)—JURISDICTION OF FEDERAL COURTS—FOREIGN CORPORATION—CITIZENSHIP.

A corporation organized under the laws of a foreign country is a citizen and resident of such country for the purposes of determining the jurisdiction of a federal court of a suit to which it is a party.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 860; Dec. Dig. § 314.*]

Citizenship of corporation for purposes of federal jurisdiction, see notes to *St. Louis, I. M. & S. Ry. Co. v. Newcom*, 6 C. C. A. 174; *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

2. UNITED STATES (§ 125*)—CONSENT TO BE SUED—HOW EVIDENCED.

The United States cannot be sued either by a private individual or by a state without its consent, which must be evidenced by an act of Congress. Government officers cannot waive its privilege in that respect.

[Ed. Note.—For other cases, see United States, Cent. Dig. §§ 113, 114; Dec. Dig. § 125.*]

3. COURTS (§ 17*)—"JURISDICTION."

Jurisdiction of the subject-matter is the power to hear and determine cases of the general class to which the proceedings in question belong.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 46-50, 52; Dec. Dig. § 17.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3876-3885; vol. 8, pp. 7697, 7698.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. APPEARANCE (§ 19*)—COURTS (§ 276*)—JURISDICTION—EFFECT OF GENERAL APPEARANCE.

While a general or voluntary appearance cannot confer jurisdiction over the subject-matter, it gives jurisdiction of the person of the defendant, and in the federal courts ordinarily is a waiver of the objection that suit is brought in the wrong district.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 79-82, 84-90; Dec. Dig. § 19; * Courts, Cent. Dig. § 815; Dec. Dig. § 276.*]

5. COURTS (§ 276*)—UNITED STATES (§ 127*)—SUITS AGAINST UNITED STATES—JURISDICTION UNDER TUCKER ACT—SUIT BY ALIEN.

The general intention of Tucker Act March 3, 1887, c. 359, 24 Stat. 505 (U. S. Comp. St. 1901, p. 752), is to open the courts of the United States to all suits against the government, as respects the claims specified in the act, to aliens as well as citizens; and the requirement of section 5 that such suits shall be brought "in the district where the plaintiff resides," if applicable to suits by nonresident aliens or citizens residing abroad, is not jurisdictional, but confers a personal privilege which is waived by a general appearance by the law officers of the government.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. § 276; * United States, Cent. Dig. § 116; Dec. Dig. § 127.*]

6. SHIPPING (§ 138*)—LIABILITY FOR DAMAGE TO CARGO—HARTER ACT.

Where there was a careful inspection of a vessel by the board of underwriters before a voyage commenced by which her seaworthiness was shown, the fact that she took in water during a heavy storm at sea is not proof of her unseaworthiness, and she is exonerated from liability for damages to cargo from such sea water under Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 (U. S. Comp. St. 1901, p. 2946).

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. § 138.*]

7. SHIPPING (§ 138*)—LIABILITY FOR DAMAGE TO CARGO—FAULT IN MANAGEMENT OF SHIP.

Where a vessel was inspected and found seaworthy at the commencement of a voyage, the fact that she was not again inspected at an intermediate port, which she reached after encountering a severe storm, if a fault, was one in the management of the ship, within Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 (U. S. Comp. St. 1901, p. 2946), and does not deprive the owner of the benefit of the exemption provided by such section.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. § 138.*]

Statutory exemptions of shipowners from liability, see notes to *Nord-Deutscher Lloyd v. President, etc., of Insurance Co. of North America*, 49 C. C. A. 11; *Ralli v. New York & T. S. S. Co.*, 83 C. C. A. 294.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the New York & Oriental Steamship Company, Limited, against the United States. Decree for libellant, and respondent appeals. Affirmed.

The bill was brought in the old Circuit Court under the Tucker Act to recover \$1,199.42 unpaid balance of hire earned by the transportation of certain government stores from New York to Manila in 1902 on board the petitioner's steamship *Shimosa*.

The petition was filed on November 5, 1906, after long negotiations with the government for the payment of the claim. On December 28, 1906, the United States attorney for the Southern district of New York filed a general appearance on behalf of the defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

A demurrer was filed based on two grounds: (1) That the petition did not state facts sufficient to constitute a cause of action. (2) That the court had not jurisdiction of the subject of the action. The demurrer was signed by the United States attorney without reservation as to the nature of his appearance. The first ground of the demurrer was not urged in the District Court or in this court. The demurrer was overruled; the opinion being reported in 202 Fed. 311. The government thereupon answered, and the case was tried on the merits; the court directing a decree for the full amount claimed. Findings of fact and conclusions of law were signed by the judge as required by the Tucker Act (Act March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752]).

The assignments of error raise two questions: 1. The jurisdiction of the District Court. 2. The correctness of the findings that under section 3 of the Harter Act the steamship company was not liable for the damage admitted to have been sustained by the government's cargo during the voyage.

H. Snowden Marshall, U. S. Atty., of New York City (Addison S. Pratt, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Convers and Kirlin, of New York City (John M. Woolsey and Cleus Keating, both of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). [1] The petition alleges that the petitioner is "a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland." A corporation is a citizen of the country or state by which it is incorporated, and it has its residence in such country or state and not elsewhere. In *Shaw v. Quincy Mining Co.* (1892) 145 U. S. 444, 450, 12 Sup. Ct. 935, 937 (36 L. Ed. 768), Mr. Justice Gray declared that:

"The legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation can only be in the state by which it was created, although it may do business in other states whose laws permit it."

And in *Insurance Company v. Francis* (1870) 11 Wall. 210, 216 (20 L. Ed. 77), Mr. Justice Davis said:

"A corporation can have no legal existence outside the sovereignty by which it was created. Its place of residence is there, and can be nowhere else. Unlike a natural person, it cannot change its domicile at will, and, although it may be permitted to transact business where its charter does not operate, it cannot on that account acquire a residence there."

We must conclude, therefore, that this suit is brought by an alien and a resident of the United Kingdom of Great Britain and Ireland. This makes it necessary to consider the conditions under which an alien residing outside the United States can maintain an action against the United States.

[2] The United States cannot be sued either by a private individual or by a state without its consent. *Louisiana v. Garfield*, 211 U. S. 70, 29 Sup. Ct. 31, 53 L. Ed. 92; *Kansas v. United States*, 204 U. S. 331, 27 Sup. Ct. 388, 51 L. Ed. 510. And consent by the United States to be sued must be evidenced by an act of Congress. *Stanley v. Schwalby*, 162 U. S. 255, 16 Sup. Ct. 754, 40 L. Ed. 960; *Hill v. United States*, 9 How. 386. Government officers cannot waive the govern-

ment's privilege in this respect. Their consent that such a suit may be brought cannot bind the government of the United States. *Carr v. United States*, 98 U. S. 433, 25 L. Ed. 209.

Congress has made provision whereby under certain limitations suits may be brought against the government, in the courts of the United States, although no consent has ever been given that it may be sued in a state court in any case. *Stanley v. Schwalby*, *supra*. The question now presented to the court is whether any act of Congress authorized the District Court to assume jurisdiction of the case at bar.

In 1855 Congress created the Court of Claims (Act Feb. 24, 1855, c. 122, 10 Stat. L. 612, 614) and conferred upon it jurisdiction to hear and determine "all claims" of the character enumerated in the act. There was nothing in the act distinguishing claims by aliens from claims brought by citizens.

In 1863 Congress passed the Captured and Abandoned Property Act (Act March 12, 1863, c. 120, 12 Stat. L. 820, 821) which authorized "any person" who claimed as owner of any such property to prefer his claim for the proceeds thereof in the Court of Claims. Under this act it was held that aliens could file such claims, and the court appears to have been of the opinion that it had jurisdiction of any suit brought by an alien. *Scharfer's Case*, 4 Ct. Cl. 529, 532; *Wagner's Case*, 5 Ct. Cl. 637, 638.

In 1868 Congress forbade the bringing of any suit in any court by an alien under the Captured and Abandoned Property Act (Act July 27, 1868, c. 276, 15 St. L. 243). It contained, however, a provision that:

"This section shall not be construed so as to deprive aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, of the privilege of prosecuting claims against the United States in the Court of Claims, as now provided by law."

The Revised Statutes defining the jurisdiction of the Court of Claims provide as follows:

"Sec. 1059.—The Court of Claims shall have jurisdiction to hear and determine the following matters: First.—All claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the government of the United States, and all claims which may be referred to it by either House of Congress. * * *

U. S. Comp. St. 1901, p. 734.

"Sec. 1068.—Aliens, who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction." U. S. Comp. St. 1901, p. 740.

The Tucker Act, under which this suit was brought, was passed by Congress on March 3, 1887 (24 Stat. L. 505, 506). And the pertinent portions of that act are as follows:

"Sec. 1. That the Court of Claims shall have jurisdiction to hear and determine the following matters: First.—All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, ex-

pressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable. * * *

"Sec. 2. That the District Courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters * * * in the preceding section where the amount of the claim does not exceed one thousand dollars, and the Circuit Courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. * * *

"Sec. 4. That the jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this act. * * *

"Sec. 5. That the plaintiff in any suit brought under the provisions of the second section of this act shall file a petition, duly verified, with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law.

"Sec. 6. That the plaintiff shall cause a copy of his petition filed under the preceding section to be served upon the district attorney of the United States in the district wherein the suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the government, and to file a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the government in the premises: Provided, That should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court."

The claim asserted by the libellant is for \$1,199.42, and therefore it is claimed was within the provision of section 2 of the Tucker Act which gave the Circuit Courts concurrent jurisdiction with the Court of Claims in cases where the amount of such claim "exceeds one thousand dollars and does not exceed ten thousand dollars." This jurisdiction of the old Circuit Court was transferred to the District Court by the provisions of the Judicial Code, § 24, subd. 20 (Act March 3, 1911, c. 231, 36 Stat. 1093 [U. S. Comp. St. Supp. 1911, p. 138]).

But it is to be observed that under section 5 of the act it is provided that the plaintiff in any suit brought under section 2 must file his petition "in the district where the plaintiff resides." As we have seen, the plaintiff herein is a foreign corporation and has its residence nowhere in the United States. It nevertheless filed its petition in the Southern District of New York. It is conceded that under the acts of Congress the petitioner might have maintained the suit if it had been brought in the Court of Claims. But it is objected that the

suit brought in the District Court cannot be maintained, as it has not been brought, as the Tucker Act requires, "in the district where the plaintiff resides." The court below (202 Fed. 311) sustained the petitioner's right to maintain the suit, and it did so upon the theory that the requirement as to bringing the suit "in the district where the plaintiff resides" does not go to the jurisdiction of the court, but is a privilege of exemption which the government can waive and in this case did waive when the district attorney put in a general appearance.

Whoever would institute proceedings against the United States "must bring his case within the authority of some act of Congress." *Carr v. United States*, supra.

Is the plaintiff in this suit able to show that this case is within the authority of any act of Congress? Unless it can show that the acts of Congress have conferred upon the court below the power to hear and determine the cause, its suit must fail and its petition be dismissed.

[3] In order that a court may hear and determine a controversy, it must have jurisdiction of the subject-matter and of the person. Jurisdiction of the subject-matter is the power to hear and determine cases of the general class to which the proceedings in question belong. In *Cooper v. Reynolds*, 10 Wall. 308, 316, 19 L. Ed. 931 (1870) Mr. Justice Miller defined jurisdiction over the subject-matter as follows:

"By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and it is to be sought for in the general nature of its powers, or in authority specially conferred."

And counsel for the government in this case concedes that the claim sued upon is one of the class of claims against the United States over which the District and Circuit Courts are given jurisdiction by sections 1 and 2 of the Tucker Act, and that the District Court had jurisdiction of the subject-matter of this controversy. His contention is that the court below had no jurisdiction over the person, if it may be so called, of the United States, for the reason that the government had not consented to be sued by a nonresident alien in any Circuit Court, and that the District Court could not, therefore, acquire any jurisdiction over it by the service of process upon the United States Attorney, as required by section 6 of the act, or by his voluntary appearance. The plaintiff, on the other hand, contends that the general appearance by the United States Attorney, before any plea to the jurisdiction, constituted a waiver of any right which the United States might have had to claim that the petition could not properly be filed in the Southern District of New York.

[5] The question to be decided, therefore, is whether jurisdiction over the United States was obtained for the purposes of this suit by the general appearance of the United States attorney and before any plea to the jurisdiction was made.

Jurisdiction of the person is obtained, as Mr. Justice Miller said in *Cooper v. Reynolds*, supra, by the "service of process, or by the voluntary appearance of the party in the progress of the cause." Neither the Tucker Act nor any other act expressly authorizes a non-resident alien to commence a proceeding against the United States in

a District Court of the United States by a service of process upon the United States District Attorney or upon any other officer of the government. In *Ribas y Higo v. United States*, 194 U. S. 315, 322, 24 Sup. Ct. 727, 48 L. Ed. 994 (1904), the Supreme Court had its attention called to the question whether an alien nonresident could bring suit against the government in a District Court. But the court refrained from expressing any opinion. It said:

"The government insists that the requirement in that act, that the petition shall be filed 'in the district where the plaintiff resides' precludes a suit against the United States by any person, natural or corporate, residing out of the country. We express no opinion upon that question, as there are other grounds upon which we may satisfactorily rest our decision."

In *Reid Wrecking Co. v. United States* (D. C.) 202 Fed. 314 (1913) the question came before the District Court for the Northern District of Ohio, and it was held that section 5 of the Tucker Act, requiring that suits brought under the act should be commenced in the district where the plaintiff resides, was mandatory, and that a federal court in the district in which the plaintiff did not reside was without jurisdiction. But in the Reid Case there was no question of waiver involved. The United States District Attorney, disclaiming intention to enter an appearance, moved to quash the monition, the corporation being an alien and not a resident of the district. The District Judge in the course of his opinion alluded to the decision made in this case in the court below and distinguished it, saying:

"It is apparent, from an examination of that decision, that the United States government waived its rights to object to the suit being brought in that jurisdiction."

The court then went on to say of the cases then before it:

"Had the United States government waived the permissive requirements of the act and proceeded with the trial of these actions, a different question might be presented; but inasmuch as the United States attorney has made prompt objection to the prosecution of these suits in this jurisdiction, for the reasons stated in this memorandum, the motion in each case will be sustained."

The exact question presented upon the facts of this case appears to be one of first impression which must be decided according to the principles which seem to us applicable.

In the English courts, at least in some cases, jurisdiction over the subject-matter may be acquired by the proper officer of the government giving his consent thereto. In such cases the consent is given by the authority of the king who thus submits to be sued in his own courts. But in the United States no power exists in any officer of the federal government to confer jurisdiction over the subject-matter upon any of the federal courts. See *The Davis*, 10 Wall. 15, 20, 19 L. Ed. 875 (1869).

[4] We are compelled to inquire as to the effect which the general appearance of the United States District Attorney in this suit had upon the rights of the government of the United States. A general appearance cannot confer jurisdiction over the subject-matter of a suit for it is a fundamental principle of the law that consent of parties

cannot give to a court jurisdiction of the subject-matter, and it consequently follows that a general or voluntary appearance does not give jurisdiction of the subject matter. *Creighton v. Kerr*, 20 Wall. 8, 22 L. Ed. 309; *Wheelock v. Lee*, 74 N. Y. 495; *Osgood v. Thurston*, 23 Pick. (Mass.) 110; *200,000 Feet Logs v. Sias*, 43 Mich. 356, 5 N. W. 414; *State v. Manitowoc*, 92 Wis. 546, 66 N. W. 702.

But a general or voluntary appearance is regarded as equivalent to service of process. *Hill v. Mendenhall*, 21 Wall. 453, 22 L. Ed. 616; *Reed v. Chilson*, 142 N. Y. 152, 36 N. E. 884; *North Hudson County R. Co. v. Flanagan*, 57 N. J. Law, 696, 32 Atl. 216; *Chicago, etc., R. Co. v. Hitchcock County*, 60 Neb. 722, 84 N. W. 97. A general appearance, therefore, under ordinary conditions is held to confer jurisdiction of the person on the court; the defendant being estopped to object for want of such jurisdiction. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931; *Rothschild v. Knight*, 176 Mass. 48, 57 N. E. 337; *Matter of McLean*, 138 N. Y. 158, 33 N. E. 821, 20 L. R. A. 389; *Fowler v. Bishop*, 32 Conn. 199. And in the federal courts a general appearance ordinarily waives the objection that suit is brought in the wrong district—as where the defendant is sued in a district other than where he resides or is found. *St. Louis, etc., R. Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659; *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093; *Kelsey v. Pennsylvania R. Co.*, 14 Blatchf. 89, Fed. Cas. No. 7,679.

In suits brought by an alien against a citizen but in a district other than that “of which he is an inhabitant,” it has been held that if the defendant enters a general appearance and pleads to the merits he thereby waives his right subsequently to object that he has been sued in the wrong district. *Betzoldt v. American Insurance Company (C. C.)* 47 Fed. 705; *Iowa Lillooet Gold Mining Co. v. Bliss (C. C.)* 144 Fed. 446. These cases proceed upon the theory that the requirement that the suit shall be brought in the district of residence is not a jurisdictional requirement but a personal privilege or exemption.

In *Barrow Steamship Co. v. Kane* (1898) 170 U. S. 100, 112, 18 Sup. Ct. 526, 530 (42 L. Ed. 964), the Supreme Court in speaking of the act of Congress defining the jurisdiction of the Circuit Courts of the United States said:

“And, as has been adjudged by this court, the subsequent provisions of the act, as to the district in which suits must be brought, have no application to a suit against an alien or a foreign corporation; but such a person or corporation may be sued by a citizen of a state of the Union in any district in which valid service can be made upon the defendant.”

In *Re Louisville Underwriters*, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. Ed. 991 (1890), the court made a like ruling in an admiralty suit. In *Re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211 (1893), a like ruling was made in a suit for an infringement of a patent. In the latter case the court alluding to the provision above referred to said:

“The words of that provision, as it now stands upon the statute book, are that ‘no civil suit shall be brought before either of said courts against any

person by any original process or proceeding in any other district than that whereof he is an inhabitant.' These words evidently look to those persons, and those persons only, who are inhabitants of some district within the United States. Their object is to distribute among the particular districts the general jurisdiction fully and clearly granted in the earlier part of the same section; and not to wholly annul or defeat that jurisdiction over any case comprehended in the grant. To construe the provision as applicable to all suits between a citizen and an alien would leave the courts of the United States open to aliens against citizens, and close them to citizens against aliens. Such a construction is not required by the language of the provision, and would be inconsistent with the general intent of the section as a whole."

It seems to us clear that the general intent of the Tucker Act is to open the courts of the United States to suits against the government as respects the claims specified in that act and that the intention was that they should be open to aliens as well as to citizens. And it may be that the provision which requires suits to be brought in the district where the plaintiff resides is applicable only to aliens and citizens residing in the United States and that persons residing outside the United States may bring suit in any district. But we do not find it necessary to express any opinion upon that question. In our opinion if the provision which requires the plaintiff to bring suit in the district in which he resides is applicable to nonresident aliens and to citizens residing abroad, nevertheless the requirement is a personal privilege which the law officers of the government may waive and in this case did waive by putting in a general appearance. In *Farrar & Brown v. United States*, 3 Pet. 459, 7 L. Ed. 741, Chief Justice Marshall held that the Attorney General of the United States by a general appearance cured any defect in the service of process on the United States, and that the general rule that such an appearance cured a defect in process was applicable to the United States as well as to any private litigant.

Having reached the conclusion that the court below had jurisdiction under the circumstances to hear and determine the issue we pass to the consideration of the government's contention that the court below erred in the conclusion it reached upon the merits.

The petition was filed November 5, 1906, four years after the steamship company had performed the service for which it now seeks to recover. The delay in its suit is accounted for in part by the fact that there were long negotiations with the government looking to a settlement of the claim. During these negotiations the government asked to have the original papers in the case filed with it which was done. The officers of the government afterwards, it is claimed by the petitioner, refused to return these papers to the petitioner, and in consequence of this arbitrary attitude of the government's officials it was made exceedingly difficult to get sufficient facts together to make it possible to draw up the petition. We are quite unable to understand what justification there can possibly be for what seems to us exceedingly reprehensible conduct. When the government decided to refuse to pay the claim the papers upon which the claim was based and which had been turned over to it at its request by the claimant ought to have been promptly returned and not arbitrarily withheld to the serious embarrassment of the petitioner.

The agreement entered into by the petitioner and the government was for the transportation of merchandise from New York to Manila; the government agreeing to pay freight on delivery at Manila in the sum of \$5,985.21. The amount actually paid was \$4,786.99. The balance was withheld on the ground that a large quantity of the merchandise was seriously damaged as the result of sea water which had come in contact with it during the voyage. This was due, the government claimed, to the failure of the petitioner to exercise due diligence to make the steamship in all respects seaworthy and properly equipped and supplied prior to her departure from New York.

The court below in its findings of fact found that:

The owners of the vessel "had exercised due diligence to make her in all respects seaworthy and properly manned, equipped, and supplied and that she was in fact seaworthy and in all respects properly manned, equipped, and supplied when the cargo referred to was loaded on board of her and when she sailed from the port of New York on her voyage aforesaid. The defendant's cargo was properly stowed and dunnaged."

The court also found as a fact that during the voyage the vessel encountered a hurricane of great severity during which she shipped heavy seas fore and aft, and that the storm caused considerable damage about the decks, "and also strained, started or bent two deadlights or ports in the way of No. 3 hatch, so that sea water was admitted into the cargo apartments through the deadlights or ports which had thus been strained. The sea water so admitted caused damage to the defendant's cargo."

It was also found:

"That the cargo in respect of which the government claims damage in this case was stowed across the ship at No. 3 hatch and that the damage suffered by the cargo was caused by sea water admitted to the vessel through the strained ports or deadlights hereinabove referred to and was a damage arising from the dangers of the seas."

In its conclusions of law the court found that the provisions of the Harter Act were applicable. It also found:

"That the petitioner and the steamship Shimosa performed all the duties and obligations laid on the said steamship or the petitioner in respect of the transportation, loading, stowage, custody, care, and delivery of the defendant's cargo."

The government's contention in this court is that these findings of fact and of law were erroneous.

The evidence satisfies us that the vessel was in all respects seaworthy when the voyage commenced. She was a new ship and started on her first voyage in January, 1902, being rated at Lloyd's 100 A-1, which is the highest class in Lloyd's Registry. She was carefully inspected and found all right before she left New York. The government introduced no testimony on the subject of the condition of the ship when she started on her voyage, and the testimony of the petitioner is unchallenged that she was at that time seaworthy and that her ports were in proper condition and were properly closed and were water tight. A due and proper inspection had been made and everything was found to be right.

[6] The decisions under the Harter Act have uniformly held that on evidence of careful inspection of a vessel before the voyage commenced, by which her seaworthiness is shown, the fact that she may have taken in water during a heavy storm at sea is no proof of unseaworthiness, but that on proper proof of seaworthiness on sailing she is entitled to the exoneration provided for by the third section of the act. *The Wildcroft*, 201 U. S. 378, 26 Sup. Ct. 467, 50 L. Ed. 794 (1905); *The Silvia*, 171 U. S. 462, 466, 19 Sup. Ct. 7, 43 L. Ed. 241 (1898); *The F. & T. Lupton* (D. C.) 182 Fed. 144 (1910); *Bradley v. Lehigh Valley R. Co.*, 153 Fed. 350, 82 C. C. A. 426 (1907); *American Sugar Refining Co. v. Rickinson Sons & Co.*, 124 Fed. 188, 59 C. C. A. 604 (1903); *The Hyades* (D. C.) 118 Fed. 85 (1902); *The Tjomo* (D. C.) 115 Fed. 919 (1902); *The British King* (D. C.) 89 Fed. 872 (1898).

The vessel had been inspected by the Board of Underwriters at New York when the loading was completed and a certificate was given by the surveyors. The evidence showed that the cargo was stowed in the usual and customary manner and was properly dunnaged. None of the cargo in hatches Nos. 1, 2, and 4 was damaged. But some of the government's cargo in hatch No. 3 and some of the cargo in hatch No. 5 were injured by sea water.

The chief officer of the vessel was asked what caused the damage to the cargo, and answered:

"The ports being strained through violent lurching and straining of the ship in the heavy weather."

He testified that when the ship reached Manila:

"We found after the cargo was discharged, and we went to look for the cause of the water, we found the ports strained, strained out of shape and the water had got in that way."

He also testified that, although his experience at sea had extended over 23 or 24 years, he did not know he had ever encountered a worse storm than the one encountered on this voyage.

[7] But the government also contends that the petitioner is not relieved by the provisions of the Harter Act for the reason that the cargo was not properly cared for during the voyage. It seems that the ship on its way to Manila reached Algiers on November 12th which was subsequent to the storm which the vessel had encountered, and that she stopped there about 36 hours taking on coal. It was discovered after the storm was over that water had entered No. 2 bilge, and also No. 4 bilge and the pumps were at once set to work and the water was pumped out. It was not known that any water had drained into No. 3 hatch where the government cargo was stowed. When the ship reached Manila it was discovered that the storm had strained some of the hatches, and among others hatch No. 3, and that sea water had entered and damaged the government's merchandise. The government complains because while the ship was at Algiers no inspection was made to discover whether water had entered hatch No. 3, or to determine at what point the water found in the bilges had entered. But it seems to us that, the vessel being seaworthy when she began her voy-

age, the failure to make the inspection at an intermediate port, if such an inspection ought to have been made, must be regarded as a fault in management of the ship under the third section of the Harter Act. *The Guadeloupe* (D. C.) 92 Fed. 670 (1899). That act provides that if the owner of any vessel transporting merchandise to or from any port in the United States exercises due diligence to make the vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner, agent, or charterer shall become or be held responsible for damage or loss resulting from faults or errors of navigation or in the management of said vessel. The act was "intended to relieve the shipowner who has done all that he can do to start off a well-fitted expedition, from liability for damages caused by faults or errors of his shipmen after his ship has gone below the horizon and away from his personal observation." *Benedict's Admiralty*, § 229. The master of the vessel testified that those in command of the ship had no knowledge that some of the ports had been leaking until they reached Manila, and that as soon as they reached Hong Kong they had a thorough examination made by the surveyors. He was asked: "But you made no other effort, prior to getting to Hong Kong, to see what had caused the damage?"

He answered:

"No, there was no need to. We found no water in our timbers and there was no cargo damaged from it."

We are entirely satisfied that the injury to the merchandise belonging to the government was a damage arising from the dangers of the sea and that the petitioner and the steamship performed all the duties and obligations resting upon them in respect of the transportation, loading, stowage, custody, care, and delivery of the defendant's cargo.

Decree affirmed.

ACTIESELSKABET INGRID et al. v. CENTRAL R. CO. OF NEW
JERSEY et al.†

(Circuit Court of Appeals, Second Circuit. July 2, 1914.)

No. 168.

1. EXPLOSIVES (§ 7*)—INJURIES FROM ACCIDENTAL EXPLOSIONS—LIABILITY.

One of the respondents, a manufacturer of explosives, shipped dynamite in car loads on the road of its correspondent railroad company to be loaded on vessels for export. The railroad company ran the cars out to the end of its pier, where they were to be unloaded by another respondent, employed by the shipper, into a lighter. While one of the cars was being so unloaded, there was an explosion of the dynamite therein, which caused loss of life and large injury to property, including the wrecking of libellant's vessel, which was lying on the other side of the pier. The dynamite was made, packed, and loaded in the car by experienced men, and the respondent, who was unloading it, had handled such explosives in a similar manner for 25 years without accident, and kept the lighter for such use exclusively. The cause of the explosion was unknown, nor was it known whether the first explosion was in the car or the lighter.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† For opinion on petition for rehearing, see 216 Fed. 991, 132 C. C. A. 665.

There was no evidence of negligence on the part of either respondent or of any of their employés. *Held*, that neither of respondents was liable for the loss of libellant's vessel.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 3; Dec. Dig. § 7.*]

2. EXPLOSIVES (§ 7*)—INJURIES FROM ACCIDENTAL EXPLOSION—LOADING DYNAMITE FROM PIER—NUISANCE.

The transfer of the dynamite from the pier did not create a nuisance which would render the parties liable, regardless of negligence, where it was shown that the place was the most remote of any that could be used, and was a mile from the nearest property or street, nor did the fact that the car was kept there for six days because of a delay before the dynamite could be received on board the ship constitute a storage, as distinguished from a part of the transportation.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 3; Dec. Dig. § 7.*]

3. EXPLOSIVES (§ 7*)—INJURIES FROM ACCIDENTAL EXPLOSION—LIABILITY—RES IPSA LOQUITUR.

Neither of the respondents could be held liable under the doctrine of res ipsa loquitur, since, admitting its applicability, there was no evidence to show which, if either, was chargeable with the negligence presumed.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 3; Dec. Dig. § 7.*]

4. NEGLIGENCE (§ 63*)—NATURE AND ELEMENTS—INCIDENTAL INJURY FROM CONDUCT OF LAWFUL BUSINESS.

One engaged in a lawful business, which does not create a nuisance, is not liable for an incidental injury to another, resulting therefrom, without proof of negligence or fault on his part.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 80, 81; Dec. Dig. § 63.*]

5. EXPLOSIVES (§ 7*)—INJURIES FROM ACCIDENTAL EXPLOSION—LIABILITY OF CARRIER.

Dynamite has become a necessity in the industries, and the construction of works of public improvement, and is a legitimate subject of commerce which a common carrier is bound to accept and transport, and, so far as the carrier is concerned, such injury as necessarily results to others from the performance of its duty, without negligence, must be borne by them as an unavoidable incident of the lawful conduct of legitimate business.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 3; Dec. Dig. § 7.*]

6. COMMERCE (§ 61*)—REGULATIONS GOVERNING SHIPMENT—INTERSTATE COMMERCE—EXPLOSIVES.

A shipment of explosives in interstate or foreign commerce while in course of transportation is subject exclusively to the regulations prescribed by the Interstate Commerce Commission, and state or local laws have no application to it.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 81-84, 89; Dec. Dig. § 61.*]

7. EXPLOSIVES (§ 7*)—INJURY TO VESSEL—LIABILITY OF WHARFINGER.

A railroad company, which directed a connecting vessel to discharge at one of its piers, where she was destroyed by an explosion of dynamite being unloaded from a car on such pier, *held* not liable because of its failure to notify the master of the presence of the dynamite, which was a commodity commonly handled at such places and usually with safety, and where also the cars were marked with the regular danger placards.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 3; Dec. Dig. § 7.*]

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree in admiralty of the District Court of the United States for the Southern District of New York, dismissing a libel.

For opinion below, see 195 Fed. 596.

Convers & Kirlin, of New York City (J. Parker Kirlin, John M. Woolsey, and Robert S. Erskine, all of New York City, of counsel), for appellants.

James T. Kilbreth, of New York City (Charles E. Miller, of New York City, of counsel), for appellee Central R. Co. of New Jersey.

William H. Button, of New York City (J. P. Laffey, of Wilmington, Del., of counsel), for appellee E. I. Du Pont de Nemours Powder Co.

Charles J. Kelaher, of New York City, for appellee James Healing.

Before COXE and ROGERS, Circuit Judges, and MAYER, District Judge.

ROGERS, Circuit Judge. [1] This libel was filed by the owner and master of the ship Ingrid to recover the sum of \$30,162.65 damages caused by the explosion of a car load of dynamite, which occurred February 1, 1911, at pier 7 of the Central Railroad Company of New Jersey in Jersey City. The Ingrid had arrived from Buenos Ayres with a cargo of bones which was to be unloaded into the cars of the Central Railroad Company of New Jersey, hereinafter referred to as the railroad company, and was moored to the pier under the orders of that company, and for its own convenience, and was lying there discharging its cargo when the explosion took place. The Ingrid was a Norwegian sailing vessel, having a net tonnage of 1,217 tons and a rating in Lloyd's Register of "A1 (Star)." She was worth \$25,000. The explosion completely wrecked the vessel. A survey was made of her and the surveyors recommended her sale as a wreck. The price paid for her at the auction was \$4,375, which was practically the value of the scrap iron and of the supplies which remained in her after the explosion. The surveyors had reported it would cost \$36,000 to put her in a state of repair, and that would have been more than she would have been worth.

The dynamite which caused the explosion had been shipped by the E. I. Du Pont de Nemours Powder Company, hereinafter called the powder company, and was consigned to itself at Jersey City and was shipped from Kenville, where the powder company had one of its plants, in the state of New Jersey, being transported in three cars which were hauled by the railroad company. These cars contained 1,493 boxes of dynamite in all; each box weighing at least 25 pounds. The dynamite which exploded was in car No. 91,442. That car contained 670 cases of dynamite weighing 38,975 pounds. The powder company had contracted with James Healing to remove the boxes of dynamite from car No. 91,442 to a steam lighter Katherine W., which he owned. The railroad company, the powder company, and Healing were all made respondents.

The Katherine W. was brought to pier 7 and there moored. The pier was about 1,000 feet long and 60 feet wide and had four tracks on it. Car 91,442 stood on one of the tracks and opposite the Katherine W. The captain and crew of that vessel were engaged in unloading the dynamite from the car to the boat by sliding the cases down a plank which ran from the door of the car to the forward deck of the boat at an incline of about three feet; the cases being passed down one at a time. During the progress of the unloading, the explosion occurred. Some of the witnesses testified they heard only one explosion, but others testified they heard two in rapid succession. The Katherine W. was completely demolished. Car No. 91,442 was also blown to pieces. The car standing next to No. 91,442 was lifted off the track and deposited upon an adjoining track, and a second car was blown off the pier and into the water. The Whistler, a boat also alongside the pier and near the Katherine W., was sunk, and everybody on board was killed. The pier itself was very badly injured, and the outer end of the pier and its crib were demolished. The shock of the explosion was felt in the office buildings of lower Manhattan.

It is matter of common knowledge that dynamite has been generally used and transported as an article of commerce for more than a quarter of a century. The evidence shows that during the year in which this explosion occurred upwards of 260,000,000 pounds of high explosives were manufactured and consumed in the United States. They are transported by the common carriers generally in car load lots. During the year of this explosion, if the high explosives manufactured that year be reduced to car load lots of 30,000 pounds each, there was an average of more than 33 car loads per day moving over the highways of commerce in this country alone. These high explosives have become a real commercial necessity, and they serve important public interests. The great industries of the country are in a high degree dependent upon the use of these explosives for their successful promotion. It is very important, if not absolutely essential, to employ them in the construction of the great tunnels, subways, aqueducts, and canals which are so vital to the commercial development and welfare of the country. Congress has recognized the necessity for their transportation as legitimate articles of commerce by providing proper regulations therefor.

The testimony showed that the dynamite shipped was what was known as 75 per cent. gelatine dynamite; that it was manufactured in the proper way, and packed in boxes in the usual manner in cartons with proper parchment paper in the boxes and sawdust in the bottom; that no instance had been reported where gelatine dynamite had ever leaked through the box; that gelatine dynamite is less sensitive to shock than nitroglycerine dynamite; that all dynamite is exploded by concussion; that it may be exploded by fire, but is more readily exploded by concussion than by spark; that powder is exploded by a spark, and that on the morning of the explosion, and prior to putting on board the dynamite, there had been placed on the Katherine W. 100 barrels of black blasting powder; that it would require great concussion to set off gelatine dynamite.

The testimony also showed that the Katherine W. was used exclusively to transport high explosives around New York; ships not being allowed to take on board explosives at any of the docks in Manhattan Island and city of New York. The transfer of explosives to ships for export had to be made at Gravesend Bay. The mode employed to transfer the dynamite from the car to the Katherine W. was the usual mode by which such transfers were made. The owner of the boat, the respondent Healing, had been engaged in the transportation of explosives for 25 years and had three boats engaged in the work at the time of the explosion. The men employed on the boat were experienced men and accustomed to handling high explosives. And Healing testified that during the whole 25 years he had been engaged he had never before had an explosion. Healing hired and paid and controlled his men, and they were subject to his exclusive orders. They were frequently assisted in loading and unloading by the men connected with the powder company or with the boats of the company.

The station and freight agent at Kenville, who had been employed there for 25 years, and during that time had been receiving shipments of explosives, testified that he had never had an accident there; that more than 15,000,000 pounds of dynamite were shipped from that station a year; that from one to ten cars a day were loaded there with dynamite each day in the week except Sundays and Saturdays; that 3,000 boxes of dynamite on the average were shipped a day; that the cars were loaded by the men belonging to the powder company; that car 91,442 was loaded in exactly the same way the cars were usually loaded; that the car after it was loaded was examined by the inspectors and found all right; that the boxes shipped on the car 91,442 were marked "High explosives Dangerous" and "This side up." Two other cars were loaded at the same time, one containing 783 boxes of dynamite and the other 40 cases. It was conceded the cars were properly loaded and placarded.

The explosion occurred a short time after the work of transferring the dynamite from the car to the lighter commenced. All the men who had been at work in the car, alongside the plank or upon the lighter, were killed. A large part of the dynamite was in the car and in possession of the railroad company at the time of the explosion. Some portion had been removed and was alleged to have been in the possession of the powder company through the medium of its agent Healing, who had been employed by it to load it upon the Katherine W.

There is no evidence which shows just what caused the dynamite to explode.

[4] Upon this state of facts the libelants contend that the explosion of the dynamite, while in the custody and possession of the respondents, gives rise to a presumption that the accident was due to their fault, and we are asked to decide the case upon the principle of liability announced in the case of *Rylands v. Fletcher*, L. R. 330, 339 (1868). It was decided in that case that, if the owner of land brings upon his land anything which would not naturally come upon it and which is in itself dangerous and may become mischievous if not kept under proper control, he will be liable in damages for any mischief thereby occasioned,

even though he may have acted without negligence. Lord Cranworth stated the principle as follows:

"If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbors, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage."

The doctrine of *Rylands v. Fletcher* has been the subject of considerable discussion in the state courts, some of which has been favorable and some unfavorable. The courts in Massachusetts have approved it and followed it in a number of cases. *Wilson v. City of New Bedford*, 108 Mass. 261, 11 Am. Rep. 352 (1871); *Shipley v. Fifty Associates*, 106 Mass. 194, 8 Am. Rep. 318 (1870); *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224 (1878). The Supreme Court of Ohio in *Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co.*, 60 Ohio St. 560, 54 N. E. 528, 45 L. R. A. 658, 71 Am. St. Rep. 740 (1899), followed it, applying it in an action for damages caused by the explosion of nitroglycerine stored in a magazine.

But the doctrine of *Rylands v. Fletcher* seems to have been, in this country, quite generally disapproved. The New York Court of Appeals in 1873 in *Losee v. Buchanan*, 51 N. Y. 476, 486, 10 Am. Rep. 638 declined to follow it, and asserted that the English doctrine was "in direct conflict with the law as settled in this country." In this country it has been held in numerous cases that if one builds a dam upon his own premises, and thus holds back and accumulates the water for his benefit, or if he brings water upon his premises into a reservoir, and the dam or the banks of the reservoir give way, and the lands of his neighbor are flooded, he is not liable for damage without proof of negligence or fault upon his part. And if one builds a fire upon his own premises, and it escapes upon his neighbor's premises, and damage results, the one who built the fire is not, under a number of decisions in the state courts, liable without proof of negligence.

In *Brown v. Collins*, 53 N. H. 442, 16 Am. Rep. 372 (1873), the New Hampshire court considered at length *Rylands v. Fletcher*, and traced the origin of the doctrine announced in that case to principles introduced in England at an immature stage of English jurisprudence and an undeveloped state of agriculture, manufacture, and commerce. The court then said:

"At all events, whatever may be said of the origin of those rules, to extend them, as they were extended in *Rylands v. Fletcher*, seems to us contrary to the analogies and the general principles of the common law, as now established. To extend them to the present case would be contrary to American authority, as well as to our understanding of legal principles."

In *Marshall v. Welwood*, 38 N. J. Law, 339, 20 Am. Rep. 394 (1876), the Supreme Court of New Jersey in an opinion by Chief Justice Beasley considers at some length the English doctrine and says that it "is clearly opposed to the course which judicial opinion has taken in this country." The court held the doctrine not applicable to the facts of that case and decided that the owner of a steam boiler which he had in use on his own property was not responsible, in the absence of negligence for the damage done by its bursting. In 1906 the doctrine

was again repudiated in New Jersey by the equity court, Vice Chancellor Garrison saying that the maintenance of the doctrine in its vigor "would have practically stopped all progress." *O'Hara v. Nelson*, 71 N. J. Eq. 161, 168, 63 Atl. 836.

The Supreme Court of Pennsylvania in *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 150, 6 Atl. 453, 460, 57 Am. St. Rep. 445 (1886), said:

"The doctrine declared in *Rylands v. Fletcher*, regarded as a general statement of the law, is perhaps not open to criticism in England, but it is subject to many and obvious exceptions there and has not been generally received in this country. A rule which casts upon an innocent person the responsibility of an insurer is a hard one at the best, and will not be generally applied unless required by some public policy, or the contract of the parties."

The general and fundamental rule is that, in order to sustain an action for a tort, the damage complained of must come from a wrongful act. In *Addison on Torts*, vol. 1, p. 3, the law is stated as follows:

"A man may, however, sustain grievous damage at the hands of another, and yet if it be the result of inevitable accident, or a lawful act, done in a lawful manner without any carelessness or negligence, there is no legal injury and no tort giving rise to an action for damages."

We are unable to discover that either the railroad company or the powder company or the contractor Healing, or any of the employes of either, committed any wrongful act which caused this explosion.

[5] At the time of the explosion the dynamite was in the course of transportation. A common carrier must transport freight of this character over its line, and the doctrine of *Rylands v. Fletcher*, if applicable at all, cannot be applied to cases of this nature. We think there can be no doubt, so far as a common carrier is concerned, that such danger as necessarily results to others from the performance of its duty, without negligence, must be borne by them as an unavoidable incident of the lawful performance of legitimate business. Indeed, in *Rylands v. Fletcher* the opinion of Blackburn, Judge in the Court of Exchequer Chamber, concedes this, for he says:

"Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and, that being so, those who go on the highway or have their property adjacent to it may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who by the license of the owner pass near to warehouses where goods are being raised or lowered certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident."

It certainly would be an extraordinary doctrine for courts of justice to promulgate to say that a common carrier is under legal obligation to transport dynamite and is an insurer against any damage which may result in the course of transportation, even though it has been guilty of no negligence which occasioned the explosion which caused the injury. It is impossible to find any adequate reason for such a principle.

[2] But it was urged upon us in the argument that the facts in the case clearly establish the existence of a nuisance. Car 91,442 had been forwarded on January 24th, and on January 25th the powder company

received notice of its arrival. The next day the powder company removed 200 cases from the car, and placed them on a storage barge which belonged to it, and anchored it down the bay, in accordance with a practice it had followed for ten years. Nothing was done on January 27th to unload the balance of the car. On January 28th there were 170 cases more removed from the car for an export shipment. The remaining 300 cases were to be placed on board a steamer which it had been expected would sail on January 25th, but which was delayed in its sailing. Under the established rules, the explosives could not be placed on board the steamer until her other cargo had been loaded. Then the explosives had to be taken to her on a lighter and put on board at Gravesend Bay. As soon as the steamer was ready to receive the cargo, the unloading of the dynamite remaining in the car commenced.

[3] The mere fact of the accident does not prove the libelant's case under the doctrine of *res ipsa loquitur*. To make that doctrine applicable, it is necessary that the thing which exploded should have been at the time in the exclusive control of the defendant, who is to be made liable. If a presumption of fault arises from the mere fact of the explosion, whose fault is indicated? It is impossible to say whether the dynamite in the car exploded first and while still in the possession of the railroad company, or whether the dynamite in the boat first exploded and while it was in the possession of Healing or of the powder company. In *Wolf v. American Tract Society*, 164 N. Y. 30, 58 N. E. 31, 51 L. R. A. 241 (1900), the evidence showed that the injury had been caused by a brick which fell from an upper story of a building in course of construction. There was no proof as to how the brick came to fall. There were 19 different contractors engaged in operations on the building at the time. The plaintiff brought his suit against the owner and two of the leading contractors. The court said:

"We agree with the court below that this is a case where the maxim *res ipsa loquitur* applies. There is a presumption that the plaintiff's injury was the result of negligence. * * * But that presumption did not complete the proof which it was incumbent upon the plaintiff to make before the case could be submitted to the jury. In a case like this, where the building in process of construction is in charge of numerous contractors and their workmen, each independent of the other, and none of them subject to the control or direction of the other, some proof must be given to enable the jury to point out or identify the author of the wrong."

In the case at bar the libelant claims that the doctrine of *res ipsa loquitur* applies to all of the respondents and imposed upon each the burden of proving absence of negligence. To make the doctrine apply to each, the dynamite which exploded must have been at the time under the control of all, which manifestly was not the fact. Moreover, to make the doctrine apply to any one of the respondents, it would be necessary that the accident should identify the wrongdoer, and under the facts of this case the wrongdoer is not identified.

In *Hardie v. Boland Co.*, 205 N. Y. 336, 98 N. E. 661 (1912), an action was brought against a contractor for the death of the plaintiff's intestate caused by the collapse of a chimney he was engaged in pointing up; he having been thrown from the scaffold upon which he was

standing and killed. The contractor was erecting the chimney in accordance with plans made by architects who were employed by the owner of the premises. The court held the doctrine of *res ipsa loquitur* had no application, since the accident did not identify the wrongdoer.

"There were two actors, the architects and the contractor, and the accident may have been due wholly to the negligence of the former. In such a case *res ipsa loquitur* is inapplicable (*Loudoun v. Eighth Avenue R. R. Co.*, 162 N. Y. 380, 385 [56 N. E. 988]), for the accident does not identify the wrongdoer (*Wolf v. American Tract Soc.*, 164 N. Y. 30 [58 N. E. 31, 51 L. R. A. 241]). If causes other than the negligence of the defendant might have produced the accident, the plaintiffs were bound to exclude the operation of such causes by a fair preponderance of the evidence. *Wadsworth v. Boston El. Ry. Co.*, 182 Mass. 572 [66 N. E. 421]. When either one of two persons, wholly independent of each other, may be responsible for an injury, the case is one for affirmative proof and not for presumption. *Harrison v. Sutter Street Ry. Co.*, 134 Cal. 549 [66 Pac. 787, 55 L. R. A. 608]."

According to the libellant's own theory as presented upon the argument, the accident might have been caused by the negligence of either the railroad company, the powder company, or Healing. It is also true that the explosion may have been caused by the act of outsiders entirely unconnected with any of the respondents. If the explosion itself is evidence of negligence, such negligence may have been that of the powder company in the manufacture of the dynamite or the packing of it in the boxes; or it may have been the negligence of the railroad company in improperly handling the car; or it may have been the negligence of Healing in carelessly transferring the boxes from the car into the lighter; or it may have been the negligence of unauthorized persons who may have interfered with some of these operations. And any one of these theories is almost as probable as another. The cause of the explosion is a mystery and cannot be accounted for.

We are asked to hold the respondents responsible for the damages upon the theory that, even though they were not guilty of negligence, they were guilty of a nuisance in keeping on pier 7 the dynamite which caused the damage. It is true that the common-law liability for a nuisance is not dependent on any theory of negligence. In an action for the creation or maintenance of a nuisance, a recovery cannot be defeated by showing that there is no negligence as the question of negligence is not involved. In 29 Cyc. 1172, it is said:

"The manufacture, storing, or keeping of explosive substances in large quantities in the vicinity of dwelling houses or places of business is ordinarily regarded as a nuisance, whether such business is so or not, being, however, dependent upon the location, the quantity, and the surrounding circumstances."

And the courts have held that no one has a right to erect or maintain a nuisance to the injury of his neighbors, even in the pursuit of a lawful trade. *Rodenhauser v. Craven*, 141 Pa. 546, 21 Atl. 774, 23 Am. St. Rep. 306 (1891); *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. Rep. 1 (1886); *Baxendale v. McMurray*, L. R. 2 Ch. 790 (1867). All this we are not disposed to question, but we do not see that the doctrine involved has any application to the facts of the present suit. The inspector of combustibles who had general supervision of the storage of explosives in Jersey City was asked:

"Q. Are you familiar with the different streets and places, the lands and waters within the jurisdiction of Jersey City? A. Yes. Q. You have been all over them time and again? A. Yes. Q. Is there any storehouse or magazine for the storage of explosives maintained in the city of Jersey City? A. No. Q. In your opinion, was the end of pier 7 the proper place for the delivery of explosives from railroad cars to vessels? A. Yes, that it was a proper and the best place around the Central Railroad. Q. Why do you say it was the best place around the Central Railroad? A. Because it was about the furthest point away from any street or any property. Q. What is the nearest street to pier 7? A. Jersey avenue. Q. How far away is Jersey avenue roughly from this pier? A. Close on to about a mile, I believe. Q. If you were asked to name a location for cars containing dynamite or high explosives, railroad cars which had been received over the rails of the Central Railroad of New Jersey, would you consider the end of pier 7 a location which the public interests would demand? A. I would consider that about the best place there is over there."

This pier 7 was used for the shipment of explosives, and the testimony shows that the locality was a suitable one for the purpose. We cannot think that under the circumstances it was an improper place on which to deliver the dynamite. Car load lots of dynamite were always sent to pier 7 to be discharged for the reason that it was more remote than any of the other piers from the general traffic in the yards. So far as the railroad company could do so, it isolated pier 7 from all general traffic. The claim was made that the railroad companies should be required to obtain piers in a more isolated part of the shore of the harbor. In view of the testimony already quoted, to the effect that this location was a mile away from any street, we cannot say that this was an improper place in which to transfer the dynamite from the cars to the lighter.

Then it has been urged upon us that, as the 300 cases of dynamite were allowed to remain in the car for six days, they are to be regarded as having been practically in storage, and that pier 7 was an improper place in which to store so large an amount of explosives. But where should they have been removed to? There was no place in Jersey City for the purpose. And we agree with the court below in its opinion that the dynamite was not being held in storage but was still in course of transportation. The evidence established the fact that, in case of goods intended to be transferred to steamers for shipment to foreign countries, the railroad company usually allowed ten days, free of demurrage, for effecting the transfer, while in the case of goods not intended for export they had to be removed within 48 hours. This difference is due to the fact that explosives cannot be placed down in the hold where the danger would be great and so are taken on board after all other cargo is stowed. This dynamite was to be transferred to the Invernica for transportation to Montevideo. The original intention was that the vessel would sail on January 25th but her departure had been delayed from day to day for reasons not connected with the respondents. Until her cargo was loaded and she was ready to sail, the dynamite could not be placed on board because of the government regulations making it necessary to load the explosives at Gravesend Bay. Under all the circumstances, neither the railroad company nor the powder company nor the respondent Healing was at fault in per-

mitting the dynamite to remain in the car for the six days which elapsed between the arrival of the car and its unloading.

[6] It is claimed that the respondent failed to comply with the requirements of the laws of the state of New Jersey and with the municipal regulations of Jersey City in respect to the storage of explosives. It is sufficient to say that the dynamite which exploded was addressed to Carlisle, Crocker & Co., Montevideo. It was a foreign shipment and as such was subject exclusively to the act of Congress approved March 4, 1909 (35 Stat. 1135, c. 321 [U. S. Comp. St. Supp. 1911, p. 1660]). That act (section 233) authorized the Interstate Commerce Commission to formulate regulations for the safe transportation of explosives which should be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives by land. The Interstate Commerce Commission accordingly formulated and issued regulations governing the transportation of explosives in interstate and foreign commerce. We have no doubt that the dynamite in question was subject exclusively to the regulations of the Interstate Commerce Commission. When Congress has legislated upon a subject within its constitutional control, and has manifested its intention to deal therewith in full, the authority of local jurisdiction is necessarily excluded. See *Northern Pacific Railway Co. v. State of Washington*, 222 U. S. 370, 378, 32 Sup. Ct. 160, 56 L. Ed. 237.

[7] The captain of the *Ingrid* had received written instructions on his arrival to place his vessel on the south side of pier 6, and the vessel was so berthed on January 10th, and on January 12th she commenced to discharge her cargo into cars of the railroad company which were on the dock alongside of the ship. On January 13th the captain was informed by a wharfinger in charge of the piers that the vessel would have to shift its berth to the next pier as the space at pier No. 6 was needed for other ships. To this the captain at first replied, "Well, you have put us in a berth for discharging, and I have a right to stay here." He finally said that he had no objection to the ship being moved, but added, "You have to move the ship yourself on your own risk." To this the wharfinger answered, "Oh, yes, we will do that." The captain then instructed the mate that if any one from the railroad company should come to move the ship he could do so, but that "he should tell the man that came with the tug it was on their risk that he did so." The afternoon of that day the ship was moved around to pier 7 by the tugs of the railroad company without expense to the *Ingrid*. Prior to the explosion no one on board the *Ingrid* had actual knowledge that any of the cars on pier 7 contained explosives. The evidence shows, however, as we have heretofore stated, that the cars containing dynamite were at all times while on pier 7 placarded with the regular danger placards. The rule is well settled that if a wharfinger knows of the existence of a danger to ships coming alongside his wharf, and permits a vessel to come alongside in ignorance of that danger or obstruction, and without any warning of it, he is liable for any damage to the ship resulting therefrom. The rule was stated by Chief Justice Fuller in *Smith v. Burnett*, 173 U. S. 430, 433, 19 Sup. Ct. 442, 443, 43 L. Ed. 756 (1899), as follows:

"Although a wharfinger does not guarantee the safety of vessels coming to his wharves, he is bound to exercise reasonable diligence in ascertaining the condition of the berths thereat, and if there is any dangerous obstruction to remove it, or to give due notice of its existence to vessels about to use the berths."

This doctrine is clearly applicable to cases where some obstruction concealed and hidden under the water makes it dangerous to approach a wharf or where the wharf is safe at high water but becomes unsafe for vessels of a certain draft at ebb of the tide, from the uneven condition of the bed of the stream or the presence of a concealed rock. But, as the wharfinger does not guarantee the safety of vessels which come to his wharf, we do not think that the facts in this case are governed by the principle now under consideration. We cannot say that the railroad company was bound to give actual notice to every vessel berthed at the wharf that cars with dynamite were on the pier. It is true that dynamite is a dangerous substance because it may be exploded, and, if exploded, the consequences may be most serious. But in reality the danger of the accidental explosion of dynamite is not great. Many car loads of it have been handled for years on this pier 7 without accident. The possible danger from it was not so imminent and so great that it was the duty of the company to warn against its presence every vessel making use of the wharf. Its explosion was something not to be reasonably expected. We do not think that the fact that the vessel was moved by the railroad company from pier 6 to pier 7, and that if she had remained at pier 6 she might not have sustained any severe injury, affects in any manner the question of liability. And the statement that the vessel if changed from pier 6 to pier 7 was to be at the risk of the railroad company related to the danger and expense involved in the act of shifting her and not as to her safety after she was moored to pier 7. The captain had no reason to suppose that pier 7 was not as safe as pier 6, and neither party at the time had in mind any guaranty of safety from an explosion on pier 7. It was not within human foresight to foresee that the vessel was not as safe on the south side of pier 7 as on the south side of pier 6. The difference involved was one of only 40 feet, and at either pier the vessel was within the zone of danger as it turned out, for men and property on pier 6 and even further to the north were seriously injured.

Decree affirmed.

ANDERSON, Internal Revenue Collector, v. MORRIS & E. R. CO. et al.

(Circuit Court of Appeals, Second Circuit. July 9, 1914.)

No. 248.

1. CORPORATIONS (§ 642*)—FOREIGN CORPORATIONS—"DOING BUSINESS" WITHIN STATE.

A single transaction within the state by a foreign corporation does not constitute "doing business" in the state within a statute forbidding a foreign corporation from doing business within the state until it has complied with specified requirements, provided the single transaction was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

done by the corporation without an intent to engage in other acts of business within the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2155-2166; vol. 8, pp. 7640, 7641.

Foreign corporations doing business in state, see note to *Wagner v. J. & G. Meakin*, 33 C. C. A. 585; *Ammons v. Brunswick-Balke-Collender Co.*, 72 C. C. A. 622.]

2. INTERNAL REVENUE (§ 9*)—CORPORATION TAX—"ENGAGED IN BUSINESS."

Where a railroad corporation leased its property and franchises for the whole term of its charter, the lessee having sole control of its property and the operation of its road, the fact that the lessor retained its primary franchise of corporate existence, maintained its organization, held an annual meeting of its stockholders, elected directors, and amended its by-laws, and that its directors held a special meeting, elected officers, and appointed an executive committee, was insufficient to show that it was "engaged in business" within Corporation Tax Act Aug. 5, 1909, c. 6, § 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 946), § 38, imposing an excise tax on corporations organized for profit and engaged in business in any state, etc.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, vol. 3, p. 2394.]

3. TAXATION (§ 58*)—STATUTES—CONSTRUCTION.

A citizen is exempt from taxation unless the tax is imposed by clear and unequivocal language, statutes imposing taxes being strictly construed in favor of taxpayers and against the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 134, 135; Dec. Dig. § 58.*]

4. INTERNAL REVENUE (§ 9*)—CORPORATION TAX—NATURE OF TAX.

The tax imposed on corporations by Corporation Tax Act Aug. 5, 1909, § 38, is not a direct tax, but rather an excise on the privilege of doing business in a corporate capacity.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

5. INTERNAL REVENUE (§ 9*)—DIRECT TAXES—CORPORATIONS.

The rule that a corporation is an artificial entity distinct from its stockholders is a fiction of the law, which is recognized by the courts for some purposes and disregarded for others; and hence, where a railroad corporation leased its property and franchises for the whole term of its charter, the fact that the lessee paid the rent, not to the lessor entity, but rather to its stockholders and bondholders, could not prevent the rent so paid being subject to taxation under Corporation Tax Act Aug. 5, 1909, § 38, if the act was otherwise applicable.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

6. INTERNAL REVENUE (§ 9*)—CORPORATION TAX—RAILROADS—LEASE OF PROPERTY—ENGAGED IN BUSINESS.

A railroad corporation leased its property and franchises, for the full term of its charter and any renewal thereof, to another railroad company, the lease being approved by the state Legislature granting the original charter, and providing, not only that the lessor should thereafter maintain its corporate existence, but should issue to the lessee stock, bonds, or other obligations for the completion of a projected branch road and for the construction of any other railroads which the lessee might desire to construct and to cover expenses for the construction or purchase of locomotives, cars, and machinery, the lessee binding itself to pay and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

discharge such obligations at maturity. *Held*, that the issuance of bonds by the lessor corporation under such provision did not amount to a resumption of business which the lease had transferred or an engaging in business within Corporation Tax Act Aug. 5, 1909, § 38, imposing an excise tax on corporations organized for profit and engaged in business in any state.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. § 9.*]

In Error to the District Court of the United States for the Southern District of New York.

This case comes here on writ of error to review a judgment of the United States District Court for the Southern District of New York, entered on November 11, 1913, in favor of the railroad company and against the collector for the sum of \$22,441.12.

H. Snowden Marshall, U. S. Atty., of New York City (Addison S. Pratt, Asst. U. S. Atty., of New York City, of counsel), for plaintiff in error.

W. S. Jenney and Douglas Swift, of New York City, for defendants in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The Corporation Tax Act of August 5, 1909 (36 Stat. 112), provides in section 38 as follows:

"That every corporation * * * organized for profit and having a capital stock represented by shares * * * and engaged in business in any state * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation * * * equivalent to one per centum upon the entire net income over and above five thousand dollars, received by it from all sources during such year," etc.

The commissioner of Internal Revenue at Washington assessed the Morris & Essex Railroad Company, incorporated by a special act of the Legislature of New Jersey in 1835, in the sum of \$19,630.23, the tax being assessed for the year 1910 under the act of 1909 above quoted. This tax was paid under protest, and this action was thereafter brought to recover the amount paid, with interest on the same from June 30, 1911. The tax was assessed upon the net income of the Morris & Essex Railroad Company for the year 1910. The act authorizes the taxation of every corporation "engaged in business" in any state, and the tax authorized is defined in the act as "a special excise tax with respect to the *carrying on or doing business* by such corporation." But the Morris & Essex Railroad Company claims that it was not subject to the tax for the reason that it was not during the period covered by the tax "engaged in business" or "carrying on or doing business" within the meaning of the Corporation Tax Act.

On December 10, 1868, the Morris & Essex Railroad Company leased to the Delaware, Lackawanna & Western Railroad Company (a corporation created by the Legislature of the state of Pennsylvania) its railroad and branches and all its other property, franchises, etc., for and during the full term of its charter and any continuance thereof. The consideration of the lease was the assumption by the lessee of all

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the bonds and other obligations of the lessor and its agreement to pay the principal and interest thereon, to pay all taxes which might be imposed on the lessor, its business, income, or property and also to pay annually 7 per cent. (or in a certain contingency 8 per cent.) of its capital stock. This lease has never been terminated by the parties, and during the entire period covered by the tax the Delaware, Lackawanna & Western Railroad Company was in possession of the property of the Morris & Essex Railroad Company and was operating its road under and in accordance with the lease.

The Delaware, Lackawanna & Western Railroad Company, hereinafter referred to as the lessee, has, according to the terms of the lease, paid the rental, consisting of the interest on the stock and bonds, directly to the stockholders and bondholders, and in the year 1910 it paid to the holders of such stock the sum of \$1,050,000 and to the holders of such bonds the sum of \$1,724,390. The sum of these two amounts was taken by the Commissioner of Internal Revenue as the income for the year 1910 of the Morris & Essex Railroad Company, hereinafter referred to as the lessor, and after deducting therefrom the sum of \$806,367.49 (the amount of interest paid during the year on an amount of its bonded indebtedness not exceeding the amount of its paid-up capital stock) and the further sum of \$5,000 specifically allowed as a deduction by the statute, he assessed a tax against said Railroad Company at the rate of one per centum of the remainder.

The lessor company has not, since the lease, managed, controlled, operated, or maintained the railroad, or any part thereof, or any other railroad, nor has it demanded or received or collected any income, revenue, earnings, rents, or profits from the railroad or from any other railroad. The lease provided, however, that the lessor company should, notwithstanding the lease, continue to maintain its organization as a corporation in the manner prescribed in and by its charter and the several supplements thereto, and do and perform all acts and things necessary and proper thereto, and should also do and perform, at the expense of the lessee company, all such lawful acts and things as the latter might request in order to preserve the former's corporate and other rights, and in order to enable the latter to enjoy, use, and exercise the demised property, franchises, and rights as fully as the former might, had the lease not been made, the latter having the right to use the former's name in connection with the lease or the demised property whenever it might be advised that it was proper so to do.

It also provided that the lessor company should, upon the request of the lessee company, make, execute, issue, and deliver to it its bonds, other obligations or stock, to such an amount as might be required by the lessee company for the completion of a certain railroad then being constructed, which the lessee company agreed to complete, for the construction of any other railroads which the lessee company, in the exercise of the rights conferred by the charter of the lessor company, might desire to construct, for the construction or purchase of locomotives, cars, machinery, etc., for all other things or works, which the lessee company might desire to do in the exercise of its rights, the cost of which is properly chargeable to construction account, and for the payment and discharge at maturity of the principal or its bonds and

other obligations theretofore issued, and that the lessor company should not make, execute, or issue any bonds, obligations, or stock unless requested so to do by the lessee company.

The lessor company has maintained its corporate organization since the execution of the lease, and in the year 1910, the year of the tax, its stockholders, board of directors, and its executive committee held meetings, and at the meetings officers were elected. At a meeting of the executive committee a resolution was adopted authorizing the president to execute and deliver a certain indenture of release and conveyance of land, but it does not appear that at any time during the year such indenture was ever executed and delivered. But on December 31, 1910, the lessor company executed and delivered to the lessee company \$1,400,000 of bonds to reimburse it for amounts previously expended by it in construction work on the railroad property. These bonds were of an issue known as "first refunding gold mortgage bonds" and were authorized to the amount of \$35,000,000 in the year 1900, and executed and delivered from time to time for the purpose of refunding the outstanding bonds of the lessor company, or of reimbursing the lessee company for amounts expended by it for construction work on the railroad property.

In the year 1910 the lessee company bought land and took title in the name of the lessor company, and sold land standing in the name of the lessor company, using its name as grantor.

The lessee company duly filed its return for the year 1910, under the Corporation Tax Law, and included under the head of gross income all of the income, revenue, and earnings received by it from the management, use, and operation of the lessor company, and under the head of deductions for the ordinary and necessary expenses of operation and maintenance, the amount of \$2,774,390 paid by it to the stockholders and bondholders of the lessor company under the lease; and the lessee company has paid the tax assessed against it, computed upon its gross and net income, as shown by said return.

[1] The question therefore arises whether upon this state of facts the tax was properly assessed upon the lessor company. Was that company in 1910 carrying on or doing business within the meaning of the Corporation Tax Act? The question of when a corporation is engaged in business or is "doing business" within the meaning of a statute may depend to some extent upon the character of the statute. The courts in many decisions have held that a single transaction within a state by a foreign corporation is not a "doing of business" in the state within the meaning of a statute which forbids a foreign corporation from doing business within a state until it has complied with certain requirements, provided the single transaction was done by the corporation without an intent to engage in other acts of business within the state. *Cooper Manufacturing Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137 (1885); *Oakland, etc., Co. v. Fred. W. Wolf Co.*, 118 Fed. 239, 55 C. C. A. 93 (1902); *Alpena, etc., Co. v. Jenkins, etc., Co.*, 244 Ill. 354, 91 N. E. 480 (1910); *Ammons v. Brunswick, etc., Co.*, 141 Fed. 570, 72 C. C. A. 614 (1905); *Alleghany Co. v. Allen*, 69 N. J. Law, 270, 55 Atl. 724 (1903); *Sigel-Campion, etc., v. Haston*, 68 Kan. 749, 75 Pac. 1028 (1904); *Lutes Co. v. Wy-*

song, 100 Minn. 112, 110 N. W. 367 (1907); Louisville, etc., Co. v. Mayor, etc., 114 Tenn. 213, 84 S. W. 810 (1905).

But a much broader meaning is said to be given to the words "doing business" when used in a tax statute than is given to them when used in a statute which forbids a foreign corporation to do business in a state until it has complied with the conditions which the statute imposes. See Cook on Corporations, vol. 3, pp. 2352, 2353. And a different meaning may possibly be given to the words when they are used in a statute which forbids a corporation from "doing business" before a condition precedent is complied with in the state which creates it. With that, however, we are not now concerned, and express no opinion concerning it.

In the year for which the tax was assessed, 1910, the stockholders, directors, and executive committee of the lessor company held no meetings and took no formal action, except as follows:

1. Its stockholders as already stated held an annual meeting at which its by-laws were amended with reference to the amount of stock necessary to constitute a quorum at a stockholders' meeting, directors were elected, and all the proceedings of the board of directors and the actions of its several committees and the acts of its officers and agents in pursuance thereof were approved, ratified, and confirmed.

2. Its board of directors held a special meeting at which officers were elected and an executive committee of three persons was appointed.

3. On January 18, 1910, the executive committee of the board of directors of the lessor company met, and authorized, empowered, and directed the president to execute and deliver to the Hoboken Ferry Company a deed, releasing and conveying to it all of the land and other property which had been, on December 29, 1904, leased by the ferry company to the lessor company.

4. On December 31, 1910, the lessor company executed, issued, and delivered to the lessee company its bonds to the amount of \$1,400,000 to reimburse it for amounts expended by it in construction work on the railroad property of the lessor company.

[2] The fact that the lessor company retaining its primary franchise of corporate existence, maintained its organization, held an annual meeting of its stockholders, elected directors and amended the by-laws, and that its board of directors held a special meeting and elected officers and appointed an executive committee, cannot be regarded as doing business within the purview of the act, for it was simply keeping up the corporate organization, and surely no one can claim that the act of 1909 imposes any excise tax upon the primary franchise or maintenance of the corporate organization. There was nothing in all this that involved the exercise of any of the secondary franchises of the corporation.

The fact that a resolution was adopted by the executive committee which directed the president of the lessee company to release and convey certain lands to the Hoboken Ferry Company, which lands had previously been leased by the latter company to the lessor company, may be disregarded. The record does not show whether or not the president carried the resolution into effect. It is not necessary, therefore, to consider whether if he had carried it into effect his action in

doing so would have amounted to a doing of business within the meaning of the act. The mere adoption of the resolution without more is, in our opinion, inadequate to such an end.

[3] This brings us to inquire whether the lessor company is to be regarded as "engaged in business" because of its issuance of the bonds. In seeking an answer to that inquiry it is necessary to bear in mind that a statute which levies a tax must be strictly construed. The rule is well settled that the citizen is exempt from taxation unless the same is imposed by clear and unequivocal language. If the language used is ambiguous and the construction doubtful, the doubt must be resolved in favor of those upon whom the tax is sought to be laid.

"It is the general rule that statutes providing for taxation are to be construed strictly as against the state and in favor of the taxpayers, and the burdens and liabilities which they impose are to be kept within the strict letter of the law and not extended beyond its clear terms by any inference, implication, or analogy; but this principle must not be pushed so far as to defeat the legislative purpose by mere construction, but an interpretation of the statute must be given in accordance with its real intention and meaning if that is clearly discoverable." 37 Cyc. 768.

Under the statute herein involved we are not inclined to decide the case upon the theory that as the issuance of the bonds was a single transaction, the lessor company cannot, because of that fact, be regarded as having been "engaged in business." A single transaction might be of such a nature as possibly would bring the corporation engaged in it within the purview of the taxing act.

[4] It is important to keep in mind that the Corporation Tax as imposed by the act is not a direct tax, but an excise on the privilege of doing business in a corporate capacity; and in construing it the purpose and design of Congress in its enactment is not to be disregarded. The Supreme Court of the United States in *Flint v. Stone Tracy Co.* (1910) 220 U. S. 108, 145, 31 Sup. Ct. 342, 347 (55 L. Ed. 389, Ann. Cas. 1912B, 1312), in passing on the statute said:

"It is therefore apparent, giving all the words of the statute effect, that the tax is imposed, not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof, in a sum equivalent to one per centum upon the entire net income over and above \$5,000 received from all sources during the year; that is, when imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint-stock organizations of the character described. As the latter organizations share many benefits of corporate organization, it may be described generally as a tax upon the doing of business in a corporate capacity."

The lessor company being a corporation organized under the laws of New Jersey and organized for profit and having a capital stock represented by shares, it, to that extent at least, is within the language of the act of 1909. In *Eliot v. Freeman*, 220 U. S. 178, 31 Sup. Ct. 360, 55 L. Ed. 424 (1911), the Supreme Court held that a joint-stock company created in Massachusetts was not within the purview of the act, because not organized "under the laws" of the state, that state having no statute providing for the organization of such companies. Joint-

stock companies of the statutory character are not known to the laws of Massachusetts.

[5] But to make the act applicable, the lessor company must not alone exist "under the laws" of the state which created it. It must, in addition, have a net income over and above \$5,000, etc. It is said the lessor company does not meet that requirement of the law, as no money was paid to it, the rentals having been paid not to it but to its stockholders and bondholders. The notion that a corporation is an artificial entity distinct from the members who compose it is a fiction of the law which the courts recognize for some purposes and disregard for others. Without going into the matter at length, it suffices to say that the fact that the lessee paid the rent, not to the corporate entity, but to the stockholders and bondholders, cannot prevent the act from applying to the money so paid if the other conditions of the act make its terms applicable. The fiction referred to cannot be permitted to accomplish a fraud upon the statute and an evasion of its obligations.

[6] But the act makes it necessary that the corporation having a net income over and above \$5,000 shall be "engaged in business," and the special excise tax which the act imposes is imposed with respect "to the carrying on or doing business by such corporation."

In *Zonne v. Minneapolis Syndicate*, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. Ed. 428 (1911), the Supreme Court held that the act was inapplicable to a corporation the sole purpose of which was to hold the title to a tract of land subject to a lease thereof for a term of 130 years, and for the convenience of its stockholders, to receive and distribute among them, from time to time, the rentals that accrued under the lease and the proceeds of any disposition of said land.

And in *McCoach, Collector, v. Minehill & Schuylkill Haven Railroad Co.*, 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842 (1913), the Supreme Court held the act was not applicable to a railroad company which had leased its line to another company by which it was operated. The court said that if the lease had been made without authorization of law it might be that the lessee could be deemed in law the agent of the lessor, or that the lessor might be estopped to deny the agency so that the act would be applicable. But the effect of the legislative authorization, the court said, was to constitute the lessee company the public agent for the operation of the railroad and to prevent the lessor company from carrying on business in respect of the maintenance and operation of the railroad so long as the lease continued. The conclusion accordingly was that the lessor company was not taxable under the act. But in the case last cited the court used this language:

"It should be mentioned that there is nothing in the record to show that during the taxing years in question the company exercised its power of eminent domain, or put in force any other special corporate power, in aid of the business of the lessee. We, therefore, do not pass upon the question whether, if it should do so, it would be taxable under the act in question."

The language above quoted has led counsel to urge upon us that the issuance of the bonds involved an exercise of the special corporate power of the lessor in aid of the business of the lessee, and that this exercise of power makes the lessor liable to the tax.

The franchise of constructing, maintaining, and operating its rail-

road was not alienable, whether by sale, lease, or mortgage, without the express consent of the Legislature of the state from which the corporation derived its charter or corporate existence. *Central Transportation Co. v. Pullman Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55 (1891). The lease made by the lessor company in the case at bar had been validated and confirmed by the New Jersey Legislature by an act approved February 9, 1869 (P. L. 1869, p. 28). The lease thus confirmed by legislative act transferred to the lessee "the franchises, immunities, rights, powers and privileges" which had been granted to the lessor, and during the full term of the continuance of the charter and all renewals thereof. And under this lease for more than 40 years prior to the enactment of the Corporation Tax Act the business for which the lessor company had been chartered had been carried on by the lessee company, which had exclusively possessed, managed, and operated the railroad property. The lease for all practical purposes was a conveyance in fee. See *Black v. Raritan Canal Co.*, 24 N. J. Eq. 455. The lessee company acquired even the right of eminent domain which the lessor company had possessed (see *Day v. N. Y. S. & W. R. R. Co.*, 58 N. J. Law, 677, 34 Atl. 1081), as well as its immunity from taxation by the state of New Jersey. See *State Board of Assessors v. M. & E. R. R. Co. and D., L. & W. R. R. Co.*, 49 N. J. Law, 193, 7 Atl. 826. The lessor company, however, had retained the power to issue bonds and to execute deeds of the leased property, but such powers it could exercise only with the consent and at the request of the lessee company, which latter company guaranteed the payment of both the principal and interest and alone derived any advantage from their issuance, as the income of the lessor's stockholders was definitely fixed by the lease for all time. The act done was a purely formal act done by the lessor to enable the lessee to raise money on the security of the property for its development and operation in the conduct of the railroad business. In doing it the lessor was not "carrying on or doing business" within the meaning of the Corporation Tax Act. The meaning of the words "carrying on or doing business" and "engaged in business" must be given their ordinary and natural signification, and, given that signification, the act done is not within the meaning of the statute. The lessor company was not an actively operating concern. Under the terms of this lease the lessor corporation had practically gone out of business and was disqualified from any activity respecting the operation and management of the railroad business which it had been incorporated to carry on.

The issuance of the bonds was an act done simply to enable the lessee to enjoy, use, and exercise the property, franchises, and rights which the lessor had previously demised, and did not amount to a resumption of business which the lease had transferred, or a "doing of business" in the statutory sense.

As the lessor company was not "engaged in business" in 1909, judgment is affirmed.

HARTLEY v. LAPIDUS & HOLUB CO.

(Circuit Court of Appeals, Eighth Circuit. August 3, 1914.)

No. 3935.

1. APPEAL AND ERROR (§ 960*)—PLEADING (§ 353*)—FILING OUT OF TIME—DISCRETION OF COURT.

Under Code Iowa 1897, § 3552, providing that all pleadings must be filed by the time the cause is reached for trial, which, by virtue of the conformity statute (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]), and rule 3, subd. 4, of the Rules of the District Court for the Southern District of Iowa, governs pleading in such court, and the further provisions of section 3622 of such Code that the allegations of an answer shall be deemed denied, the refusal of a District Court to permit the filing of a reply after trial has commenced, or the striking out of a reply then filed without leave, is within the sound discretion of the court, and its action is reviewable only for a gross abuse of discretion apparent in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825, 3832-3834; Dec. Dig. § 960; * Pleading, Dec. Dig. § 353.*]

2. EVIDENCE (§ 461*)—VARIANCE OF WRITING BY PAROL.

Code Iowa 1897, § 4617, providing that "when the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it," has no application where the language of the contract is plain and unambiguous, and does not authorize the introduction of parol evidence to vary the written contract by showing that the intent of the parties was different from that clearly expressed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.*]

3. SALES (§ 200*)—EXECUTORY CONTRACT—TRANSFER OF TITLE AS BETWEEN PARTIES.

Plaintiff and defendant entered into a written contract in August, by which plaintiff agreed to sell to defendant his entire crop of apples then growing in his orchard at a stated price per barrel. The apples were to be picked by plaintiff at any time after certain dates named, packed by defendant in barrels which it was to furnish, placed in cars by plaintiff, and each car load to be paid for by defendant before leaving the station. When a portion of the apples had been picked, shipped, and for the most part paid for, there was a freeze, which rendered those remaining on the trees unsalable, and defendant refused to accept them. *Held*, that the contract was not one of sale, but was an agreement to sell under which title to the apples remained in plaintiff until they were picked and delivered, and that the loss of those frozen without fault on the part of defendant fell on plaintiff.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 524-528; Dec. Dig. § 200.*]

Transfer of title as dependent on appropriation by seller, see note to *H. Baars & Co. v. Mitchell*, 83 C. C. A. 470.]

In Error to the District Court of the United States for the Southern District of Iowa; Smith McPherson, Judge.

Action at law by L. M. Hartley against the Lapidus & Holub Company. Judgment for plaintiff, for a part of his claim only, and he brings error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Harold J. Wilson, of Burlington, Iowa (W. E. Blake, of Burlington, Iowa, J. C. McCoid, of Mt. Pleasant, Iowa, and George B. Stewart, of Fort Madison, Iowa, on the brief), for plaintiff in error.

John E. Bishop, of St. Louis, Mo. (Samuel F. Knox, of Chicago, Ill., and Thomas H. Cobbs, of St. Louis, Mo., on the brief), for defendant in error.

Before HOOK, ADAMS, and SMITH, Circuit Judges.

SMITH, Circuit Judge. The plaintiff in his petition filed October 25, 1909, says that the parties to this suit entered into a written contract as follows:

"Chicago, Aug. 24th, 09.

"Memoranda of agreement made this day between L. M. Hartley of Salem, Iowa, party of the first part and the Lapidus & Holub Co., 141 So. Water St. Chicago, Ill., party of the second part.

"Party of the first part agrees to sell to party of the second part his entire crop of apples now growing on his farm about four and one half ($4\frac{1}{2}$) miles south of Salem, Iowa consisting of orchard of about one hundred ten acres (110) for one dollar and fifty cents (\$1.50) per barrel and to carefully pick said apples put in piles or on packing tables as party of the second part may direct, haul empty barrels from Houghton station and load filled barrels on cars at station or in storage at station or in cars on track near orchard.

"Party of second part agrees to furnish empty barrels as fast as needed, pack said apples as fast as picked if possible, measure up all apples picked from trees, no dropped apples to be included, and pay party of first part one dollar and fifty cents (\$1.50) per barrel for same. Party of second part shall pay five hundred dollars (\$500.00) this day which shall apply on last payment of apples and pay for each car before leaving the shipping station. Barrels to be standard size holding about 3 bushels.

"We further agree that Shackelford varieties of apples are not to be picked before Sept. 15th, 1909 and winter varieties not earlier than September 25th, 1909 but as soon after these dates as party of the first part may direct.

"Party of first part has privilege of reserving apples for his own use.

"[Signed] L. M. Hartley,
"Lapidus & Holub Co."

That about 7,000 bushels of apples have been delivered under said contract and the defendant is indebted to the plaintiff in the sum of \$507 on apples already shipped; that there are about 14,000 bushels of apples remaining on the trees frozen on the night of October 11th, and defendant has notified plaintiff's men not to pick any more apples, and that they would not accept any more apples under such contract, and that plaintiff has been damaged in the sum of \$7,000 by defendant refusing to take the apples as agreed. In its answer, filed March 19, 1912, the defendant denies all the allegations of the petition, except the making of the written contract, and alleges that according to the terms of said contract plaintiff was to have the sole charge, control, and direction of picking said apples; that the failure to pick and deliver said apples in time to save them from injury and damage by frost was due solely to the negligence and delay on the part of the plaintiff; that by reason of said apples being frosted and frozen they were rendered worthless and of no value to the defendant; and that plaintiff by his contract had impliedly warranted to pick and deliver to the defendant good merchantable apples. In the amendment to the an-

swer filed before the trial commenced the defendant says that it denies that the contract operated to vest title in defendant to the apples then growing on plaintiff's farm, or that it passed the title of said apples to the defendant, but avers that said contract was but an agreement to sell, and left the title in the plaintiff until they were picked from the trees by him and delivered to the defendant, as required by the terms of said contract, and the title thereto only vested in the defendant as fast as the same were picked and delivered by plaintiff, but that before the balance of said apples had been picked and delivered by plaintiff, and while the ownership and title still remained in him, they froze upon the trees, and so became unmarketable and worthless and in fact were never picked and delivered. After the trial to a jury had commenced, and after the trial court had practically ruled against the plaintiff on all the matters involved in this case, the plaintiff, without leave of court, filed a reply as follows:

"Plaintiff denies that by said contract he was to deliver to defendants good merchantable apples, or that this was so implied, but states the facts to be as follows:

"That in negotiating for the purchase of said apples the defendants stated that they desired to buy such of the apples as would be good merchantable apples, and plaintiff refused to sell said apples in that way; that defendant offered plaintiff 75 cents per bushel for the good merchantable apples in said orchard, but plaintiff refused to sell said apples that way and told them that he would take the less sum of 50 cents per bushel for said apples, they taking all the apples on the trees, which was agreed to, and the contract in question was prepared by defendants pursuant to said oral agreement and as embodying the same. That the defendants agreed when negotiating the deal, saw and inspected the apples before the contract was entered into. That by reason of said facts the defendant cannot now be heard to say that this is an implied warranty that the apples would be sound, merchantable apples, and is estopped from so asserting.

"Plaintiff admits that on the night of October 11, 1909, there came a hard freeze, which froze the greater part of the apples remaining upon the trees on that date, but denies that the title to said apples had not passed to defendants, and alleges the facts relating thereto to be as follows: That such type-written contract was reduced to writing by defendants in Chicago in duplicate and sent to plaintiff to sign in duplicate, with directions to return one copy to defendant, which plaintiff did not do on receiving same. That several days after he had received said contract from defendants, defendants called him up by telephone from Chicago and asked him why he had not signed the contracts, and plaintiff replied that it fixed the date of picking so late that the apples might freeze before they were picked, and he was not certain where loss would be, and that thereupon the defendant replied that after plaintiff signed the contract the apples were theirs and the late date of picking and freezing would not affect plaintiff or be any loss to him. The defendants having placed this construction upon the contract in question, it cannot now be said that the title to said apples had not passed to them at the time of said freeze, and are estopped from so asserting.

"And plaintiff further states that at the time of said freeze he had a large number of men hired to pick apples, hired at large expense, and that the getting of said men together was attended with large expense. That on the morning following the freeze defendant told plaintiff and his men in charge of picking to stop picking for the present and to hold their men there, which the plaintiff did under protest. That during the day following the freeze defendant told plaintiff and his agents in charge of picking to let the apples remain on the trees a few days, and then they would be all right. That the plaintiff, relying upon defendant's statement and directions, held his men for several days at a large expense so as to be ready to pick said apples as di-

rected by defendant, all of which was at the time known to the defendant, knowing that if plaintiff let the pickers go and separate that it would take time and expense to get pickers together again. That defendant directed plaintiff to go among the trees in orchard and pick the apples from the trees which were not frozen, which the plaintiff did at defendant's direction, picking about one-fourth of the apples on some 100 or 150 trees, which were barreled and shipped and are included in the 2,285 barrels mentioned in pleadings of defendants. That the picking of said apples in that way was accompanied with much more expense to plaintiff than picking all the apples from the trees. That on the 20th day of October, 1909, the defendant notified plaintiff that they would not receive the remainder of the apples and not to pick them. That prior to said notification the defendants had treated said apples as their own, and had given plaintiff directions to let them stand on trees and they would be all right in a few days, and had ordered plaintiff to hold his men in readiness to pick same at great expense and directed the picking of some of the apples from some trees, and balance of apples in question were left, and defendants, therefore, by reason of such facts and statements over telephone before signing of contract, are estopped from denying that title to the apples passed to them under the contract in question, and have waived any and all conditions precedent to the passing of title that may be in said contract. That the foregoing facts and acts on part of defendant amount to a construction of said contract by them, and they are now bound thereby.

"Plaintiff further alleges that the defendant filed in this court a construction based upon said contract and based upon the title to said apples having passed to defendant, and that the same amounted to an election upon part of defendant to treat said contract as passing title and an election of their rights, and they cannot now assert a different or inconsistent right. That by reason of all the foregoing facts the defendant is estopped from denying that title to the apples in question passed to them prior to the freeze, and have waived any condition in said contract precedent to the passing of title, and have construed said contract prior to the signing thereof, and at all times up to the 16th day of October, 1909, as passing title to them of the apples in question and as now bound by said contract.

"Plaintiff further alleges that if the apples had been shaken to the ground the next morning after the freeze, the frost would have gone out and would not have materially affected same, but same were left upon the trees at direction of defendant, and, being so directed, the leaving of said apples, and they being thus spoiled, the defendant is estopped from denying title thereto or liability for the contract price of said apples."

The defendant filed a motion to strike this reply from the files, which was sustained. The plaintiff delivered 2,285 barrels of apples under this contract, and was paid thereon something over \$2,900. On the trial it was agreed there was due the plaintiff for apples delivered \$507, with interest of \$91.26, and the court on motion of the defendant peremptorily instructed the jury to find for the plaintiff for \$598.26 and no more, and the plaintiff brings the case here on error. The trial commenced to a jury on October 16, 1912.

[1] The first error assigned is that the court erred in sustaining the defendant's motion to strike the plaintiff's reply from the files.

Section 914, Revised Statutes (U. S. Comp. St. 1901, p. 684) provides:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

By subdivision 4 of rule 3 of the District Court of the United States of the district in which this action was tried, adopted with the approval of the judges of this court, it is provided that:

"Except as otherwise provided in these rules, and except as provided for in the laws of the United States in force at the time action is sought to be taken in this court, pleadings and practice and procedure, both before and after judgment, shall be as then prescribed in the laws of the state of Iowa."

The Iowa law at the time in question provided (section 3576, Code 1897):

"There shall be no reply except: * * * 2. Where some matter is alleged in the answer to which the plaintiff claims to have a defense by reason of the existence of some fact which avoids the matter alleged in the answer."

It is also provided by section 3622 that the allegations of an answer are to be deemed controverted.

Under the Iowa statute it is held that the law implies a denial of all the allegations of the answer, and there was therefore an implied denial of all of the allegations of the answer and the case was at issue. It is provided in section 3552 of the Iowa Code that all pleadings must be filed by the time the cause is reached for trial. True the courts of Iowa are very liberal in allowing amendments of the issues and these laws are applicable in the District Court, but under the federal practice they are left entirely to the sound discretion of the trial court. While in this case the reply stricken was the first reply filed anterior thereto, there was a reply by operation of law and the proposed reply was in the nature of an amendment to the issues, if not in fact an amendment to the implied controverting of the allegations of the answer. When the trial was entered upon, the issues were framed and complete, and any attempt to change them was within the sound discretion of the trial court, and at least in the absence of gross abuse apparent in the record could not be reversed. *Mandeville v. Wilson*, 5 Cranch, 15, 3 L. Ed. 23; *Marine Ins. Co. v. Hodgson*, 6 Cranch, 206, 3 L. Ed. 200; *Sheehy v. Mandeville*, 6 Cranch, 253, 3 L. Ed. 215; *Walden v. Craig*, 9 Wheat. 576, 10 L. Ed. 393; *Chirac v. Reinicker*, 11 Wheat. 280, 6 L. Ed. 474; *Wright v. Hollingsworth*, 1 Pet. 165, 7 L. Ed. 96; *United States v. Buford*, 3 Pet. 12, 7 L. Ed. 585; *Boyle v. Zacharie*, 6 Pet. 648, 8 L. Ed. 532; *Pickett v. Legerwood*, 7 Pet. 144, 8 L. Ed. 638; *Breedlove v. Nicolet*, 7 Pet. 413, 8 L. Ed. 731; *Ex parte Bradstreet*, 7 Pet. 634, 8 L. Ed. 810; *Walden v. Craig*, 14 Pet. 147, 10 L. Ed. 393; *Holmes v. Jennison*, 14 Pet. 540, 614, 10 L. Ed. 579; *Murphy v. Stewart*, 2 How. 263, 11 L. Ed. 261; *Slicer v. Bank of Pittsburgh*, 16 How. 571, 14 L. Ed. 1063; *Spencer v. Lapsley*, 20 How. 264, 15 L. Ed. 902; *Tilton v. Cofield*, 93 U. S. 163, 23 L. Ed. 858; *Ricker v. Powell*, 100 U. S. 104, 25 L. Ed. 527; *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800; *Bullitt County v. Washer*, 130 U. S. 142, 9 Sup. Ct. 499, 32 L. Ed. 885; *Gormley v. Bunyan*, 138 U. S. 623, 11 Sup. Ct. 453, 34 L. Ed. 1086; *Sawyer v. Piper*, 189 U. S. 154, 23 Sup. Ct. 633, 47 L. Ed. 757; *Royal Ins. Co. v. Miller*, 199 U. S. 353, 26 Sup. Ct. 46, 50 L. Ed. 226; *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102, 6 Ann.

Cas. 253; *Oregon & Transcontinental Co. v. Northern Pac. R. Co.* (C. C.) 32 Fed. 428; *Sheffield & B. Coal, Iron & R. Co. v. Newman*, 77 Fed. 787, 23 C. C. A. 459.

But, wholly aside from this question, we will briefly consider whether the reply did present any proper issue in connection with the consideration of the other assignments of error.

They are:

(2) The court erred in the construction of the contract as set forth in the record in holding that the title to the apples remaining on the trees after the night of October 11, 1909, remained in the plaintiff, Hartley, and as such apples were not afterwards picked by Hartley, he cannot recover the contract price thereof.

(3) The court erred in holding, ruling, and adjudicating that said contract was executed as to the apples picked and executory as to the apples frozen on the trees.

(4) The court erred in not allowing recovery by plaintiff for the 12,672 bushels of apples frozen on the trees, to wit, \$6,381, with 6 per cent. interest thereon from October 11, 1909, in addition to plaintiff's recovery of \$598.26 and costs.

It must be borne in mind that this is not an action in equity to reform the contract, and such an action would in all probability have failed, nor is it alleged that this was a contract in part in writing and part oral, but the allegation is that the contract was in writing and the writing was as hereinbefore set forth.

[2] Plaintiff calls attention to section 4617 of the Code of Iowa.

"When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it."

But it was held as early as *Walker v. Manning*, 6 Iowa, 519, that this section did not authorize the introduction of parol evidence to vary the written contract by showing that the intent of the parties was different from that implied in the words used therein. The provision is only applicable to a case where the contract involved is fairly susceptible of different meanings. *Rouss v. Creglow*, 103 Iowa, 60, 72 N. W. 429. And this statute has no application where the language of the contract is plain and unambiguous. It is but declaratory of the common law. *Inman Manufacturing Co. v. American Cereal Co.*, 133 Iowa, 71, 110 N. W. 287, 8 L. R. A. (N. S.) 1140, 12 Ann. Cas. 387; *Capital City Carriage Co. v. Moody*, 135 Iowa, 444, 110 N. W. 903.

[3] It is manifest that if there were latent ambiguities in this contract this statute would be applicable, but there is nothing to indicate that such ambiguities exist. Here the chief question is whether the contract was in itself a sale of the apples while on the trees, so as to pass the ownership, or was it in legal effect only an agreement to sell an executory contract.

In *Mechem on Sales* (Ed. 1901) par. 5, it is said:

"If there be an agreement for sale and the goods perish, the loss falls on the seller; while if there has been a sale, the loss, as a rule, falls on the buyer, though the goods have not come into his possession."

And in Benjamin on Sales (Ed. 1888) p. 237, § 308:

"After a contract of sale has been formed, the first question which suggests itself is naturally: What is its effect? When does the bargain amount to an actual sale, and when is it a mere executory agreement?"

"We have already seen that the distinction between the two contracts consists in this: That in a bargain and sale, the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded, and without regard to the fact whether the goods be delivered to the buyer or remain in possession of the vendor, whereas in the executory agreement the goods remain the property of the vendor till the contract is executed. In the one case, A. sells to B.; in the other, he only promises to sell. In the one case, as B. becomes the owner of the goods themselves as soon as the contract is completed by mutual assent, if they are lost or destroyed, he is the sufferer. In the other case, as he does not become the owner of the goods, he cannot claim them specifically; he is not the sufferer if they are lost, cannot maintain trover for them, and has at common law no other remedy for breach of the contract than an action for damages."

At the time of the making of the contract the apples were still growing and a part of the real estate, and it must be presumed that the contract contemplated they should be nourished from the soil until ripe. The plaintiff was to pick the apples and deposit them in piles or on packing tables. It is manifest that under our settled rules of construction the title did not pass until these things were done. *Elgee Cotton Cases*, 22 Wall. 180, 22 L. Ed. 863.

Where the written contract purports on its face to be a memorial of the transaction it supersedes all prior negotiations and agreements, and oral testimony will not be admitted of prior and contemporaneous promises on a subject so closely connected with the principal transaction with respect to which the parties are contracting as to be a part of the transaction itself without the adjustment of which the parties cannot be considered to have finished their negotiations and finally concluded a contract. *Chicago Lumber Co. v. Comstock*, 71 Fed. 477, 18 C. C. A. 207; and, to the same effect, see *Godkin v. Monahan*, 83 Fed. 116, 27 C. C. A. 410.

There is nothing tending to sustain the alleged estoppel and nothing tending to sustain the claim of an election of remedies. It is true that where one has two remedies and he elects to prosecute one of them, he cannot subsequently prosecute the other, but the first essential to this defense is that it shall appear that there were two remedies. It is true that the agreement was to sell the entire crop of apples "now growing on his farm," and this contract can never be carried out in its entirety, but the destruction of the apples was due either to the negligence of the plaintiff in failing to have them picked before the 11th of October, or an untimely frost, which was an act of God, destroyed them. If either of these avoid the entire contract, it may be that he was not entitled to recover for the apples delivered under the contract, but under a quantum meruit, but in *Buskirk Bros. v. Peck*, 57 W. Va. 360, 50 S. E. 432, it was held under such circumstances he could recover under the contract. In any event the plaintiff has recovered under the contract for the apples delivered, and he cannot complain that he has been permitted so to do.

There is no error apparent prejudicial to the plaintiff and the judgment of the District Court is affirmed.

M. V. MOORE & CO. v. GILMORE.

(Circuit Court of Appeals, Fourth Circuit. May 5, 1914.)

No. 1224.

BANKRUPTCY (§ 178*)—CLAIMS—CORPORATIONS—STOCK—SALE—VALIDITY.

A bankrupt corporation being in financial difficulties, in January, 1911, it was proposed by defendant majority stockholder to wind up the concern. In September, however, the minority stockholders proposed that the corporation should purchase defendant's majority interest, amounting to \$5,100 par value, for \$2,000, to which defendant agreed. Five hundred dollars was paid at the time, which was borrowed for the purpose, and the balance was secured by three notes secured by a deed of trust covering all the assets of the corporation. No improvement resulted from the change, and on November 15th the corporation made a general assignment for the benefit of creditors and on December 5th was adjudged an involuntary bankrupt. *Held*, that such transaction in itself operated to render the corporation insolvent, and, though the transaction was without fraud in fact, it was nevertheless fraudulent as against the corporation's creditors, and therefore void as against its trustee in bankruptcy.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 221, 264-274, 283, 284; Dec. Dig. § 178.*]

Appeal from the District Court of the United States for the Western District of North Carolina, at Asheville, in *Bankruptcy*; James E. Boyd, Judge.

Action by Harry M. Gilmore, as trustee in bankruptcy of the Canton Co-operative Company, against M. V. Moore & Co. Judgment for plaintiff, and defendants appeal. Affirmed.

Louis M. Bourne, of Asheville, N. C. (Bourne, Parker & Morrison, and Theodore F. Davidson, all of Asheville, N. C., on the brief), for appellant.

Junius G. Adams, of Asheville, N. C. (Merrimon, Adams & Adams, of Asheville, N. C., on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. This is an appeal from a decree of the above District Court confirming the findings and order of the referee in bankruptcy, which disallowed the claim of appellant.

It appears that the Canton Co-operative Company was a North Carolina corporation, organized April 21, 1910, with an authorized capital of \$25,000, but which began business about that time, as its charter permitted, with only \$10,000 of its stock, consisting of 1,000 shares, subscribed for and issued. The incorporators were M. V. Moore, W. M. Smathers, and Geo. J. Williamson, who are the members of the firm of M. V. Moore & Co., the appellant. Moore and Smathers were directors of the corporation, the former being also its treasurer and the latter its general manager, and they continued to occupy those positions until the transaction occurred which gave rise to this litigation. During this period the firm of M. V. Moore & Co. held shares to the amount of \$5,100, which was a majority of the outstanding stock. M. V. Moore & Co. were located at Asheville, N.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

C., and the corporation carried on its mercantile business at Canton, in that state.

For some reason the enterprise was not successful. That this became apparent before the close of the year is evidenced by the fact that in January, 1911, it was proposed by appellant to sell out the stock of goods in bulk and wind up the concern. The other parties in interest were unwilling to take this course, and the business went on, apparently going from bad to worse during the succeeding six months. In the latter part of August matters came to something like a crisis, and various negotiations followed between the majority and minority stockholders. Without reciting the details, it is sufficient to state here that on or about the 5th of September an arrangement was made by which the corporation itself purchased all the shares of stock held by appellant for \$2,000. Of this sum \$500 was paid at the time, with money borrowed for that purpose, and the balance by three notes of \$500 each, payable in 6, 12, and 18 months, with interest, the notes being secured by a deed of trust covering all the property and assets of the corporation. Moore & Co. thereupon retired, and a new management took charge. No improvement resulted from this change, the business further declined, and failure occurred not long afterwards. On the 15th of November the corporation made a general assignment for the benefit of its creditors, and on the 5th of December was adjudged an involuntary bankrupt. In due course of administration the appellant filed proof of debt for the three notes mentioned, and claimed a preference for their full amount under the deed of trust given to secure their payment. The entire claim was disallowed by the referee, as above stated.

It is unnecessary to hold that the members of appellant's firm acted in bad faith, or with any fraudulent design in selling their stock. Nor is it shown that they used any improper persuasion to that end. So far as appears they were no more willing to sell than the other parties were to buy, and the latter very likely thought they were making a good bargain. No inventory was taken, and no reliable measures adopted for getting at the true value of the merchandise then on hand, whether for continuing or closing out the business, or the amount that could be collected from the unpaid book accounts. The only reasonable inference from the record is that neither party realized the actual state of affairs, and that both of them largely overestimated what the belongings of the company were worth for any purpose. In short, there may have been an honest belief on both sides that there was a margin of assets over liabilities, and an honest expectation that the concern would be able to pay its debts and make a success of the business.

But all parties were aware that the corporation was seriously embarrassed; that creditors were pressing, salaries in arrears, taxes unpaid, and a large part of the indebtedness long overdue. Had the truth about the assets been ascertained at the time, it would have shown at best doubtful ability to pay the debts in full, even with good management and the forbearance of creditors; that is to say, it would have shown that the invested capital was nearly all lost and the stock prac-

tically worthless. That this was the actual situation is found by the referee upon evidence which appears to us convincing. Shortly after the retirement of Moore & Co., the witness Wentz, who is an experienced bookkeeper and accountant, who took part in the negotiations for the purchase of appellant's stock, and who later became the general manager of the corporation, audited the books of the concern and prepared a statement of its financial condition as of September 5, 1911. His testimony recites at some length what was done in that regard, including an inventory and valuation of the merchandise in stock, and a careful estimate of the amount that could be realized from the outstanding accounts. This appraisal shows total assets of less than \$100 in excess of liabilities on the date mentioned, exclusive of debts owing to stockholders. No reason appears for doubting that Wentz made an honest and intelligent effort to find out just how the corporation stood, and we regard his appraisal as a conservative and even liberal valuation of the company's assets at the time of the purchase of the stock in question. As might be expected, it proved a good deal more accurate than the estimates and opinions on which the parties apparently acted; and this view is confirmed by the much lower prices which the trustee in bankruptcy was afterwards obliged to accept.

In view of the relations above stated between the buyer and seller of this majority stock, it must be held that Moore & Co., whatever their belief at the time, were chargeable with full knowledge of the financial condition of the corporation, and that their rights are to be determined by the facts which actually existed. The vice of the transaction under review is not found in dishonest intention on their part, but in the distressed situation of the company which operated as matter of law to make what they did a fraud upon creditors. Without adding a dollar to the assets they increased the liabilities some 20 per cent., and got security for the debt so created by a pledge of all the property of the corporation. The necessary effect of this arrangement was to make the concern hopelessly insolvent. The stock they parted with was valueless, and the notes they took had no valid consideration.

To uphold the transaction here disclosed, however free from moral delinquency, and thereby give preference over other creditors to these majority stockholders whose debt is the purchase price of their own shares sold to the corporation itself, when its condition was manifestly precarious, to say the least, would be so contrary to good conscience and common sense that no argument is needed to show that it ought to be condemned. The members of appellant's firm were bound to know, as the event proved, that the concern was on the verge of failure, and the law forbade them to deplete the assets, which belong in equity to the creditors, for the purpose of recovering some part of an otherwise lost investment.

The case, *In re Castle Braid Co.* (D. C.) 145 Fed. 224, which is referred to at length in appellant's brief, holds nothing whatever inconsistent with the views herein expressed. Not only are the facts materially different, as respects the vital issue in dispute, but the only

question decided was that, under the circumstances there appearing, the proof of debt filed by the claimant made a prima facie case in his favor, and cast the burden of disproof on the trustee. Moreover, the opinion contains a statement of the settled rule of law as follows:

"However, it must be borne in mind that the law looks with a watchful eye upon such a transaction—one between those having the management of a corporation, being directors therein, and occupying a position of trust and confidence, and the corporation itself—especially where such directors are to be benefited in any way, and where, as here, the rights of general creditors are involved."

The case of *Smith Lumber Co.* (D. C.) 132 Fed. 618, affirmed in 140 Fed. 988, 72 C. C. A. 682, is directly in point. The facts are strikingly similar and the question presented identically the same. It is decisive of this case.

However, we see no occasion for reviewing the authorities or otherwise prolonging the discussion. In our judgment, the referee was clearly right in disallowing appellant's claim, and the decree confirming his decision will therefore be affirmed.

In re LATHROP, HASKINS & CO.

(Circuit Court of Appeals, Second Circuit, July 8, 1914.)

No. 261.

1. PRINCIPAL AND AGENT (§ 85*)—LOSSES BY AGENT—INDEMNIFICATION.

An agent is entitled to be indemnified by his principal for losses arising by reason of acts done in the course of the agency, providing the agent's acts or transactions are not contrary to law.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 224-228; Dec. Dig. § 85.*]

2. JOINT ADVENTURES (§ 4*)—STOCK POOL—LOSSES—RIGHT TO INDEMNITY.

L. & Co. organized a stock pool to deal in the stock of a specified railroad company; F. & Co. subscribing to the extent of $\frac{2}{17}$ in one venture and $\frac{1}{5}$ in another. L. & Co. as agents of the subscribers gave the buying and selling orders, and when stock was bought would pay for it and deliver it among the subscribers in proportion to their respective interests, and when it was sold would call on the subscribers to furnish the stock for delivery in the same proportions. On January 19, 1910, L. & Co. bought stock for the pool, but on that day they failed, and because of their failure did not take or pay for the stock, nor was any portion thereof tendered to the subscribers, nor any demand made on them to contribute to the purchase price; the stock being resold for the account of L. & Co., causing a heavy loss. *Held*, that the loss was caused, not by the carrying out of the duties of L. & Co., under the pool contract, but by their insolvency only, and hence F. & Co. though having failed on the same day, could not be compelled to contribute any portion of such loss.

[Ed. Note.—For other cases, see *Joint Adventures*, Cent. Dig. §§ 3-6; Dec. Dig. § 4.*]

3. INDEMNITY (§ 9*)—MEASURE OF DAMAGES.

The measure of damages for breach of a contract of indemnity is not the amount of liability incurred, but the amount actually paid by the person indemnified on account of the loss.

[Ed. Note.—For other cases, see *Indemnity*, Cent. Dig. §§ 16, 17; Dec. Dig. § 9.*]

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here on appeal from the order of the United States District Court for the Southern District of New York, dismissing a petition for the review of an order made by a referee in bankruptcy. See, also, 184 Fed. 534.

Hays, Hershfield & Wolf, of New York City (Ralph Wolf, of New York City, of counsel), for Irving L. Ernst et al., as trustees, etc.

Abram I. Elkus and William A. Barber, both of New York City (Abram I. Elkus, and William E. Collins, both of New York City, of counsel), for respondents.

Before COXE and ROGERS, Circuit Judges, and HAND, District Judge.

ROGERS, Circuit Judge. The appellants are the trustees in bankruptcy of J. M. Fiske & Co. and others, bankrupts, and they allege that Lathrop, Haskins & Co., bankrupts, were, at and before the filing of the petition in bankruptcy against them, and still are, justly and truly indebted to the firm of J. M. Fiske & Co. in the sum of \$123,578.79. On the same date that Lathrop, Haskins & Co. became bankrupt, J. M. Fiske & Co. also failed, the failure of each having been occasioned by a severe decline in Columbus & Hocking stock. The appellants have an admitted claim against the estate of Lathrop, Haskins & Co. of \$103,485.17. The question involved is whether or not there should be set off as against this admitted liability the sum of \$22,812.38 as claimed by the trustee of Lathrop, Haskins & Co.

It appears that in March and July, 1909, certain New York Stock Exchange houses, including, among others, Lathrop, Haskins & Co. and J. M. Fiske & Co. entered into two joint ventures for the purchase and sale of shares of the common stock of the Columbus & Hocking Coal & Iron Company. J. M. Fiske & Co. subscribed therein to the extent of $\frac{2}{17}$ thereof in one joint venture, and $\frac{1}{8}$ thereof in the other joint venture. Lathrop, Haskins & Co., as the agents of the joint ventures, gave the buying and selling orders for the stock. When stock was bought it was distributed by Lathrop, Haskins & Co. among the participants in the joint ventures in proportion to their respective interests. When stock was sold the participants in the joint undertaking were called upon by Lathrop, Haskins & Co. to furnish the stock for delivery, in proportion to their respective interests.

On January 19, 1910, brokers, acting upon instructions from Lathrop, Haskins & Co., bought a total of 2,600 shares of Columbus & Hocking Coal & Iron Company stock at a total cost of \$217,562.49. This was the day on which Lathrop, Haskins & Co. failed, and because of their failure they did not take and pay for this stock, as had been their custom in the past in respect to stock purchased for the joint adventure or pool. If they had proceeded as respects this purchase according to the method they pursued as respects the other purchases previously made by them for the pool, they would have taken and paid for this stock and then distributed it among the members of the pool, including J. M. Fiske & Co., and thereupon, under the terms

of the pool agreement, such members would have been obligated to accept and pay for their proportionate share of said stock. Lathrop, Haskins & Co. never made any demand or request upon J. M. Fiske & Co. to purchase or take up their proportion of the shares, and they never tendered such shares. And as Lathrop, Haskins & Co. did not themselves, according to their custom, take and pay for the stock, it was resold and brought only \$69,929, causing a loss to Lathrop, Haskins & Co. of \$147,633.49.

The trustee in bankruptcy of Lathrop, Haskins & Co. claims that he should be allowed to offset against the claim filed by J. M. Fiske & Co. for \$103,485.17 the sum of \$22,812.38, representing J. M. Fiske & Co.'s proportionate share of the total loss of \$147,633.49 suffered by Lathrop, Haskins & Co. The referee in bankruptcy allowed the claim made by Lathrop, Haskins & Co., and ordered the claim of J. M. Fiske & Co. reduced by the sum of \$22,812.38. And on petition to review the District Judge affirmed the action of the referee.

[1] The case was decided in the court below upon the principle that an agent is entitled to indemnity from his principal for losses occurring in the due execution of his agency. We do not understand that any one questions the principle that an agent must be indemnified by those for whom he has acted against loss arising by reason of acts done in the course of the agency. The principle is an old and well-established one which entitles the agent to call upon his principal to indemnify him against the consequences of all acts done by him in the execution of his agency, provided the actions or transactions are not contrary to the law. In the language of the Supreme Court in *Bibb v. Allen* (1893) 149 U. S. 481, 498, 13 Sup. Ct. 950, 956 (37 L. Ed. 819):

"Speaking generally, the agent has the right to be reimbursed for all his advances, expenses, and disbursements incurred in the course of the agency, made on account of or for the benefit of his principal, when such advances, expenses, and disbursements are reasonable, and have been properly incurred and paid without misconduct on the part of the agent. * * * It is another general proposition, in respect to the relation between principal and agent, that a request to undertake an agency or employment, the proper execution of which does or may involve the loss or expenditure of money on the part of the agent, operates as an implied request on the part of the principal, not only to incur such expenditure, but also as a promise to repay it."

[2] But the question we have to consider is whether the facts of this case bring the transaction within the operation of the rules thus stated. Was the loss which Lathrop, Haskins & Co. incurred a loss incurred without fault on their part and without violating their duties as agent? The claim is made that, inasmuch as Lathrop, Haskins & Co. failed to take and pay for the stock which they purchased, they were never in a position to deliver it to J. M. Fiske & Co., the latter were never under any obligations to take and pay for their proportionate part of it. And that as no demand or request was ever made upon J. M. Fiske & Co. to purchase or take up their proportionate part of the shares and no tender of the shares was made, no obligation existed to reimburse Lathrop, Haskins & Co. for the loss they incurred. In other words,

it is asserted that Lathrop, Haskins & Co. failed to perform their contract, and therefore are not entitled to indemnity.

In *Duncan v. Hill*, L. R. 8 Ex. 242 (1873) the facts were as follows: The plaintiffs were brokers, and bought for the defendant certain shares of stock for the account of July 15th; on that day by the defendant's instructions they carried them over to the account of July 29th, and paid differences amounting to £1,688; on July 18th the brokers, being unable to meet their engagements, by reason of various persons for whom they had made contracts (the defendant being one) failing to make their due payments, were declared defaulters, and, according to the rules of the Stock Exchange, all their transactions were closed, at prices current on that day. The result was to make the brokers liable to pay a further sum for differences upon the stocks and shares so carried over by them, and they sought to recover this difference, together with the £1,688 from the defendant. As to the latter claim no contest was made, but the defendant denied the right to recover the former claim. The court decided for the defendant, and held that as the loss incurred by the brokers arose from their own default by reason of their insolvency brought on by want of means to meet their other primary obligations, and that as there was no evidence that such insolvency was occasioned by reason of their having entered into the contract for the defendant, the latter was not liable.

So in the case at bar the loss incurred by the brokers Lathrop, Haskins & Co. arose from their own default. There is nothing in the record which shows that any demand was made upon J. M. Fiske & Co. or upon any of the other members of the pool, and if no such demand was made and no opportunity afforded to them to turn over to Lathrop, Haskins & Co. their respective proportions of the money needed, they were not in default, but the default was solely the default of Lathrop, Haskins & Co. The default is the same whether under the agreement of the parties, Lathrop, Haskins & Co. had or had not a right to call upon the parties to the pool to furnish the money for the purchase of the stocks before they were prepared to make delivery of the stocks. If we concede, for the purpose of argument, that Lathrop, Haskins & Co. had a right to ask for payment before they had possession of the stocks, they never exercised the right. It is said that if they had made a demand on J. M. Fiske & Co., the latter could not have complied with it, as the bankruptcy of that firm occurred on the same day. Non constat that J. M. Fiske & Co. would not have raised sufficient money to have met this particular obligation, if obligation it was, had the demand been made. Neither does it appear from anything upon the record that the failure of Lathrop, Haskins & Co. to take the stock would have been avoided if J. M. Fiske & Co. had supplied their proportionate part of the money needed to complete the payments. It is true that tender is waived where it is useless to make it. And it is urged that as the bankruptcy of J. M. Fiske & Co. occurred on the very day that that of Lathrop, Haskins & Co. occurred, the tender would have been useless. But we think that if the principle referred to is to have any application to the facts of this case, it should affirmatively appear that the default of Lathrop, Haskins &

Co. as to this stock happened after, and not before, the receiver of J. M. Fiske & Co. had been appointed. But even if that affirmatively appeared to be the fact, we do not wish to be understood as intimating that in our opinion the claim now made against J. M. Fiske & Co. could be sustained.

There can be no implied obligation to indemnify a broker for a default which is due to his own insolvency brought on by want of means to meet his own personal obligations. And if a broker or agent seeks to recover upon the theory of an implied obligation to indemnify him against losses, the burden must be upon him to show that the loss was occasioned by the default of the principal, and was not occasioned by the broker's own default or insolvency or failure to do his duty. He must show that the loss for which he seeks indemnity would not have occurred but for the default of the principal. If this be the law, then it would be necessary that the trustee for Lathrop, Haskins & Co. should show that the default made by them was not due to their own insolvency and inability to meet their own obligations, but was occasioned by the failure of their principal, J. M. Fiske & Co., to meet theirs. This they have not done. And even if it were to be conceded that J. M. Fiske & Co. were in default, although no demand had ever been made upon them, and although Lathrop, Haskins & Co. were in no position to make a demand under the terms of the agreement, not having obtained the stocks, still it would be incumbent to show that it was the default of J. M. Fiske & Co., and not the insolvency of Lathrop, Haskins & Co., which occasioned the loss if indemnity is to be made. In *Duncan v. Hill*, supra, the defendant, along with many others, was in default, but the fact of the defendant's default did not entitle the plaintiff to his indemnity because the loss was not due to the defendant's default but to the plaintiff's insolvency.

The agreement between the parties to this pool seems to have been an agreement on the part of Lathrop, Haskins & Co. that that firm would purchase certain shares of stock, and that after it had been so purchased and paid for by them they would distribute it among the members of the pool, who would then reimburse Lathrop, Haskins & Co. according to their respective interests. That this was the understanding seems to be shown by the conduct of the parties in their prior dealings. The stipulated facts show that if Lathrop, Haskins & Co. had taken and paid for the stock, they might have been in a position then to assert a claim against J. M. Fiske & Co. for the cost of their proportionate share. As Lathrop, Haskins & Co. never fulfilled the condition, they have no claim which they can assert.

[3] The court below seems to have confused a distinction which exists between a covenant to pay money and a covenant to indemnify. The theory of the court appears to have been that there was an obligation on the part of J. M. Fiske & Co. as a principal to indemnify Lathrop, Haskins & Co. as agents for losses incurred in the purchase of these stocks. But in the final adjustment of the claim it seems to have proceeded upon the theory of a covenant to pay money, and not upon the theory of indemnity. For it allows the whole claim of \$22,812.38. But the measure of damages in contracts of indemnity is not the amount of liability incurred, but the amount actually paid by the

person indemnified on account of the loss. See *Central Trust Co. v. Louisville Trust Co.*, 100 Fed. 545, 546, 40 C. C. A. 530, 531 (1900); the court through Mr. Justice Lurton, after citing *Wicker v. Hoppock*, 6 Wall. 94, 18 L. Ed. 752 (1867), *Mills v. Dows*, 133 U. S. 424, 10 Sup. Ct. 413, 33 L. Ed. 717 (1890), and *Johnson v. Risk*, 137 U. S. 300, 308, 11 Sup. Ct. 111, 34 L. Ed. 683 (1890), says:

"These cases emphasize the distinction between a covenant to pay and one to indemnify, and hold that an action will lie for a breach of a covenant to pay before actual payments by the plaintiff, but not upon a mere covenant of indemnity, until the plaintiff has actually sustained loss or damage."

Now Lathrop, Haskins & Co., being bankrupt, it must be conceded, can never pay the full amount of the claim of the brokers for \$147,633.49, due because of the failure to take the stocks in question. And assuming that any liability of indemnity exists against J. M. Fiske & Co., it is only a right to be indemnified by the latter for such a proportionate share of \$147,633.49 as the estate of Lathrop, Haskins & Co. ultimately pays. As only a small proportion of the claim of \$147,633.49 made against Lathrop, Haskins & Co. will ever be paid if the trustees of J. M. Fiske & Co. are made to pay 100 per cent. of their proportionate part of that claim, they will be receiving much more by way of indemnity than they will pay or disburse.

But for reasons already stated we do not think that, either upon the theory of an agreement to pay or upon the theory of an agreement to indemnify, any reason exists at law or in equity for allowing the trustees of Lathrop, Haskins & Co. to assert against the trustees of J. M. Fiske & Co. any claim for a loss incurred by their own default in not completing the purchase of the shares of stock according to their agreement.

The decree is reversed.

MUNROE v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. July 9, 1914. Rehearing Denied August 11, 1914.)

No. 1047.

WITNESSES (§ 21*)—FAILURE TO COMPLY WITH SUBPENA DUCES TECUM—LIABILITY FOR CONTEMPT.

A witness is not subject to punishment for contempt for failing to produce, in obedience to a subpoena duces tecum, documents which were not in his physical possession nor under his personal control as of legal right, but were in a foreign country across seas, in the possession of a partnership of which he was a member, but not subject to his control except by consent of his copartners.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 37-41; Dec. Dig. § 21.*]

In Error to the District Court of the United States for the District of Massachusetts; Jas. M. Morton, Jr., Judge.

Proceeding for criminal contempt by the United States against Henry W. Munroe. Finding of guilty, and defendant brings error. Reversed.

For opinion below, see 210 Fed. 326.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Boyd B. Jones, of Boston, Mass. (Henry R. Stern, of New York City, on the brief), for plaintiff in error.

Asa P. French, U. S. Atty., of Boston, Mass., for the United States.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PUTNAM, Circuit Judge. This is a writ of error to the District Court of the United States for the District of Massachusetts to review a judgment against Henry W. Munroe for contempt. The facts of the case are mainly stated for our purposes in the opinion of the District Court.

Munroe was found guilty of criminal contempt, and sentenced to pay a fine of \$250 and be confined in jail for 10 days. The contempt charged was the alleged refusal or failure of Munroe to produce certain checks before the grand jury after service on him of a subpoena duces tecum. Munroe failed to produce the checks as ordered by the subpoena. Munroe is a citizen of the United States, residing, at the time of the service of the subpoena upon him, in the city of New York. He is the senior partner of the firm of Munroe & Co., whose principal place of business was, and is, in Paris, France, where the checks in question were, and always have been, and still are, and where the business transactions out of which the checks arose occurred; none of the transactions, so far as Mr. Munroe's partnership is concerned, having been in the United States.

There was no specific finding of facts; but this writ of error has proceeded before us on the opinion filed in the District Court as though it had been a formal finding of facts, the same having been incorporated in the record. It is necessary, therefore, with reference to certain requests for rulings, to refer to what appears in that record. The District Attorney had observed, as appears by the record, that he understood that certain requests were for facts, and not requests for rulings; and he said he was not quite clear whether the court refused to give them or declined to pass upon them as being immaterial. Thereupon the following came from the court:

"I regard them as immaterial, but I also refused them because the evidence produced before me did not sustain them."

Then Munroe excepted to the refusals of the court to find the facts as stated in certain other requests, some of which we will call to specific attention. Under the circumstances, we might reverse for the want of formal findings of fact, but we deem it suitable to proceed on the same line on which the parties have proceeded, namely, to hold the matters stated in the opinion of the District Court as facts found, and to pass upon the rulings made, and those requested and refused, in the light of what appears in the record before us. Proceeding thus, the facts found by the court covered the following:

"I find the material facts to be as follows: The defendant is a member of a partnership (Munroe & Co.) which consists of five partners and has been in existence at least 10 years. It is organized under the laws of France and is engaged in the business of banking and foreign exchange. The defendant has been a member of the firm since its organization, and is now the senior partner, and has the largest individual interest; he is a citizen of the United States. The principal place of business of the firm is in Paris, where three

of the partners are resident, of whom one is a French citizen, and another is a brother of the defendant. It has also had, for 10 years at least, a place of business in New York, in or near which city the defendant and one other partner reside. This place of business is carried on under the name of John Munroe & Co. Although the partnership is, as stated, organized under the French law, the rights of the partners inter sese do not appear, as to the papers and matters concerned in these proceedings, to be different from what they would be under the law of this district. At times the defendant went to Paris and participated in the business there, and one of the Paris partners came to New York and participated in the business there.

"In May, 1913, the United States officers had reason to believe that one Mary A. Dolan, of Brookline, Mass., might have been guilty of offences against the criminal laws of the United States by smuggling merchandise imported by her from Paris, France, into the district of Massachusetts, and her conduct in relation thereto was under investigation by the grand jury for this district at the times herein referred to. She had had a deposit with Munroe & Co. at its Paris establishment, against which she had drawn checks, which had been delivered to various persons in Paris in payment of accounts due them. These checks had been paid by Munroe & Co. at their Paris branch, and the paid checks were retained there. * * *

"On September 19, 1913, the defendant and the other New York partner of Munroe & Co. were duly served with a subpoena duces tecum of this court, commanding them to appear before the United States grand jury in Boston, and to produce certain papers and documents therein specified, among which were certain paid checks drawn by Mary A. Dolan upon Munroe & Co. at their Paris house. Other papers were called for by the subpoena, the production of which is not now insisted upon, and as to which the defendant was informed by the United States officers that they need not be produced. A correct copy of said subpoena and returns of service thereon is annexed to the presentment of the grand jury for contempt. No question has at any time been raised by the defendant that the subpoena required the production of an unreasonable number of documents, or insufficiently described the documents which were required. The checks called for by it were material and important evidence upon the matters which the grand jury were investigating. At the time of the service of this subpoena, said checks were, and they still are, in Paris, in the possession of the firm of Munroe & Co., of which the defendant, as has been stated, was and is a member. In other words, the possession of the checks was in the defendant and his four partners as joint tenants.

"This subpoena the defendant, under advice of counsel, entirely disregarded in so far as it required the production of papers or documents. He did not communicate to his partners in Paris the fact that the subpoena had been served upon him. He made no request upon the Paris house to forward the papers called for by it, and made no effort whatever to obtain any of the papers specified in it. He appeared before the grand jury October 22d and testified that he had not the papers called for, that he had made no effort whatever to obtain them since the service of the subpoena, and that he was under no obligation to make any effort to obtain said papers or checks. The other New York partner was excused from appearing before the grand jury, and no proceedings are pending against him.

"Thereupon the defendant was presented by the grand jury for contempt, and these proceedings were instituted. The statements of fact in the presentment of the grand jury are true.

"A hearing was had before me upon said presentment on October 29th, at which the defendant was present with counsel, and such evidence was taken as either party desired to offer. At said hearing the facts appeared to be as above stated, and at the conclusion of the hearing I said:

"I think, when the government required evidence for use in prosecutions, that as a citizen of the country he was bound to make a reasonable and honest and diligent effort, not to pass into unreasonable bounds (and plainly to procure a few checks was nothing unreasonable to ask of a man) to get the evidence requested when he was a joint owner of it. I do not think it is par-

ticularly important that the papers in this case are in Paris. They might be in Chicago; they might be in San Francisco. The fact is that a joint owner of documents called for by a subpoena duces tecum, without making any effort whatever to procure them, comes into court and says, "I am not bound to make any effort." I think he is. I haven't any doubt that upon the facts here the defendant is in contempt."

Other matters appearing in the opinion of the District Court are not essential to the case presented here. They were connected with a praiseworthy attempt on the part of the court to adjust the matter amicably. In the eyes of the law they are only personal matters, and cannot affect this writ of error.

Various errors were assigned that were too general according to technical rules. The grounds upon which we rest our conclusion, however, are of so fundamental a character that we have a right to refuse to be committed to any result contrary thereto; and they may be said to be covered by the general assignments of error to which we refer, and also by the following assigned error:

"3. Said District Court erred in refusing to make the sixth ruling requested by the defendant, namely:

"The evidence does not warrant a finding that at or since the date of the service of the subpoena upon the defendant the checks or drafts therein referred to were not in Paris, France, in the actual possession of the partners of the defendant under a partnership agreement whereby such partners were under no obligation to send the same to the defendant at New York, and whereby the defendant had no right, without the consent of all the partners, to have the checks sent to him at New York."

As to this refusal the request was correct, because, the right being a joint right, and the papers referred to, as well as the partners referred to, being in a foreign country, where the business to which the papers related was transacted, it was plain that the partners who resided there, and had the papers in their possession had the privilege of objecting to their being forwarded to a foreign country if they desired so to do. This is plain law, as was stated by Vice Chancellor Shadwell in *The Attorney General v. Wilson*, 9 Simons, pages 526 and 530. It may be added that this proposition is so clear that there is no necessity of citing any authorities in reference thereto. It is true that the court observed that if Munroe had been insistent upon a request for the papers they would have been forwarded to this country; but there is no evidence to that effect. We know of no proofs upon that point except of a mixed character; indeed, so far as that is concerned, the case is exactly like *The Attorney General v. Wilson*, supra, except that in *The Attorney General v. Wilson* the party proceeded against made a statement that his copartners would not give their consent to the delivery of the books, papers, etc., asked for by the subpoena. In neither case was there any direct evidence that such a consent had been in fact refused.

Two other errors assigned were as follows:

"(8) Said District Court erred in ruling that the question of whether the defendant was of right entitled to have said checks or drafts sent to him at New York by his partners for the purposes of said subpoena was immaterial.

"(9) Said District Court erred in refusing to make the eleventh ruling requested by the defendant, namely:

"If the defendant at the date of the service of said subpoena was not, and has not since been, entitled as of right to have said checks or drafts sent to him at New York for the purposes of said subpoena, then he cannot be found guilty of criminal contempt for not having obtained them, even if the court should find that his partners by way of favor would have sent them to him at New York if he had requested it."

In proceeding on a matter of contempt, involving a fine and imprisonment, Munroe was entitled to have his rights positively determined, and there should have been a positive ruling of the court upon these propositions; and that ruling would necessarily have been against the United States, and would have positively precluded any proceeding against Munroe growing out of the answer thus given. In the line of the request per the above alleged errors 8 and 9, was also the following leading up to them, although it was practically covered by what we have from the opinion of the learned judge of the District Court:

"(13) The District Court erred in refusing to make, without any qualification, the findings of fact asked for in the defendant's first request for finding, namely:

"At the time of the service of the subpoena referred to in the above-entitled petition the defendant was in New York City, and the checks therein set forth were not in the physical possession of the defendant, but were in Paris, France, in the possession of the banking copartnership of Munroe & Co., of which the defendant was then a partner."

No observation, however, is required with reference to assigned error 13; it only leads up to assigned errors 8 and 9, and the whole together would have necessarily resulted that the court could not compel Munroe to do what he could not do in his own right, nor punish him for contempt in neglect in reference thereto. The fundamental question involved is not one of morals or etiquette, nor one whether the court could punish Munroe for not doing what he could accomplish only with the aid of favors from other persons; it could only punish him for what was in his power or legal right to do, and this, too, leads directly to what is the leading case on this topic.

We refer to the opinion of Lord Ellenborough, in *Amey v. Long*, 9 East, 473, relating to subpoena duces tecum, announced in 1808, and of the highest authority in reference thereto. He was speaking the unanimous opinion of the Court of King's Bench. Some things have since been broadened out in practice, but there is nothing to show that what we now quote from this opinion, at pages 482 and 483, has ever been modified in practice or questioned in theory, namely:

"As to the first of these objections, and which applies to both counts of the declaration equally, it appears to us that the allegation 'that the defendant could and might in obedience to the said subpoena have produced and shown forth at the time and place aforesaid, at the said trial of the said issue, the said warrant mentioned and referred to in the writ of subpoena,' in the plain, natural, and obvious sense of these words, imports an immediate physical ability to do the thing required to be done on the part of the defendant; i. e., that the defendant was able, by having the warrant in his own possession, to have produced it, and not that, by application to others who had the custody of it, he could and might have acquired the means, and indirectly have become the instrument, of producing it. The latter sense of the words is indeed so remote from the ordinary understanding of mankind on such a subject, and has so little reference to the duty sought to be enforced, viz., the production of that by the witness which the witness could, in obedi-

ence to the subpoena, personally produce, that, after verdict, it is not to be intended that the judge at the trial received proof of the words in this strained and unnatural sense of them. And when it is afterwards said in the count that the defendant did not, nor would, at the time and place of trial, produce the warrant, although solemnly called upon by the court for that purpose, 'and, although he had no lawful or reasonable excuse or impediment to the contrary,' it certainly excludes the case of the warrant being in the possession of another, and on that account attainable only through the means or by the delivery of such other person, inasmuch as the existence of such circumstances, if they had in fact existed, would have afforded 'a lawful and reasonable excuse and impediment to the contrary,' and of course have falsified the allegation upon which the blame of nonproduction is rested; no man being obliged, according to any sense of the effect of such a subpoena, to sue and labor in order to obtain the possession of any instrument from another for the purpose of its production afterwards by himself, in obedience to the subpoena."

We lay emphasis here upon the words, "could and might have produced," "imports an immediate physical ability to do a thing required," "by having the warrant in his own possession," "and not that by application to others who had the custody of it," "which the witness could, in obedience to the subpoena, personally produce," "excludes the case of the warrant being in the possession of another," "and no man being obliged to sue and labor," etc. Of course, this is not to be taken too literally, but it certainly applies to the case of this plaintiff in error. He could not lawfully be called upon under a writ of subpoena duces tecum, to sue and labor to the extent of superintending shipment of papers from France to the United States, to have the care and responsibility of them upon arrival, or of being obliged to await the necessities of Atlantic navigation, and to assume all the other incidents of an importation of this character, including the chance of the time of the arrival of the documents and the travel to and from in connection therewith, merely for the per diem of a witness of perhaps only one day attending court, and the mileage from his place of residence to the place of trial.

We make these observations because the amount of responsibility and attention required from the position of the United States, with reference to importing documents from a foreign country, are too great to be lawfully demanded as the result of a subpoena duces tecum upon an ordinary witness; and in doing this we stop short of considering whether, in any event, the service of a subpoena can compel a witness to go outside of the district of his own residence for the purpose of obtaining documents, or for any purpose except traveling to the place of judicial session for which he is compensated, and especially whether a subpoena duces tecum can compel the holder of documents, which, in many cases, may be of very great value, to transport them from one foreign country to a domestic country, and especially across the high seas, with all the perils attaching thereto. No case can be found which justifies a proposition of that character. The caution which the common law took in regard to transportation of documents of value across the high seas is illustrated by what is said in Bacon's Abridgement under Error (D) II. While, with reference to a writ of error from Parliament to the King's Bench, the Chief Justice was required to attend with the original record, though the same was immediately restored

to the King's Bench, yet, on a writ of error to a judgment in the King's Bench in Ireland, only a transcript of the record was sent across the channel by reason of the dangers of the seas. This practice was commented on by Lord Mansfield in *Vicars v. Haydon*, Cowper, 841 and 843.

The judgment of the District Court is reversed, and the case is remanded to that court for further proceedings in accordance with law

In re ROMADKA BROS. CO.

FIRST SAVINGS & TRUST CO. v. ROMADKA.

(Circuit Court of Appeals, Seventh Circuit. May 29, 1914.)

No. 2046.

1. CORPORATIONS (§ 484*)—POWERS—GUARANTY.

A corporation cannot ordinarily become bound as an accommodation guarantor, and its naked promise as surety or guarantor with or without an independent consideration cannot be enforced.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1815; Dec. Dig. § 484.*]

2. BANKRUPTCY (§ 341*)—CLAIM AGAINST ESTATE—LIABILITIES—NOVATION—EVIDENCE.

On an application to establish a claim against the corporation's estate in bankruptcy on a note of certain of its stockholders guaranteed by it, evidence held insufficient to show a novation agreement or an assumption by the corporation of the indebtedness represented by the note, but on the contrary, to establish that the guaranty was made for the mere accommodation of the stockholders, and was not based on an independent consideration flowing to the corporation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 516, 528; Dec. Dig. § 341.*]

3. CORPORATIONS (§ 484*)—POWERS—INDEBTEDNESS—SURETY—GUARANTY.

While a corporation may bind itself as surety or guarantor to perform a contract, made for its benefit or in the furtherance of an object within its corporate powers and purposes, it cannot bind itself for the payment of debts owing by its stockholders to third parties, wherein it had no interest, either direct or collateral, against which guaranty it may properly plead the defense of *ultra vires*.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1815; Dec. Dig. § 484.*]

Appeal from the District Court of the United States for the Eastern District of Wisconsin; Ferdinand A. Geiger, Judge.

In the matter of bankruptcy proceedings of Romadka Bros. Company. An order of the referee rejecting the claim of the executors of Charles P. Romadka, deceased, was reversed by the District Court (206 Fed. 944), and the First Savings & Trust Company, trustee of the bankrupts, appeals. Order of District Court reversed, with directions to disallow the claim.

The bankrupt is a corporation, incorporated under the laws of Wisconsin for manufacturing and other purposes specified in the articles, and the trustee in bankruptcy appeals from an order of the District

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
216 F.—8

Court, which reverses an order of the referee therein and directs allowance against the estate in bankruptcy of the appellee's claim in suit. The opinion of Judge Geiger upon which the order rests, together with his recital of facts deemed material, is certified in the transcript of record, and appears as well reported under the title *In re Romadka Bros. Co.* (D. C.) 206 Fed. 944.

Miller, Mack & Fairchild, of Milwaukee, Wis. (Samuel T. Swansen, of Madison, Wis., and James B. Blake, of Milwaukee, Wis., of counsel), for appellant. John M. W. Pratt, of Milwaukee, Wis. (Cary, Upham & Black, of Milwaukee, Wis., of counsel), for appellee.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

SEAMAN, Circuit Judge. The claim in suit is a promissory note for \$30,000, dated March 17, 1909, made by five individual signers and payable to the decedent, Charles P. Romadka, bearing an indorsement thereon as follows: "For value received, we hereby guarantee the payment of the within note at maturity, and interest thereon at its respective maturity"—signed in the name of the bankrupt corporation, by its president and secretary. Both of the officers so executing the guaranty are individual makers on the face of the note and all the makers are stockholders of the guarantor corporation and owners of all its capital stock. Thus the prima facie import of the contract is an obligation of the joint and several makers of the note for their individual indebtedness, and an undertaking on behalf of the corporation to guarantee payment thereof.

[1] In this aspect of the claim, the corporation appears as an accommodation guarantor of the indebtedness of the makers, and the doctrine is well settled that a corporation cannot ordinarily become bound for such purpose, so that its naked promise as surety or guarantor (with or without independent consideration) could not be enforced. 3 Cook on Corporations (6th Ed.) § 774; 4 Thompson, Com. on Corporations, § 5739; 10 Cyc. 1115. This doctrine is a mere exemplification of the established general rule that the contractual powers of a corporation are limited to objects authorized (either expressly or by implication) in its incorporation. It is upheld in Wisconsin (*Madison, W. & M. Plank Road Co. v. Watertown & P. Plank Road Co.*, 7 Wis. 59; *Kennan v. Rundle*, 81 Wis. 212, 51 N. W. 426) and by this court, in effect, in the case entitled *In re Haas Co.*, 131 Fed. 232, 234, 65 C. A. 218.

We do not understand the above stated general doctrine to be controverted or questioned in the opinion of the trial court directing allowance of the claim, nor in the argument on behalf of the appellee in support of such allowance, but that the ruling in favor of the claim is predicated on other propositions which are assumed to render that doctrine either inapplicable or inoperative. Those propositions are: First (as stated in substance in the opinion filed), that the evidence proves the transaction out of which the note arose to be in truth and purpose an assumption by the corporation of the indebtedness of the several makers (stockholders), for the benefit and purposes of the corporation, and thus within its powers. Second (as further contended in the argument of counsel), that the evidence establishes the contract on the part of the corporation, treated as one of guaranty: (1) To be made

for corporate purposes within its powers; and (2) in either view of the contract creates an estoppel against the defense of ultra vires.

[2] 1. The contention that the arrangement was not one of accommodation guaranty of payment, but was intended by all the parties and amounted to an assumption by the corporation of "the personal debt" of the stockholders to the payee, is discussed and upheld in the opinion of the trial court for the allowance. The opinion is prefaced with a summary of circumstances in evidence which either preceded or attended the execution of the note in suit, whereon the ruling must rest, and such statement (as reported 206 Fed. 944) may be referred to without repetition as an entirety in the present opinion. On examination thereof, however, and as well of the testimony preserved in the record, we believe no sanction appears for the above-mentioned inference therefrom (either of law or of fact) of a novation agreement, or assumption on the part of the corporation of the indebtedness represented by the note, irrespective of the question of want of corporate power to that end reviewed by this court in the case of *In re Haas Co.*, supra, involving like conditions.

These facts are settled and conceded: (a) The consideration represented by the note was the personal indebtedness of the stockholders to the payee when it was executed by them as makers. (b) The purported authorization of any undertaking on the part of the corporation thereupon appears "from the records of the stockholders' meeting," in substance reciting as follows: That "the president suggested" an issue of "at least \$100,000 common stock as collateral security" to be held by the payee with the note signed by the stockholders, and such "note to be assumed by this company"; that the payee, "C. P. Romadka, who was present, preferred their note and indorsement"; and that a resolution was then adopted for the note to be executed by the stockholders "and indorsed by this company by its president and secretary, Mr. C. P. Romadka consenting." (c) The note in suit was thereupon signed by the makers, so "indorsed" with guaranty of payment and accepted by the payee. The ruling that the corporation "really assumed the personal debt" of the makers, notwithstanding the undoubted import of the written contract otherwise, rests on circumstances which are the subject-matter of recitals contained in the above-mentioned record of the stockholders' meeting, together with testimony as to financial difficulties of the corporation and antecedent conferences for rehabilitation thereof. In the opinion it is stated that "there is controversy in the testimony" of various witnesses "with respect to the precise consideration prompting the transfer of real estate" by the stockholders to the corporation (hereinafter mentioned), but we believe any differences in their versions respectively to be immaterial, and that the recitals thereof as entered of record at the meeting of stockholders are both sufficient and controlling for all purposes of the present issue. The additional facts so relied upon may be classified and stated as follows: (1) That the corporation accepted a conveyance from the stockholders of their several equities in certain real estate, in settlement of \$64,800, as their personal indebtedness to the corporation for overdrawn accounts, and "for the purpose of strengthening the assets of the company," thereby exhausting all their property, aside from

their holdings of stock in the corporation, and that the payee of the note (as stated in the opinion) gave "his assent thereto," and surrendered certain of the stock held by him as collateral for the stockholders' indebtedness to him. (2) That the corporation had been for some time in financial difficulties, with its resources impaired by the above-mentioned overdrafts and other causes, and various plans for rehabilitation were under consideration, resulting in the adoption of a plan at a stockholders' meeting of even date with the note—attended by the payee in an advisory capacity only—to increase the capital stock from \$359,000 to \$500,000, whereof \$100,000 was to be preferred stock and placed on sale, and \$400,000 common stock to be issued to the stockholders in lieu of their \$359,000. (3) That C. P. Romadka, payee of the note, who was originally a principal stockholder in the corporation, had sold and transferred "his entire holdings" therein to the remaining stockholders (makers of the note) several years before, but all their shares of stock were thereafter held by him pledged as a collateral for the purchase money, whereof the note in suit represents the unpaid portion, and that in the course of the stockholders' proceedings above mentioned, the suggestion appears of record (as hereinbefore quoted) for acceptance by such payee of \$100,000 of common stock as collateral security, together with his answer and the ensuing resolution above stated.

Laying aside the last mentioned "suggestion," offered by the president (one of the makers) at the meeting of stockholders, that the note "be assumed by this company," we are advised of no testimony in the record which tends to prove even an offer on the part of the corporation to assume the indebtedness of the stockholders to the payee, and the ensuing rejection of that proposal plainly left it inoperative, aside from any question of want of consideration for such an agreement. In reference to the conveyance made by the stockholders to the corporation, the transaction is without force, as we believe, for the following reasons: Not only was it executed nearly a month prior to the making of the note and for the clearly expressed purpose of satisfying the conceded indebtedness of the grantors to the grantee corporation, but the payee of the note was neither a party to the conveyance, nor possessed of any interest in the property conveyed; and the facts cited, that he appears to have advised or assented to the making of such conveyance by the stockholders (his debtors), and that the corporation accepted the grant, can neither create liability in his favor against the corporation for the grantors' indebtedness to him, nor impute consideration therefor.

We are of opinion, therefore, that the first proposition must be overruled as unsupported by evidence.

[3] 2. The contentions that the evidence establishes liability under the contract, treated as one of guaranty on the part of the corporation, are both untenable, as we believe, for like want of supporting facts. Undoubtedly the corporation may bind itself as surety or guarantor for performance of a contract made for its benefit, or in furtherance of an object within its corporate powers and purposes (vide *Winterfield v. Cream City Brewing Co.*, 96 Wis. 239, 242, 71 N. W. 101), but payment of debts owing by its stockholders to third parties, where-

in the corporation has no interest, direct or indirect, is plainly not for its benefit, nor within its corporate objects. In *re Haas Co.*, supra. As before stated, the transfer of real estate by the stockholders to the corporation were prior and independent transactions and for an independent consideration, wherein the payee of the note in suit neither claimed nor had any interest; and the evidence discloses no benefit granted to or acquired by the corporation in consideration of its guaranty. The further fact relied upon as proving consideration—agreement by the payee to accept from the makers, as collateral security, \$100,000 of stock in place of the entire amount theretofore pledged—is without force, for the reason that it was for the exclusive benefit of the makers and the corporation had no interest and acquired no benefit in such arrangement.

We believe, therefore, that the purported guaranty indorsed thereon by its officers was purely an accommodation promise, not within the corporate powers and not binding as a corporate obligation, and that no circumstances are in evidence to estop the corporation "from invoking the defense of *ultra vires*."

The order of the District Court is reversed, accordingly, with direction to disallow the appellee's claim.

COPELAND v. HORNIK.

(Circuit Court of Appeals, Fourth Circuit. May 8, 1914.)

No. 1235.

HUSBAND AND WIFE (§ 171*)—MORTGAGE BY WIFE—VALIDITY—SCHEME IN FRAUD OF BANKRUPTCY ACT.

By an agreement between a bankrupt and a creditor, the creditor agreed to advance money to effect a composition for which, together with his own claims in full, he was to be secured by the bankrupt. The creditor made certain advances for the purchase of other claims against the bankrupt, and, by the aid of the votes so secured, he forced acceptance of the composition; but the court refused to confirm it. The wife of the bankrupt executed a mortgage on her separate property to secure the amount agreed upon between the creditor and bankrupt. It appeared that she made the mortgage for the general purpose of aiding her husband in the composition, but without knowledge of the fraudulent means by which it was to be brought about. *Held* that, the scheme being fraudulent, and the advances made pursuant thereto, and not for the benefit or advantage of the mortgagor who was not a party thereto, the mortgage as to her was wholly invalid.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 351-358; Dec. Dig. § 171.*]

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Suit by the trustees of H. C. Copeland and H. C. Copeland and Company, bankrupts, against Mrs. C. J. Copeland and M. Hornik. Appeal by Mrs. Copeland from a decree in favor of Hornik. Reversed.

See, also, 216 Fed. 120, 132 C. C. A. 364.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Stanwix G. Mayfield, of Denmark, S. C. (Mayfield & Free, of Bamberg, S. C., on the brief), for appellant.

T. M. Mordecai, of Charleston, S. C., for appellee.

WOODS, Circuit Judge. The complainants as trustees of the bankrupts, H. C. Copeland and H. C. Copeland & Co., on March 8, 1912, filed their bill in the District Court asking, among other things, that a mortgage executed by Mrs. C. J. Copeland, wife of the bankrupt H. C. Copeland, to M. Hornik, be declared void and that the tract of land covered by it containing 175 acres claimed by Mrs. Copeland be adjudged the property of the bankrupt. Answers were filed by the defendants raising several issues, among them the answer of M. Hornik setting up his mortgage as a valid lien on the land, and the answer of Mrs. Copeland claiming the land as her own, but alleging the invalidity of the mortgage executed by her to Hornik. In the course of the proceedings all issues have disappeared except the contest between Hornik and Mrs. Copeland as to the validity of her mortgage to him and of the debt claimed thereunder. The referee to whom the cause was referred reported as a conclusion of law that the mortgage was entirely invalid. The District Court held it valid to the amount of the several sums actually advanced by Hornik on the faith of the security, and Mrs. Copeland appeals.

The controversy depends on one issue of fact which will be made evident by a short statement of the circumstances under which the mortgage was given. H. C. Copeland, the bankrupt, being desirous of making a composition of his debts, agreed with H. M. Graham, an attorney, that Graham should procure for him \$15,500, and with this sum effect the composition. Hornik made a separate agreement with Copeland to "accept drafts of H. M. Graham, attorney for H. C. Copeland, for ten thousand six hundred twenty-five dollars (\$10,625.00) in payment of composition, including cost of administration and accounts of M. Hornik & Co. and M. Hornik's connectional firms—including fees of the different lawyers representing the claims against the bankrupt's estate." Copeland contracted to secure Hornik by mortgages including a mortgage on the tract of 175 acres, then supposed to be his property. Afterwards, when it appeared that this land belonged to Mrs. Copeland, she executed a mortgage to Hornik conditioned for the payment of "the full and just sum of fifteen thousand five hundred dollars as per the terms of certain drafts drawn and to be drawn by H. M. Graham, attorney for the said H. C. Copeland, upon the said M. Hornik & Co., together with any other amount of indebtedness that may be by the said H. C. Copeland hereafter contracted with the said M. Hornik while he holds this security whether same be evidenced by notes, drafts, open account or otherwise, according to the terms as may be agreed." Hornik paid drafts of Graham amounting to \$3,760.02.

By the vote of Hornik, representing his own debt and the debts assigned to him in consideration of drafts drawn on him by Graham in favor of creditors of Copeland, the composition was carried at the meeting of creditors. But the District Court refused to confirm it on

the ground that it was contrary to the manifest intention of the bankruptcy statute that a creditor should force a composition by voting claims purchased at less than their full value on a promise from the bankrupt to pay his original claim and the assigned claims in full.

Not only was the scheme fraudulent against the creditors of the bankrupt, but it is manifest that the acceptance of a security or money by any of the parties to it, from another person who was trying to aid in securing a supposed lawful composition in ignorance of the facts which made the scheme undertaken unlawful, would be a fraud upon such person; and this for the reason that the parties to the unlawful scheme are chargeable with knowledge that the scheme would fail and that the security or money would be wasted.

It is not disputed that the purpose of Mrs. Copeland in giving the mortgage was to get through the composition and put her bankrupt husband on his feet. Hornik was fully apprised that this was her purpose, and he undertook to use the proceeds of the mortgage for that purpose, in the illegal manner agreed upon by himself, Copeland, and Graham. Not only is he presumed as a matter of law to know that the scheme was illegal, but there can be no doubt that as an intelligent business man he in fact knew that it was unfair and fraudulent, and that it would be struck down unless the parties to it concealed it from the court. In short, he accepted the mortgage from Mrs. Copeland and paid out money and charged it to her on the faith of the mortgage, when he was chargeable with knowledge that the payments would avail nothing towards legally effecting the purpose for which he undertook to use the mortgage—the composition with Copeland's creditors.

This brings us to the vital issue of fact in this phase of the case, whether Mrs. Copeland was a party to the illegal scheme or authorized the mortgage to be used as security for drafts drawn in carrying it out. Hornik could not charge to Mrs. Copeland the money uselessly paid out in forwarding the illegal scheme unless Mrs. Copeland made the mortgage with knowledge of the facts which made the scheme of composition illegal, and thus authorized the useless disbursement of money for her account. Further, since Hornik was a party to the illegal contract looking to the composition and was to receive large profit from it, as a condition of putting the loss and failure due to its illegality on Mrs. Copeland, he must assume the burden of showing that she knew of the features of the plan which would make it abortive and with that knowledge gave the mortgage. The record does not show that he made this proof. On the contrary, the evidence tends to the conclusion that Mrs. Copeland was an untutored woman, knowing little of the details of business affairs; that she knew her husband was trying to effect a composition with his creditors and that she gave the mortgage to Hornik to aid in this purpose; that she was assured by Graham when she gave the mortgage that the composition had gone through and that nothing remained to be done except to procure the confirmation of the judge. In all this there was nothing to suggest to her the facts constituting illegality. She testified without contradiction that she was assured by Graham that the mortgage would be returned if the confirmation failed and that she executed it with this understanding. Had she known that the mortgage was to be used to buy up debts of her

husband in order to get votes to carry the composition, she would have known it could not be returned even if the composition failed. It is true that Graham testified Mrs. Copeland knew "practically all the business transactions that we were having," but he gives no facts warranting this expression of opinion. On the contrary, his account of his conversations with Mrs. Copeland indicates that she intended to give the mortgage for the legal purpose of paying the creditors the amount agreed on after the composition had been confirmed by the court. Our conclusion is that Hornik paid out the sums which he seeks to charge against Mrs. Copeland's mortgage in furtherance of a scheme to put through a composition with Copeland's creditors by means which he knew to be illegal and ought to result in failure, that he has failed to show that Mrs. Copeland authorized the mortgage to be used in that way, or that she assented to the illegal method adopted to bring about the composition.

If it had been shown that Mrs. Copeland was a party to the illegal scheme and gave the mortgage to aid in carrying it through, it would be doubtful, to say the least, whether the bond and mortgage constituted such an independent contract as to enable Hornik to recover on it. *Rountree v. Ingle*, 94 S. C. 231, 77 S. E. 931, 45 L. R. A. (N. S.) 776; *Railroad Co. v. Durant*, 95 U. S. 576, 24 L. Ed. 391. But it is not necessary to decide that question.

It will be observed the facts do not make a case of implied contract by Mrs. Copeland, that is, a contract implied by the law to repay to Hornik money expended by him for her benefit; for the debts purchased by him were the debts of her husband and not hers, and the assignment of them to Hornik was of no benefit to her.

For these reasons we conclude that Mrs. Copeland owes Hornik nothing under the mortgage, and that it should be canceled.

Reversed.

COPELAND v. HORNIK.

In re H. C. COPELAND & CO.

(Circuit Court of Appeals, Fourth Circuit. May 13, 1914.)

No. 1207.

On petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

In the matter of H. C. Copeland & Co., bankrupt. On petition of Christian J. Copeland to revise an order of the District Court allowing the claim of M. Hornik. Dismissed.

See, also, 216 Fed. 117, 132 C. C. A. 361.

Stanwix G. Mayfield, of Bamberg, S. C. (Mayfield & Free, of Bamberg, S. C., on the brief), for petitioner.

T. Moultrie Mordecai, of Charleston, S. C., for respondent.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. This case was brought up by both appeal and a petition to superintend and revise. As there were both

questions of law and fact involved, the case was decided upon the appeal. For this reason this petition must be dismissed, with costs against the petitioner.

Dismissed.

ROBINS DRY DOCK & REPAIR CO. v. CHESBROUGH.

(Circuit Court of Appeals, First Circuit. July 10, 1914. Rehearing Denied August 11, 1914.)

No. 1048.

1. ADMIRALTY (§ 32*)—DISTRICT OF SUIT—SUIT IN ADMIRALTY.

The rule which practically prohibits suits by attachment, by garnishment, or otherwise in the federal courts outside of the districts of the residence of the parties, has ordinarily no application to suits in admiralty.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 306-312; Dec. Dig. § 32.*]

2. ADMIRALTY (§ 108*)—APPEALS—TIME FOR TAKING—"LAW."

A rule of the District Court fixing the time for the taking of appeals in admiralty is not a "law" within the meaning of the proviso of Act March 3, 1891, c. 517, § 11, 26 Stat. 829 (U. S. Comp. St. 1901, p. 552), creating the Circuit Court of Appeals, which, after providing that no appeal or writ of error by which any order, judgment, or decree may be reviewed in such courts shall be taken or sued out, except within six months after the entry of such order, judgment, or decree, further provides that, "in all cases in which a lesser time is now by law limited for appeals or writs of error, such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the Circuit Courts of Appeals," and notwithstanding such rule the time for taking an appeal is governed by the six months' provision.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 727-730, 793; Dec. Dig. § 108.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4014-4023; vol. 8, p. 7701.]

3. ADMIRALTY (§ 14*)—JURISDICTION—TAKING OF BOND AND MORTGAGE TO SECURE MARITIME CLAIM.

Where a debt was for material and supplies furnished to vessels and cognizable in admiralty, the right to sue thereon in admiralty was not affected by the taking of a bond and mortgage for the same unless such was the express intention of the parties.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 177-180; Dec. Dig. § 14.*]

Dodge, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Massachusetts; Jas. M. Morton, Jr., Judge.

Suit in admiralty by the Robins Dry Dock & Repair Company against Fremont B. Chesbrough. Decree for respondent, and libellant appeals. Reversed.

Edward Sandford, of New York City (Blodgett, Jones, Burnham & Bingham, of Boston, Mass., on the brief), for appellant.

G. Philip Wardner, of Boston, Mass. (Carver, Wardner, Cavanagh & Walker, of Boston, Mass., on the brief), for appellee.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PUTNAM, Circuit Judge. [1] This is a libel in personam in admiralty by a citizen of the state of New York against a citizen of the state of Michigan, brought in the District Court for the District of Massachusetts. It was apparently brought in that district for the purpose of attaching property which was in that district, including a garnishment of garnishees residing there. This was permissible, because the statutes limiting the jurisdiction of the federal courts to particular districts do not always relate to suits in admiralty; and the rule as re-announced in *Big Vein Coal Co. v. Read*, 229 U. S. 31, 33 Sup. Ct. 694, 57 L. Ed. 1053, May 26, 1913, which practically prohibits an attachment by garnishee, or otherwise, outside of the districts of the residences of the parties, has ordinarily no application to suits in admiralty, and the corresponding order of notice which is an inherent incident of such suits is not barred from such proceedings. No point has been made of this, and the respondent appeared in the District Court without questioning the jurisdiction on this account; but we deem it proper to make reference to the exceptional character of this class of suits, now so fully settled by the authorities.

[2] The decree of the District Court having dismissed the bill, the proponent below took this appeal, and the respondent seasonably moved to dismiss on the ground that the appeal was not taken in season.

The right of appeal is given by the eleventh section of the act of March 3, 1891, 26 Stat. 829, establishing this court. So far as we can discover, that section still stands, with a re-enactment of the concluding sentence, which now appears in section 132 of the Code of March 3, 1911, 36 Stat. 1134. Changes made there are merely literal, and can in no way affect this case. Section 11 provides that no appeal shall be taken "except within six months after the entry of the order, judgment, or decree sought to be reviewed." The section provides, however:

"That in all cases in which a lesser time is now by law limited for appeals, * * * such limits of time shall apply to appeals * * * in such cases taken to * * * the Circuit Courts of Appeals."

The section further provides as follows:

"And all provisions of law now in force regulating the methods and system of review, through appeals, * * * shall regulate the methods and system of appeals * * * provided for in this act in respect of the Circuit Courts of Appeals," etc.

The appellant claimed that the statute gave him six months within which to appeal, and the appeal was taken within that period.

The grounds of the motion seem to be two. One is that the terms of the statute state only the extreme limit within which time an appeal must be taken. The other is that, inasmuch as the rules in this district when the statute establishing this court was enacted required appeals in admiralty to be taken in the District Court within ten days from the rendering of the decree, the rules have the effect of law as the word "law" is used in section 11 of the act referred to.

The cases cited by the appellee from the Supreme Court give no special effect to the proposition that a judge of a court must obey its rules, and that, so far as he is concerned, the rules generally have the force of law; but there are many cases in which the court may of its own

motion waive the special application of a rule, and, while the decisions use the expression, "force of law," none cited by the appellee, and none of which we are aware, go to the extent of holding that any rules of the class referred to by the appellee operate as "laws" within the meaning of section 11 referred to.

The practice is given as claimed by the appellant in *Benedict's Admiralty* (4th Ed. 1910) 571, and is directly sustained by the Circuit Court of Appeals for the Eighth Circuit in *The City of Naples*, 69 Fed. 794, 795, 16 C. C. A. 421, and by the Circuit Court of Appeals for the Sixth Circuit in *The New York*, 104 Fed. 561, 565, 44 C. C. A. 38. We see no reason why we should not apply our usual rule in following the decisions of the Circuit Courts of Appeals in other circuits, especially in the present case where there is no contravening decision, and the results conform to our views. Therefore the motion to dismiss on the ground that the appeal was not seasonably taken has no force.

[3] The libel was brought for material and supplies furnished to three registered or enrolled steamers. The parties assume that these supplies were furnished within the state of New York; but there is no allegation to that effect. It may be inferred from the fact that the shipyard where the work on the vessels was done, or may be assumed to have been done, was in the state of New York. The parties also assume that after some time the accounts against the vessels were settled by a promissory note. That is an error, because no promissory note was given, but a mortgage containing an obligation, which mortgage was based on the form prescribed by the Department of Commerce and Labor, and was in substance what is ordinarily known in New York as a "bond and mortgage." We will see, however, that there was nothing in these errors or oversights, whichever they may be, which justifies the decree entered in the District Court from which this appeal is taken. That decree was as follows:

"The libel in this cause was entered at the September term, 1912, of this court, and, upon consideration thereof, It is now, to wit, June 27, 1913, ordered, adjudged, and decreed that the libel do stand dismissed for want of jurisdiction, without a hearing on the merits of the case, and without costs to either party."

The ground of dismissal is not stated in the decree, except that it was for want of jurisdiction. Neither was there any formal opinion explaining the views of the court as to the want of jurisdiction, or anything said by which they can be definitely ascertained. It was expressly stated, however, that the dismissal was without a hearing on the merits. It also will be assumed that the ground for dismissal was not the want of jurisdiction of that class which would take the case directly to the Supreme Court. No doubt it was because the learned judge of the District Court thought that the original accounts for supplies and labor had been merged in an obligation under seal over which the courts of common law alone had jurisdiction.

It seems that, after many dealings in partial adjustment pro and con, Chesbrough, who was libeled on account of what was furnished the vessels, alleging him to be sole owner, gave the plaintiff an instrument under seal by which he bound himself in the sum of \$15,000, and mort-

gaged one of the vessels referred to as security for that obligation. This has been spoken of between the parties as a note, but was really a covenant under seal for the payment of the \$15,000. The respondent below, now the appellee, insists that the libel was brought on the mortgage, using such expressions as these:

"The libel, as the appellee contends, seeks to recover the balance due on a mortgage given on November 13, 1911."

It also alleges that:

"The libel cannot be considered a suit on the indebtedness on account of which the mortgage was originally given."

Also it says that:

"It would seem clear on the face of the record that this is a suit to recover a balance due on a mortgage, and therefore is not within the admiralty jurisdiction of the District Court."

Also it says:

"The fact that the claim for which the mortgage was given was enforceable in the admiralty, if such is the fact, would not give the admiralty court jurisdiction of a suit on the mortgage."

The fact, however, is that the libel commences as follows:

"On the thirteenth day of November, 1911, the respondent was indebted to the libellant in the sum of \$15,000, for certain repairs made and certain supplies furnished, at the request of the respondent, to the steamers Kennebec and Kanawha and to the steamer Felix Carbray, which last-mentioned vessel was then owned by the said respondent."

The libel then follows with the allegation that, to secure the payment of this amount, the respondent mortgaged the steamer to the libellant for the sum of \$15,000, and it then proceeds with a long story, showing how the balance due, as shown by the mortgage, became reduced to the sum of \$7,388.04, and interest. It also alleges that "all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court," and prays the court "to decree payment of the sum due as aforesaid," meaning, of course, the balance of the original debt secured by the bond and mortgage which had not been paid.

Therefore, what we have before us is a libel for the recovery of the balance of a sum incurred for the repairs and supplies to mercantile steamers, and secured by the bond and mortgage aforesaid. We may add that, if the original obligation for the payment for the labor and supplies furnished the vessels had taken the form of an instrument under seal, admiralty, which is international and universal, would have taken no cognizance of the peculiar form of the obligation in this respect.

There is much discussion by the parties with reference to the effect of the taking of a promissory note for a debt in accordance with the law of the state of New York, where undoubtedly these transactions occurred, as both parties concede, although not clearly stated in the pleadings. In these respects, and in some other respects, the libel was apparently hastily drawn in order to secure an attachment, and needed

to be amended in several particulars; but that is not a ground for dismissal for want of jurisdiction, even if it might now have been a ground for dismissal with or without leave given to the District Court to permit amendments. The dismissal ordered, and a dismissal for want of proper detailed allegations, are two very different things; so much so that one cannot take the place of the other; and on this record we have nothing to lay out now except the question of want of jurisdiction on the part of the District Court.

The parties seem to understand, and it is no doubt the fact, that this dismissal was based on the proposition that the original claim or claims were merged in the bond and mortgage given as we have said; so that the original claim or claims were wiped out of existence, and nothing was left except a bond for which there was no relief unless at common law. It is settled, however, by sound reason, and by long practice and acquiescence, that any debt to which a lien or a special ground of relief is attached is not discharged so far as the lien or special ground of relief is concerned by a renewal, or any number of renewals, unless there is something of a peculiar nature which showed that what was done was intended to absolutely merge the original debt. Nothing of that sort appears here; only the usual acknowledgment of satisfaction by reason of the new security being obtained. Independently of the question of the effect of taking a promissory note, which in Massachusetts and Maine is regarded as a discharge of the original debt *prima facie*, while in New York it is not regarded as such a discharge, the rule is universally applicable, for example, that the taking of a new obligation does not necessarily discharge the original debt without an especial intention on the part of the parties that it should do so. A debt secured by a mortgage, even in either the States of Massachusetts or Maine, may be renewed *ad libitum* without loss of a lien on the property covered by a mortgage; and it is the universal rule in admiralty that the taking of a new obligation, even a mortgage, does not discharge a lien on the property on which the mortgage is made, and never affects any privilege of relief in admiralty which attached to the original debt. Consequently, there is nothing in this record which shows that the libellant ever lost the right to proceed in admiralty which originally pertained to him.

The decree of the District Court is reversed, and the case is remitted to that court for further proceedings not inconsistent with this opinion; and the appellant recovers his costs of appeal.

DODGE, Circuit Judge (dissenting). I do not think the libel can be fairly construed as asserting any claim other than for the balance due upon the mortgage. The District Court found, in effect, after hearing the witnesses, that the promise to pay set forth in and secured by the mortgage had been accepted in satisfaction of the pre-existing claim for repairs and supplies; and I am unable to find in the record sufficient ground for holding that this finding was wrong. I am therefore obliged to dissent from the result reached by the court.

UNITED STATES v. MACKEY et al.

(Circuit Court of Appeals, Eighth Circuit. July 29, 1914.)

No. 4093.

1. INDIANS (§ 27*)—LANDS—QUIETING TITLE—PLEADING—DISMISSAL OF BILL ON MOTION.

A bill by the United States to quiet title to lands alleged to be unallotted lands of the Creek Nation of Indians *held* erroneously dismissed on the ground that the Creek Nation had no title, on a demurrer treated as a motion to dismiss.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 19, 20; Dec. Dig. § 27.*]

2. EQUITY (§ 241*)—PLEADING—DISMISSAL OF BILL ON MOTION.

To authorize a court to sustain a demurrer to a bill by reason of matters of which it takes judicial notice requires a very clear case.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 515; Dec. Dig. § 241.*]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit by the United States against Phillip Mackey, Mary Mackey, Lovely Mackey, for himself and as guardian of Phillip Mackey and Mary Mackey, minors, Cyrus S. Avery, the Waterside Oil & Gas Company, the Gypsy Oil Company, the Texas Company (sued as the Texas Pipe Line Company), the Gladys Belle Oil Company, Charles Stunkard, Walter Stunkard, the Pollard-Hagan Oil Company, and the State of Oklahoma. Decree for defendants, and the United States appeals. Reversed.

For opinion below, see 214 Fed. 137. See, also, Gladys Belle Oil Co. v. Mackey, 216 Fed. 129, 132 C. C. A. 373.

C. C. Herndon, of Muskogee, Okl. (D. H. Linebaugh, of Muskogee, Okl., on the brief), for the United States.

John B. Campbell and George W. P. Brown, both of Muskogee, Okl. (Wm. O. Beall and R. Emmett Stewart, both of Muskogee, Okl., on the brief), for appellees Cyrus S. Avery, Waterside Oil & Gas Co., Phillip Mackey, Mary Mackey, and Lovely Mackey.

W. A. Ledbetter and B. F. Burwell, both of Oklahoma City, Okl. (Ledbetter, Stuart & Bell and Burwell, Crockett & Johnson, all of Oklahoma City, Okl., on the brief), for appellee Pollard-Hagan Oil Co.

Before SANBORN and CARLAND, Circuit Judges, and REED, District Judge.

CARLAND, Circuit Judge. [1] The bill in this case was filed by the United States to quiet the title to a certain parcel of land in Tulsa county, Okl. The Waterside Oil & Gas Company, the Texas Pipe Line Company, the Pollard-Hagan Oil Company, and Lovely Mackey, individually, and as guardian of Phillip Mackey and Mary Mackey, filed demurrers to the bill, which when heard by the trial court were treated as motions to dismiss under the new equity rules and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

motions were granted. The United States appeals from the decree dismissing the bill. We may properly say by way of premise that it would be unfortunate if the court should be compelled to decide the grave and important questions arising in this litigation, upon a mere motion to dismiss the bill and without the full presentation of the facts by way of lawful evidence. The demurrer treated as a motion to dismiss, admitted all allegations in the bill that were well pleaded. The bill, after stating the facts showing the right of the United States to maintain the same for the benefit of the Creek Nation, alleged:

"That at all times hereinafter mentioned, the following described real property has been and is now a portion of the unallotted lands of the said Creek Nation of Indians in Oklahoma, situated in Tulsa county in said state, to wit: 'That portion of section 18, township 18 north, range 13 east, beginning at the northwest corner of lot 1 of section 18, township 18 north, range 13 east, the same being a point at the intersection of the meander line of the north bank of the Arkansas river with the section line of between sections 7 and 18 of said township 18 north, range 13 east, and running thence south 20 degrees east 660 feet; thence south 32 degrees 15 min. east 3,102 feet; thence south 42 degrees east 459.4 feet to the point at the intersection of the meander line of the north bank of the Arkansas river with the section line between sections 17 and 18 of said township 18 north, range 13 east; thence west 1,108 feet to a point at the low-water mark of the north bank of said Arkansas river; thence north 50 degrees 30 min. west 300 feet along the low-water mark of the north bank of said Arkansas river; thence north 19 degrees 45 minutes west 1,209 feet along the low-water mark of the north bank of the said Arkansas river; thence north 50 degrees 30 minutes west 469 feet along the low-water mark of the north bank of said Arkansas river; thence north 21 degrees west 850 feet along the low-water mark on the north bank of said Arkansas river; thence north 63 degrees 30 minutes west 354 feet along the low-water mark on the north bank of said Arkansas river; thence north 65 degrees 30 minutes west 184 feet along the low-water mark of the north bank of said Arkansas river; thence north 32 degrees 45 minutes west 959 feet along the low-water mark on the north bank of said Arkansas river; thence north 89 degrees 51 minutes east 1,450 feet to the point of beginning, containing 84.41 acres—a surveyor's plat of which said land, showing the same in green, is hereto attached, marked 'Exhibit A' and made a part of this bill; that said above tract of unallotted land lies in said section 18, township 18 north, range 13 east, between the meander line on the north bank of the said Arkansas river and the low-water mark on the north bank of said Arkansas river, and was not surveyed or allotted as a part of the tribal lands of said Creek Nation of Indians which were to be surveyed and allotted in severalty to the several members of said tribe or nation of Indians under the acts of Congress above referred to; and that no citizen of said Creek Nation of Indians has the absolute right to the fee-simple title to said land or any part thereof but that the same is owned in common by all of the citizens of said Creek Nation of Indians and is, therefore, a part of the tribal lands belonging to said nation under the supervision and control of the United States by virtue of the acts of Congress above referred to. That the above-described tract of lands is situated in the oil and natural gas belt of the said Creek Nation of Indians and is of great value chiefly because of the deposits of oil and gas under the same."

The remainder of the bill is devoted to setting forth the pretended claims of the several defendants in and to the land in question. The United States was not obliged to deraign the title of the Creek Nation in its bill, but could allege the ultimate fact of ownership without more. The demurrers treated as motions to dismiss, admitted the allegation as to ownership in paragraph three above quoted. Notwithstanding this, the court dismissed the bill for the reason that the Creek Nation

had no title to the land in controversy. As the only record before the court was the demurrers, and the bill, it is difficult to see how this result could be brought about. The United States has never at any time had an opportunity to show by evidence that the allegations contained in paragraph 3 of the bill were true. On the contrary, they have been turned out of court by a finding that the Creek Nation had no right or interest in the land, and this not upon any showing of the United States, but upon a case gathered from the world at large. All the demurrers, except that of the Pollard-Hagan Oil Company, were simply demurrers for want of equity. The Pollard-Hagan Oil Company filed a speaking demurrer. The demurrer, after stating that the bill did not state any matter of equity entitling the plaintiff to the relief prayed for, adds the following language:

"And this defendant says that it appears from the said bill of complaint that neither the plaintiff, the United States of America, nor the Muskogee or Creek Nation, or Tribe of Indians, has any interest, whatever, in the land in controversy herein for the reason that said land is described as being below the high-water mark on and adjacent to the banks of the Arkansas river, which river is a navigable stream under the laws of the United States. And this defendant avers that under the allegations in said bill it appears that the land in controversy is in the state of Oklahoma. And the defendant being the lessee of the state of Oklahoma is entitled to recover said land."

Of course, this language of the demurrer proved nothing and for the purposes of decision could have had no effect.

Counsel for the Pollard-Hagan Oil Company, in their brief, concede that the validity of its oil and gas lease depends upon the fact as to whether the Arkansas river is navigable. Counsel for Cyrus S. Avery, the Waterside Oil & Gas Company, and the Mackeys, assume that the Arkansas river is navigable. There is nothing said in the bill of the United States as to whether it is navigable or not. Counsel attempt to draw certain inferences from the language used in paragraph 3; but, if the navigability of the Arkansas river is as important as defendants seem to claim, the fact ought not to be established by inferences drawn from a strained construction of the language of the bill. Counsel for Cyrus S. Avery, the Waterside Oil & Gas Company, and the Mackeys say in their brief:

"As the record stands, there is more or less merit in the contention of the government that the demurrers, which were treated as motions to dismiss below, should have been denied."

But they say that at the argument in the court below the question whether the Creek Nation owned the bed of the Arkansas river was conceded to be the only question at issue, and the case was argued and disposed of on that theory. If there was any agreement as to the facts, it is unfortunate that it was not reduced to writing and made a part of the record, as we certainly cannot consider anything but the record as it stands.

[2] Voluminous documents are presented in the brief of counsel for the Pollard-Hagan Oil Company of which it is claimed the court below and this court may take judicial notice. We apprehend, however, that, in order to enable the court to sustain a demurrer to a bill by rea-

son of matters of which it took judicial notice, it would require a very clear case, and we are not satisfied that this is such a case.

We think we cannot do otherwise than reverse the decree of dismissal and remand the case with instructions to the trial court to deny the motions to dismiss and allow the defendants to answer if they shall be so advised.

And it is so ordered.

GLADYS BELLE OIL CO. et al. v. MACKEY et al.

(Circuit Court of Appeals, Eighth Circuit. July 29, 1914.)

No. 4037.

APPEAL AND ERROR (§ 78*)—DECISIONS REVIEWABLE—"FINAL DECREE."

A decree of a District Court dismissing a cross-bill as to one issue raised thereby on demurrer, treated as a motion to dismiss, by one only of a number of defendants, but giving all defendants thereto leave to answer and retaining the case as to the cross-bill for further proceedings, is not a "final decree" from which an appeal by the cross-complainant will lie to the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426, 434, 464-477, 480, 481; Dec. Dig. § 78.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2774-2798; vol. 8, p. 7663.

Finality of judgments and decrees for purpose of review, see notes to *Brush Electric Co. v. Electric Imp. Co. of San Jose*, 2 C. C. A. 379; *Central Trust Co. of New York v. Madden*, 17 C. C. A. 238; *Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. R. Co.*, 28 C. C. A. 482.]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit by the United States against Phillip Mackey, Mary Mackey, Lovely Mackey, for himself and as guardian of Phillip Mackey and Mary Mackey, minors, Cyrus S. Avery, the Waterside Oil & Gas Company, the Gypsy Oil Company, the Texas Company (sued as the Texas Pipe Line Company), the Gladys Belle Oil Company, Charles Stunkard, Walter Stunkard, the Pollard-Hagan Oil Company, and the State of Oklahoma. From a decree (214 Fed. 137), sustaining in part a motion by defendant Pollard-Hagan Oil Company to dismiss their cross-bill, defendants Gladys Belle Oil Company, Gypsy Oil Company, Charles Stunkard, and Walter Stunkard appeal. Appeal dismissed.

See, also, *United States v. Mackey*, 216 Fed. 126, 132 C. C. A. 370.

James B. Diggs, of Tulsa, Okl. (F. C. Proctor and D. Edward Greer, both of Beaumont, Tex., and Henry McGraw, of Tulsa, Okl., on the brief), for appellants Gladys Belle Oil Co., Gypsy Oil Co., Charles Stunkard, and Walter Stunkard.

John B. Campbell, of Muskogee, Okl. (Campbell & Beall, of Muskogee, Okl., on the brief), for appellees Cyrus S. Avery and the Waterside Oil & Gas Co.

Before SANBORN and CARLAND, Circuit Judges, and REED, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
216 F.—9

CARLAND, Circuit Judge. The bill in this case was filed by the United States to quiet the title to a parcel of land in Tulsa county, Okl. Appellants, having been made defendants therein, filed an answer and also a cross-bill, making the United States and certain codefendants in the original suit, defendants therein.

The Pollard-Hagan Oil Company, Cyrus S. Avery, and the Waterside Oil & Gas Company demurred to the cross-bill. The United States answered the same. On July 19, 1913, the demurrers of Avery, and the Waterside Oil & Gas Company, having been brought on for hearing, were treated as motions to dismiss under the new equity rules and overruled. The demurrer of the Pollard-Hagan Oil Company, treated in the same way, was sustained "in so far as said cross-complaint claims and asserts any right, title, or interest in and to the land described therein which lies below the high-water mark in the Arkansas river," and the cross-complaint in the particular mentioned was dismissed. The Waterside Oil & Gas Company, Avery, and the Pollard-Hagan Oil Company, were given 15 days to answer the cross-bill. It was also provided in the decree appealed from:

"It further appearing to the court that there are certain answers, issues, and actions arising between and among the defendants herein of which the court has jurisdiction and which ought to be determined, and said cause is retained on the docket for such other and further orders, judgments, and decrees as may be found to be proper."

The proceedings in the court below, as above detailed, left the cross-bill pending with the right of the Pollard-Hagan Oil Company, Cyrus S. Avery, and the Waterside Oil & Gas Company to answer the cross-bill within 15 days; the United States having already answered the same. Appellants have appealed from so much of the decree of the court as dismissed a portion of their cross-bill. We think it clearly appears from the face of the record that we have no jurisdiction to hear the appeal, and, such being the case, it is our plain duty to notice our want of jurisdiction even though counsel for appellees make no objection upon this ground. The act of Congress creating this court (Act March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 547]) confers on it appellate jurisdiction to review, by appeal or writ of error, final decisions of the District Courts in the class of cases to which this appellate jurisdiction extends. The only exceptions to this rule are appeals relating to orders granting or continuing an injunction or appointing receivers. In *Robinson v. Belt*, 56 Fed. 328, 5 C. C. A. 521, this court said:

"A final judgment or decree, within the meaning of the act regulating appeals to this court, is one that terminates the litigation on the merits, so that in case of affirmance the court below will have nothing to do but to execute the judgment or decree it originally rendered. *Bostwick v. Brinkerhoff*, 106 U. S. 3, 1 Sup. Ct. 15 [27 L. Ed. 73]; *Grant v. Insurance Co.*, 106 U. S. 429, 1 Sup. Ct. 414 [27 L. Ed. 237]; *St. Louis, I. M. & S. R. Co. v. Southern Exp. Co.*, 108 U. S. 24, 2 Sup. Ct. Rep. 6 [27 L. Ed. 638]; *Ex parte Norton*, 108 U. S. 237, 2 Sup. Ct. Rep. 490 [27 L. Ed. 709]."

Counsel for appellants in their brief on the merits after stating the propositions of law involved say:

"If either of the above propositions be a correct statement of the law, applicable to this cause, it is evident that the trial court erred in sustaining the demurrer to the cross-bill in part, and such decree must be set aside, the demurrer overruled, and this cause remanded with directions to proceed with the further hearing thereof."

We think it clearly appears that the decision appealed from, so far as it relates to appellants, was not a final decision. The cross-bill itself was not dismissed. The decree only disposed of a part of the issues made therein, and these only in favor of one defendant. The defendants who demurred, including the Pollard-Hagan Oil Company, were given the right to answer the cross-bill within 15 days, and the court, as above stated, retained the case as to the cross-bill for further proceedings. See *U. S. v. Phillip Mackey et al.*, 216 Fed. 126, 132 C. C. A. 370, just decided.

Appeal dismissed.

MILLER et al. v. HAMILTON et al.

(Circuit Court of Appeals, Eighth Circuit. July 13, 1914.)

No. 3985.

1. EVIDENCE (§ 399*)—PAROL EVIDENCE AFFECTING WRITING—VARYING CONTRACT FOR CONSTRUCTION OF SEWER.

Where a contract by plaintiffs to furnish the material and construct certain sewer lines expressly specified the amount of work to be done and material to be furnished, parol evidence, offered by defendant, that a larger amount of work and material than so specified were to be furnished by plaintiffs was for the purpose of varying the contract, and not of construing it, and was not admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1772-1777; Dec. Dig. § 399.*]

2. CONTRACTS (§ 166*) — CONSTRUCTION — CONTRACT FOR CONSTRUCTION OF SEWER.

Where a contract by plaintiffs to construct a sewer expressly fixed the time for the beginning and completion of the work, a further provision that it should be executed according to specifications attached did not make a part thereof a provision of the specifications fixing a different time for completing the work and requiring the payment of liquidated damages for delay.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 749; Dec. Dig. § 166.*]

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Action at law by J. F. Hamilton and others against Max D. Miller and others, constituting the Sewer Commissioners of District No. 1 of Marianna, Ark. Judgment for plaintiffs, and defendants bring error. Affirmed.

S. H. Mann, of Forrest City, Ark. (H. F. Roleson, of Marianna, Ark., on the brief), for plaintiffs in error.

J. M. Vineyard, of Helena, Ark. (Moore, Vineyard & Satterfield and Jacob Fink, all of Helena, Ark., on the brief), for defendants in error.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before SANBORN and SMITH, Circuit Judges, and POPE, District Judge.

SMITH, Circuit Judge. A suit was brought by the members of the copartnership of Hamilton Brothers' Company against the Sewer Commissioners of District No. 1, of Marianna, Ark., upon a written contract. There was a cross-complaint for liquidated damages. The case resulted in a verdict and judgment for the plaintiffs, both upon the complaint and cross-complaint, and the defendants sued out this writ of error.

The material portions of the contract in question are as follows:

"That for and in consideration the payments hereinafter stated the party of the second part (Hamilton Brothers Co.) agrees to furnish all the materials, tools and labor necessary to complete, and will complete, the unfinished and abandoned contract for the construction (—) a system of sewers in Sewer Improvement District No. 1 of the said city of Marianna, Arkansas, the work to be done and materials to be furnished are as follows: Furnishing and laying 20072 feet of eight (8) inch sewer pipe, furnish and lay eighty four (84) feet of ten inch sewer pipe, nineteen flush tanks, thirty seven manholes, one lamp hole and two bulk heads.

"It is also agreed that the material now on line of the streets in said sewer district shall be delivered to the said party of the second part without cost to him, to be used in completion of the said sewer system. The said material is as follows:

- 15 cubic yards stone (for macadam)
- 10 cubic yards sand
- 19 syphons (pacific flush tank pattern)
- (2255) 2255 pieces of 8 in. pipe (thirty in. long)
- 177 Ys 6⁷/₈ 24 in. long
- 14 Ts 6⁷/₈ 24 in. long
- 22 Ls 6 in.

"Said material is now distributed along the line of the proposed sewer, and the said party of the second part agrees to take possession of the same and be responsible for the same until placed in sewer and accepted."

[1] The sewer commissioners had a prior contract for the construction of these sewers with the Nick Peay Construction Company, which had been abandoned by the Construction Company. They also claimed that the contract that they made with the plaintiffs below, defendants here, meant that the Hamilton Brothers Company would complete the unfinished Nick Peay Construction Company contract, and that to that end they would both furnish and lay the amount of sewer pipe specifically listed in the contract, and would in addition lay the pipe and accessories turned over to them under the contract.

Hamilton Brothers Company claim that they were only to lay a little in excess of 20,000 feet of sewer pipe, or less than four miles, while the sewer commissioners claim they were to lay a little more than one mile of additional service. It is claimed that this was due to a latent as distinguished from a patent ambiguity.

The defendants offered considerable evidence as it is alleged to aid in the interpretation of the contract, and especially offered to show how much service was necessary to complete the system in District No. 1, but it was excluded. They did not, however, offer the contract with the Nick Peay Construction Company, or otherwise offer to show how much of that contract was uncompleted. Even according

to the defendants' contention the agreement was not to complete the sewer system, but to complete "the unfinished and abandoned contract for the construction of the system of sewers in sewer improvement district No. 1." Nor was it attempted to be shown how much was contracted to be done under the abandoned contract. If there was any latent doubt about the construction of the contract, much of the evidence offered would have been admissible, but the parties had not only agreed that the Hamilton Brothers Company would complete the unfinished and abandoned contract, but they had explicitly agreed that "the *work to be done* and materials to be furnished" were as specifically described. The contention that the plaintiffs below were to do a mile more than thus described was not an attempt to aid the court in the interpretation of the contract, but was an effort to vary the terms of the written instrument by parol.

There is nothing in the contention that plaintiffs did not furnish the materials turned over to them. It was expressly agreed the property should be delivered to the plaintiffs without cost to them, to be used in the completion of the sewer system; it was furnished by them as much as any pipe bought by them. When the parties had expressly stipulated how much material and work was necessary to complete the contract, this could not be varied by parol on the theory that it was to aid in the interpretation of the contract. The plaintiffs were not subject to have one-fourth added to the amount of the sewer stipulated to be laid by them under the guise of interpretation.

We have no inclination to dispute or modify the fundamental rule in this court that:

"The situation of the parties when the contract was made, its subject-matter, and the purpose of its execution are material to determine the intention of the parties and the meaning of the terms they used, and that when these are ascertained they must prevail over the dry words of the stipulations." *Accumulator Co. v. Dubuque St. Ry. Co.*, 64 Fed. 70, 12 C. C. A. 37; *City of Salt Lake City v. Smith*, 104 Fed. 457, 43 C. C. A. 637; *Kauffman v. Raeder*, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247.

We simply hold that the contract in question was clear and unambiguous and such evidence would not in this case aid in its construction.

[2] Coming now to the cross-complaint. Nothing was said about liquidated damages in the contract, but it was provided:

"It is also agreed that the said party of the second part will commence work on or before March 1st, and will complete the same on or before July 17, 1907; and the said party of the second part agrees to push the said work as rapidly to completion as the conditions will reasonably permit. It is also agreed that the said contract will be executed under the terms and according to the plans, profiles and specifications now on file with the said commissioners, a copy of the plans and specifications being attached hereto."

The specifications contained the following:

"The work embraced in this agreement shall be begun within one week after written notice so to do shall have been given to the contractor by the engineer employed by the sewer commissioners and shall be carried on regularly and uninterruptedly thereafter (unless the said engineer shall otherwise in writing, especially direct) at a rate to secure its full completion within five (5) months thereafter, unless the time shall have been extended by the engineer, as afore-

said, and then within said period of five (5) months plus the additional time allowed by the engineer, the time of beginning, rate of progress and time of completion being essential conditions of this agreement. If the contractor fails to complete the work within the time above specified, the sum of five dollars per day for the first ten days and the sum of ten dollars per day for each and every day thereafter until such completion, shall be deducted from the moneys provided for under this agreement."

The sole question here is whether, under the provisions of the contract, this portion of the specifications became a portion thereof. In a suit between the plaintiffs in error, the defendants below, and the Nick Peay Construction Company arising out of the contract for the construction of this sewer system the Supreme Court of Arkansas held that this provision in the specifications was not as against the sureties upon the bond of the contractor incorporated in the contract. *Peay Construction Company v. Miller*, 100 Ark. 284, 139 S. W. 1107. This is especially true in this case, where the time fixed by the contract for the completion of the work was wholly different from the time fixed in the specifications.

There is no substantial error in the record, and the case is affirmed.

SMITH & SONS CO. v. TREXLER LUMBER CO.

(Circuit Court of Appeals, Second Circuit. July 22, 1914.)

No. 264.

TOWAGE (§ 7*)—COMPENSATION—BREAKING ICE.

The breaking of ice to make a channel through which to tow a vessel is no part of the towage service, and one who contracted to pay for the towage of a schooner to its dock after her arrival at New York cannot be charged with the cost of breaking such channel.

[Ed. Note.—For other cases, see *Towage*, Cent. Dig. §§ 6, 7, 10; Dec. Dig. § 7.*]

Appeal from the District Court of the United States for the Southern District of New York.

This suit comes here upon an appeal from a final decree of the United States District Court entered on June 18, 1913, dismissing a libel. The action was brought for the breach of a charter party on the part of the respondent in not paying for certain towage services pursuant to the terms of the charter party. The respondent claimed that the towage services should not have been performed at the time they were rendered because of the ice on the Passaic river. A charter party was signed on November 16, 1911, by the terms of which it was agreed that upon the arrival of the schooner *Melbourne P. Smith* in New York Harbor on her voyage from Jacksonville, Fla., with a cargo of lumber, the respondent would pay the vessel's towage over and above \$25 from Robbins Reef, N. Y., to the respondent's lumber dock on the Passaic river, N. J., and upon her discharge, back to anchorage at the same place in New York Bay. It was also agreed that respondent should have the privilege of naming the towing line to perform the service.

The schooner arrived at the port of New York on January 11, 1912, and anchored off Stapleton, Staten Island, where she remained until January 15th, when she was taken to Shooter's Island, where she remained until January 30th, when she was towed from there to respondent's dock near Newark, N. J., on the Passaic river. During all the time the vessel lay at Stapleton and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

at Shooter's Island and also on the day she was towed, Newark Bay and the Passaic river were closed to navigation by ice. The libellant, after giving due notice to respondent to name a towing company and upon respondent's refusal to do so, employed tugs at an expense of \$285 to tow the schooner to its dock on the Passaic river, and after the cargo was discharged, back to its original anchorage off Stapleton, or Robbins Reef. After deducting \$25 allowance made by libellant to respondent on account of said towage in accordance with the charter party, and the sum of \$25 received on account of such towage, the libellant claims there is due the balance of \$235, with interest. This claim is disputed because it involves the expense of breaking ice through Newark Bay and the Passaic river in order to tow the schooner to its destination.

MacFarland, Taylor & Costello, of New York City (Willard U. Taylor and Alfred H. Strickland, both of New York City, of counsel), for appellant.

Hyland & Zabriskie, of New York City (Nelson Zabriskie, of New York City, of counsel), for appellee.

Before COXE and ROGERS, Circuit Judges, and HAND, District Judge.

ROGERS, Circuit Judge (after stating the facts as above). This suit grows out of a dispute over towage services, and involves a determination of the question whether an agreement "to pay vessel's towage" includes the expense of breaking a path through the ice when the ice had to be broken because there was no channel through the bay and the river, which were closed to navigation by the fact that their waters were frozen. Is breaking ice towage, so that a party who has agreed to pay a vessel's towage is under obligation to pay the expense of breaking the ice?

The definition of towage given in 1849 in *The Princess Alice*, 3 W. Rob. 138, 140, by Dr. Lushington, and which has been so often cited since, was as follows:

"Without attempting any definition which may be universally applied, a towage service may be described as the employment of one vessel to expedite the voyage of another, when nothing more is required than the accelerating her progress."

Towage service is aid rendered in the propulsion of a vessel. In *The H. B. Foster*, 11 Fed. Cas. 949 (1848), District Judge Betts said:

"Towage may be applied merely in aid of a vessel against adverse winds or tides, or in difficult passages, while she is in possession of her ordinary powers of locomotion."

In *The Plymouth Rock* (D. C.) 9 Fed. 413 (1881), District Judge Addison Brown adopted the definition of Dr. Lushington as already quoted. This definition has recently been referred to approvingly in an opinion rendered in the Privy Council by Sir Robert Phillimore in *The Strathnaver*, 1 App. Cas. 58, 63 (1875). Here he refers to it as "a very clear and precise statement of the law." In the *Century Dictionary* towage service is defined as:

"Aid rendered in the propulsion of vessels, irrespective of any circumstances of peril; the employment of one vessel to expedite the voyage of another ves-

sel when nothing more is required than the acceleration of her progress. When used in contradistinction to *salvage service*, it is confined to vessels not in distress."

In the 65 years since Dr. Lushington defined the meaning of "towage service" no adverse criticism of his definition seems to have been made, and we are prepared to accept it as an accurate statement of the law. An agreement to pay a vessel's towage is an agreement to pay for the services of a vessel or vessels rendered in the propulsion of another vessel through the water when nothing more is required than the acceleration of her progress. The breaking of a channel through the ice in order that, after the ice has been broken, a vessel can be towed through is no part of towage service. And consequently expense involved in breaking the ice and creating the channel cannot be included in the expense of towage.

The charter party gave the respondent the right to name the towing line, and an agreement was made with a certain towing company to do the round trip for \$50. But that contemplated a trip through open water, and when the ice closed navigation the agreement was abandoned. Then the libellant made an arrangement with the Tice Towing Line to tow the boat and use three tugs for \$75 a tug, and so informed the respondent on the day before the towage began. To the respondent's protest against it the libellant's agent is said to have replied:

"That is the best we can do, and the only one we could get to tow her, and we are going to tow her up there * * * and we are going to do it anyway."

And this bargain with the Tice Towing Line was concluded by the libellant before any notification was given to the respondent. When notification was given the libellant was told by the respondent that the arrangement was contrary to the charter party agreement, and respondent would not be responsible, and if the vessel was towed it would be wholly at the libellant's risk.

"Then Mr. Bryant [the libellant's representative] got a little bit mad about it; so did I. He said they would tow her up if it took \$10,000, and our charter was written in such a way they would make us pay for it."

And the libellant was thereupon informed that the respondent would not pay \$225 for the service.

The testimony showed that the ice in the bay was from 10 to 12 inches thick. It also showed that under ordinary circumstances, where the water was free from ice, one tug would have been sufficient to have towed the respondent's vessel. The manager of the towing line was asked, "Under ordinary circumstances, so far as the size of the vessel went, one tug would be perfectly able to take her up?" to which he replied, "Perfectly." As it was three tugs were used. Two tugs were sent ahead to break a channel through the ice. While three tugs had to be used in taking the vessel up to her dock on the Passaic river, only two were employed to bring her back. Seventy-five dollars for each tug was charged for taking her up and only \$60 for bringing her back, making the cost \$285 for the entire service.

According to the testimony of the manager of the company that did

the towing, two of the three tugs used in going up were used to make a channel by breaking the ice. And the witness West, who was in charge of the tug that did the towing up, testified that the other two tugs "were ahead breaking the ice." A deposition, however, was received in evidence from the master of the schooner in which he stated:

"We had one boat towing ahead and one along side and a third boat going ahead breaking the ice in the channel."

There is thus some conflict in the testimony, but the district judge found that two tugs were used in breaking ice and one in towing in going up. Where there is a conflict in the testimony the judge's finding of fact should be accepted. There is no testimony showing that any tug was employed in breaking the ice on the trip back.

The charge for the two tugs used in breaking ice on the trip up cannot be allowed. But the libelant is entitled to charge for the service of the one tug which towed the boat up and of the two tugs which towed her down, less \$25 allowed and \$25 paid.

The decree is reversed, with half costs of this court to the appellant, and the cause is remanded to the District Court, with instructions to enter a decree for the libelants for \$85 and interest and one-half of the costs of that court.

KENNEDY v. BRODERICK.

(Circuit Court of Appeals, Seventh Circuit. June 15, 1914.)

No. 2090.

BILLS AND NOTES (§ 166*)—NEGOTIABLE INSTRUMENT—TWO INSTRUMENTS IN ONE.

Defendant executed a note containing over his signature an absolute promise to pay a specified sum 90 days after date at a specified bank, waiving demand, protest, and notice of nonpayment, and declaring that certain securities delivered to the payee had been pledged as collateral security. At the left of the signature was a provision that the collateral was of the market value of \$5,500, that if the collateral depreciated the payee might demand additional security or mature the note at once, and that any assignment of the note should carry all rights to the collateral, and that the payee or assignee might sell the collateral at public or private sale. *Held*, that such provision amounted to a separate contract of pledge and, though written on the note, did not detract from its negotiability.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 418, 421; Dec. Dig. § 166.*]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois; George A. Carpenter, Judge.

Action by William Broderick against Walter B. Kennedy. Judgment for plaintiff, and defendant brings error. Affirmed.

Kennedy signed and delivered to Purse a written instrument, of which the following is a copy:

"Kansas City, Mo., June 5, 1911.

"\$4,000.00 No.

"Ninety days after date, for value received, I promise to pay to the order of W. D. Purse, four thousand and no/100 dollars, at National Bank of Com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

merce, Kansas City, Mo., with interest from maturity until paid, payable annually at the rate of six per cent. per annum, and if not so paid, compounded. Demand, protest and notice of nonpayment of this note is waived by both makers and indorsers hereof. To secure the payment of this note, securities herewith delivered to the payee, are pledged as collateral security.

"W. B. Kennedy.

"The above collateral has a market value of \$5500. If, in the judgment of the holder of this note, said collateral depreciates in value, the undersigned agrees to deliver when demanded additional security to the satisfaction of said holder; otherwise this note shall mature at once. Any assignment or transfer of this note, or other obligations herein provided for, shall carry with it the said collateral securities and all rights under this agreement. And we hereby authorize payee or his assigns or the legal holder hereof, on default of payment of this note or any part thereof, according to the terms thereof, to sell said collateral or any part thereof, at public or private sale and with or without notice and by such sale the pledgor's right of redemption shall be extinguished."

In the original document the part shown in the copy above Kennedy's signature was printed in large type, and the part below the signature was printed in small type in the lower left corner of the paper, so that the signature in the lower right corner was below the large-type matter and opposite the small-type matter. Both parties of course agree that Kennedy intended to be bound by all the agreements and stipulations that appear upon the paper.

Broderick averred in his declaration that before the maturity of the instrument he purchased it in due course from Purse for full value, and that Purse duly indorsed and delivered it to him.

Kennedy admitted that this was so, but sought to avoid the effect thereof by pleading that he signed and delivered the instrument to Purse as surety for Joyce on Purse's promise to obtain Joyce's signature and thereupon to advance the money to Joyce, that Purse failed to make the loan, failed to obtain Joyce's signature, and wrongfully sold the instrument to Broderick, and that this was done without his knowledge or consent.

On the court's sustaining a demurrer to this plea, Kennedy declined to move further, and judgment followed.

Prior to 1911 Missouri had adopted the Uniform Negotiable Instruments Act. R. S. Mo. 1909, § 9972 et seq.

James M. Rader, of Kansas City, Mo., for plaintiff in error.

Edmund W. Burke, of Chicago, Ill., for defendant in error.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). Under the general law, as well as under the Negotiable Instruments Act, the writing in question, if the small-type matter in the lower left corner be disregarded, constitutes a perfect negotiable promissory note.

Does the inclusion within the same document of an agreement respecting a pledge of collateral securities, by the terms of which the pledgee may anticipate maturity, sell collaterals, and leave an uncertain amount unpaid, render the instrument nonnegotiable?

No, if this is a question of Missouri law. For her courts have clearly and unmistakably arrived at the following position: If two instruments are executed at the same time, in the course of the same transaction, and covering the same subject-matter, they are to be read and construed together as one instrument. But this doctrine does not apply to a transaction in which two separate and distinct matters are involved. Each is to be considered and interpreted as a complete entity, whether they be written upon one paper or several. An unconditional

promise to pay a certain sum at a certain time is a matter apart from security by way of deed of trust or mortgage of land or pledge or mortgage of chattels. One is governed by the law merchant, the other by property laws. The owner may rely, if he chooses, exclusively upon the promise to pay, according to its terms. Conditions for his benefit in the mortgage or pledge agreement may be availed of only in his capacity of mortgagee or pledgee; they are limited to the purposes of the mortgage or pledge; they cannot be read into the promise to pay, and so render a certain promise uncertain, convert a negotiable into a non-negotiable instrument. *Morgan v. Martien*, 32 Mo. 438; *Mason v. Barnard*, 36 Mo. 384; *Hurck v. Erskine*, 45 Mo. 484; *Brownlee v. Arnold*, 60 Mo. 79; *Whelan v. Reilly et al.*, 61 Mo. 565; *Noell v. Gaines*, 68 Mo. 649; *Owings v. McKenzie*, 133 Mo. 323, 33 S. W. 802, 40 L. R. A. 154; *McMillan v. Grayston*, 83 Mo. App. 425; *Board of Trustees of Westminster College v. Peirsol et al.*, 161 Mo. 270, 61 S. W. 811; *Curry v. La Fon*, 155 Mo. App. 678, 135 S. W. 511.

If the question is one of general law, the answer is the same. In *Chicago Ry. Co. v. Merchants' Bank*, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349, within one document were contained an unconditional promise to pay a certain sum at a certain time and a collateral agreement that the note, being one of a series given to the Northwestern Car Company for the purchase of cars, should become due and payable on default of payment of principal and interest of any note of the series, and that the title to the cars should remain in the payee for the equal and ratable security of all the notes.

"The agreement that the title should remain in the payee until the notes were paid—it being expressly stated that they were given for the price of the cars sold by the payee to the maker and were secured equally and ratably on the property—is a short form of chattel mortgage. The transaction is, in legal effect, what it would have been if the maker, who purchased the cars, had given a mortgage back to the payee, securing the notes on the property until they were all fully paid. The agreement, by which the vendor retains the title and by which the notes are secured on the cars, is collateral to the notes and does not affect their negotiability."

But even if the two matters were to be read together, it is clear that the stipulations for additional collaterals and the sale of collaterals are pertinent only to the pledge part of the transaction, and that the only condition which could, in any event, be carried into the promise to pay part is the one by which maturity might be anticipated. That condition, however, could only affect the time provision of the note to the extent of causing the maker to promise to pay 90 days after date, or sooner on demand of the holder after the maker's default in putting up additional securities. The applicable doctrine is correctly stated, we believe, in *Hunter v. Clarke*, 184 Ill. 158, 56 N. E. 297, 75 Am. St. Rep. 160:

"There can be no difference, in principle, between the exercise of an option by the maker to pay before a certain day, or a provision that the note shall be due upon the happening of some event prior to the date fixed and an option of the holder to declare it due upon the occurrence of some event."

The judgment is affirmed.

BATES v. UNITED SHOE MACHINERY CO.

(Circuit Court of Appeals, Second Circuit. June 2, 1914.)

No. 253.

1. CORPORATIONS (§ 158*)—STOCKHOLDERS—RIGHT TO SUBSCRIBE FOR NEW STOCK.

When a corporation by resolution authorized an issue of new stock for which the stockholders of record on a certain date were given the right to subscribe, complainant's predecessor in title held a certificate of stock duly indorsed with power of attorney to act in all respects for the record holder. *Held* that presentation of such papers, together with a demand of the right to subscribe for the new stock and a tender of the necessary money, were sufficient to fix his right thereto.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 449, 587-592; Dec. Dig. § 158.*]

2. CORPORATIONS (§ 158*)—RIGHT OF STOCKHOLDER TO SUBSCRIBE FOR NEW ISSUE—ENFORCEMENT IN EQUITY.

A stockholder in a corporation who, under the terms of an issue of new stock has a preferred right to subscribe for a certain amount thereof, may enforce such right by a suit in equity.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 449, 587-592; Dec. Dig. § 158.*]

3. JUDGMENT (§ 592*)—BAR OF OTHER ACTION—SPLITTING CAUSES OF ACTION.

A receiver, to whom a certificate of stock in defendant corporation had been assigned, applied to have it transferred to his name on the books, which was refused. Afterward a new issue of stock was authorized, for which the stockholders of record on a certain date were given the preferred right to subscribe pro rata. The receiver applied for the share to which his stock was entitled, and tendered payment therefor; but his offer was refused. He brought suit, and obtained a decree requiring defendant to transfer the stock on its books and for the recovery of back dividends. The stock was transferred to complainant, who brought suit to enforce the right to subscribe for his share of the new issue at par. *Held*, that the decree in the receiver's suit was not a bar to the second suit, that it was not a splitting of a single cause of action, but that the rights sought to be enforced in the two suits, while related, arose out of separate transactions at different times.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1107; Dec. Dig. § 592.*]

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in equity by Jerome E. Bates against the United Shoe Machinery Company. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 206 Fed. 716.

J. W. Griggs, of New York City, and W. B. Farr, of Boston, Mass., for appellant.

G. M. Mackellar, of New York City, for appellee.

Before COXE, Circuit Judge, and HAND and MAYER, District Judges.

HAND, District Judge. [1] In the case at bar Odell became an attorney in fact for Cavanaugh, the stockholder, when Cavanaugh indors-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ed the certificates of stock, and we have the admission made upon the argument that that power of attorney was in fact free from any conflicting claims; in short, that Odell's title—to use a rather inapt word—was free and clear. Now it may be true that the defendant or its transfer agent had some just ground for hesitation in recognizing that the power of attorney so executed by Cavanaugh was within his powers, or that they could safely register Odell upon their books and issue to him a certificate, so making him a stockholder. That question we do not mean to pass upon, because we think it immaterial here. The fact remains that Odell did through his attorney, Smith, demand a new certificate and registration at least as early as October 27, 1900. If it be true that this was not a formal demand, it is equally true that any formal demand was waived. We think even a demand was unnecessary, but if it were, it was as good as made.

Coming, then, to the date of the resolution authorizing the issue of new stock of March 23, 1901, the status was that Cavanaugh was the stockholder and Odell his attorney, with power to do everything on his own behalf which Cavanaugh could do, but in Cavanaugh's name. During the month when the books were open, Odell made two efforts to exercise the right given to Cavanaugh, the stockholder of record, to subscribe for the new shares. He first wrote through Choate, his attorney in Boston, saying that he exercised his right, which was perhaps futile, but on the 23d of April, 1901, through Bates and Smith he actually appeared at the Hanover Bank, in New York, tendered the necessary cash, and demanded the right to subscribe. Odell unquestionably had the absolute right to subscribe; he was Cavanaugh's attorney, with full powers to do everything that Cavanaugh himself could do. This was one of those things and Odell tried to do it. The transfer agent refused the subscription, that is, refused to Odell his right to subscribe on his own behalf as transferee or attorney in fact. At that time, had the transfer agent wished, it might perhaps have rightfully insisted that the new certificate and registry should wait till the transferred shares were duly registered themselves, or if Odell had insisted on the shares at once, that they should have been issued in Cavanaugh's name. In this they would only have been following their records, as they were entitled to do; but when the old certificate was presented, duly indorsed, together with the subscription, the conditions mentioned in the resolutions were in fact fulfilled, and the transfer agent had no right to refuse the subscription, or indeed to refuse to give the stock full registry any longer than was necessary to ascertain the validity of the transfer. Concededly that had been done before this suit was brought.

[2] The next question is of the jurisdiction in equity. It has been well-settled law for long that the transferee of shares of stocks may call upon a court of equity in order to get his name registered and a new certificate. It must be admitted that in those jurisdictions which allow a transferee to sue for the full value of the shares at law upon refusal, this remedy seems a little anomalous, if the shares have a market value. The rule is different where there is a sale of stock, and it is a little hard to see why both remedies should coexist here and yet not on a sale. Sometimes it is said that the corporation holds the

shares in trust, and there is authority for that view in reported cases, but it seems rather an explanation to fit the instance. The most plausible reason seems to be that the refusal to register the new stockholder and give him a certificate subjects him to annoyance and indefinite trouble, the measure of which he cannot prove. Probably all his rights can be worked out as attorney for the old stockholder, but only with great trouble to him. Such a suitor requires equitable relief. It is surely somewhat anomalous to treat the refusal to register a shareholder or give him a new certificate as conversion of the stock, which indeed the corporation cannot mean it to be. However, whatever rights a transferee of old shares should have against the corporation, he should also have them in respect of new shares issued, like these, to old stockholders. Certainly the two cases are no different, and the authorities have given equitable relief nearly uniformly, in the latter as in the former, *Dousman v. Smelting Co.*, 40 Wis. 418; *Real Estate Trust Co. v. Bird*, 90 Md. 229, 44 Atl. 1048; *Cunningham's Appeal*, 108 Pa. 546; *Electric Co. v. Electric Co.*, 200 Pa. 516, 50 Atl. 164. Sometimes the point has not been considered, though equitable relief was given. *Jones v. Railroad*, 67 N. H. 119, 38 Atl. 120; *Way v. American Grease Co.*, 60 N. J. Eq. 263, 47 Atl. 44; *Snelling v. Richard* (C. C.) 166 Fed. 635.

[3] Finally, there is the question of splitting the causes of action. This rule is a salutary one, as it tends to minimize litigation, but it is not capable of absolute and nice definition. Generally the courts have said that the incident must follow along with the thing, and that one cause of action should not be divided. "Cause of action" is a vague phrase, but we think that these two wrongs are separate enough not to constitute a single cause of action. As we have suggested, the wrongs were in failing to register Odell as stockholder upon two separate blocks of stock. His demand was made in respect of one in October, 1900, and the wrong consisted in failing to recognize him as soon as his title was clear. His demand in respect of the other was made in April, 1901, six months later. It concerned a separate block of stock purchased by subscription, not by transfer, and the result of a wholly different transaction. It is quite true that the right to the second block was derivative from the first, but it was not a mere incident to it, like a dividend. To get one's rights to the new stock one had to make a new and distinct bargain; the only connection between the two was that only the owners of the first block had the option to buy the new. While these two transactions might have been joined, we think that they need not have been. None of the authorities are in point; the question is necessarily *res integra*, and we see no reason to extend the rule to a case like this.

Decree affirmed, with costs.

BENEDETTO v. W. P. REND COLLERIES CO.

(Circuit Court of Appeals, Seventh Circuit. May 18, 1914.)

No. 2085.

1. APPEAL AND ERROR (§ 977*)—ORDER DENYING NEW TRIAL—REVIEW—DISCRETION OF COURT.

Where the trial court has considered and passed on plaintiff's alleged errors, brought forward in a motion for a new trial and denied the motion, no error can be assigned on such order on a writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

2. TRIAL (§ 110*)—EXAMINATION OF WITNESSES.

It was improper for plaintiff's counsel in the examination of witnesses to repeat questions in substantially the same form after objections had been sustained to them.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 271; Dec. Dig. § 110.*]

3. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—RECEPTION OF EVIDENCE.

Error in sustaining an objection to a question propounded by plaintiff to an expert witness was cured by the court subsequently permitting the witness to answer substantially the same question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4195, 4200-4204, 4206; Dec. Dig. § 1058.*]

In Error to the District Court of the United States for the Eastern District of Illinois; Francis M. Wright, Judge.

Action by Gaetano Benedetto against the W. P. Rend Colleries Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Charles B. Elder, of Chicago, Ill., for plaintiff in error.

William H. Hart, of Benton, Ill., for defendant in error.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

PER CURIAM. This was an action at law for damages on account of personal injuries suffered by plaintiff in error in the mine of defendant in error. On a consideration of the evidence under the instructions of the court, the jury returned a general verdict in favor of the defendant.

[1] One contention for reversal is that the trial court committed an abuse of discretion in denying plaintiff's motion for a new trial. It is a familiar rule in federal practice that no error can be assigned upon the action of the court in overruling a motion for a new trial. The only qualification of this general statement is that it is not within the discretion of the trial court to refuse to entertain and consider and pass upon the matters urged by the defeated party as grounds for a new trial. *Mattox v. United States*, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917; *Felton v. Spiro*, 78 Fed. 576, 24 C. C. A. 321. In this case the trial court considered and passed upon the plaintiff's contention that the jury should have found in his favor under the evidence, and therefore the action of the trial court in ruling upon the motion is not subject to review. *McBride v. Neal* (at this term) 214 Fed. 966, 131 C. C. A. 262.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

There is no assignment that there was not sufficient evidence for the defense to justify the court in submitting the case to the jury. 'And on examination we find that there was sufficient evidence.

[2] Complaint is also made of the action of the court in restricting plaintiff's counsel in the examination of witnesses. On examination of the record showing counsel's persistence in repeating questions in substantially the same form after objections had been sustained, we are satisfied that the action of the trial judge was entirely proper.

[3] One serious question might be presented with respect to the ruling of the court in sustaining defendant's objection to a question propounded by plaintiff to an expert witness, if it were not for the fact that subsequently the expert was permitted to answer substantially the same question.

No exception was taken to any portion of the court's instructions to the jury. We conclude that the cause was submitted on sufficient evidence and under proper instructions, and the judgment is therefore affirmed.

ERICKSON v. GALLAGHER et al.

GALLAGHER et al. v. ERICKSON.

(Circuit Court of Appeals, Second Circuit. June 3, 1914.)

SHIPPING (§ 49*) — CHARTER — UNAUTHORIZED WITHDRAWAL OF VESSELS BY OWNER.

Where the owner of two scows chartered the same for a year at a monthly hire, no time being fixed in writing for its payment, the real agreement apparently being that he should be paid whenever he asked for it, which was the course followed, he was not entitled to withdraw the boats, without notice, because hire was in arrears, and is liable for the damages thereby caused to the charterers.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 48, 76; Dec. Dig. § 49.*

Cancellation, surrender, or rescission of charter of vessel, see note to *McNear v. Leblond*, 61 C. C. A. 569.]

Appeal from the District Court of the United States for the Southern District of New York.

On appeal from a decree of the District Court of the United States for the Southern District of New York entered April 21, 1913, in favor of the libelant appellant Erickson for \$59.13.

Nelson Zabriskie, of New York City, for libelant.

Foley & Martin, of New York City, for respondents.

Before COXE and ROGERS, Circuit Judges, and MAYER, District Judge.

COXE, Circuit Judge. Erickson and Carlson were the owners of two scows, Plymouth Rock and Pilgrim, which were chartered by them in the name of Erickson to Gallagher Bros. The action is for charter hire. The defense is that the libelant withdrew the scows before the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

charter expired, which the charterers allege was for the full year of 1912. They assert that by withdrawing the scows in August the libelant broke the charter and cannot recover. Because of the withdrawal Gallagher Bros. were compelled to hire other vessels at an increased cost of \$850, for which sum they demand judgment. The court found that there was due the libelant \$683.33 and awarded the Gallagher Bros. \$633 with \$8.80 interest, leaving due the libelant, Erickson, \$59.13.

The Gallagher Bros. contend that the hiring was for a year and that the scows were to continue in their possession till January 1, 1913. The rates for 1912 were to be the same as for 1911 except that the rate for the Plymouth Rock was to be \$105 per month till March 12, 1912 and \$125 per month thereafter. The only question is whether payment was to be made on the 26th of each month and if so, had the owner the right to rescind the charter and withdraw the boats if the payment was delayed beyond that time?

We think that if there had been a time set for the payment, the rule in *Tyrer v. Hessler*, and in *Aspinall's Maritime Cases* (N. S.) 292, would apply. But there was no time fixed in writing and therefore the time of payment may be arrived at by what was said and by the conduct of the parties.

The real agreement seems to have been that the owner was to get his money whenever he asked for it. There never was any complaint regarding the payments; the owner got his money promptly and would in all probability have continued on with the charter had he not received a favorable offer for the purchase of the boats. This he accepted without a word of notice to the charterer. It seems to us that this was unfair dealing. Even if there had been an express agreement to pay on the 26th of each month the owner, by his conduct in demanding and receiving pay thereafter waived the provision and practically said, "I will call for the money when I want it."

It is unnecessary to add further to the opinion of the District Judge. The decree is affirmed with costs.

LOVELL-McCONNELL MFG. CO. v. AUTOMOBILE SUPPLY MFG.
CO. et al.[†]

(Circuit Court of Appeals, Second Circuit. June 8, 1914.)

No. 292.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—AUTOMOBILE HORNS.

The Hutchinson patents, No. 923,048, No. 923,049, and No. 923,122, for signal or alarm horns for use on automobiles, launches, etc., as to their broad claims, are void for anticipation by the device of the Pierman patent. The more specific claims *held* not infringed, if valid.

Appeal from the District Court of the United States for the Eastern District of New York.

On appeal from an interlocutory decree entered by the District Court for the Eastern District of New York holding valid and infringed certain claims of three patents granted to Miller Reese Hutchinson for improvements in signal or alarm horns such as are used on automobiles, launches, steamboats, etc. These patents, all issued on the same day, May 25, 1909, aggregate about 29,000 words; they contain 125 claims and 27 illustrative figures. The claims involved, 48 in all, are Nos. 16, 17, 19, 24, 27, 29, 36 and 37 of No. 923,048; Nos. 1, 2, 8, 12, 13, 22 and 30 of No. 923,049; and Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 13, 14, 15, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 35, 36, 37, 38, 45, 47, 48, 52 and 53 of No. 923,122. There are three volumes of testimony, containing 2,770 pages. This cumbersome record, imposing, as it does, an immense burden upon counsel and upon the court, has for its object the elucidation of an alarm horn of comparatively simple construction. It is said that this expanding of the record is largely due to the fact that the major part of the testimony was taken under the old equity rules. It is hardly probable that under the new system such a record could be produced. After endeavoring to follow experts and counsel through the infinite mazes of the record, the predominant thought left upon the mind of the court is the difficulty of discovering the exact nature of the controversy in this wilderness of words.

The opinion of the Circuit Court on the motion for a preliminary injunction is reported in 193 Fed. 658. The opinion at final hearing is reported in 212 Fed. 192.

Frederick P. Fish, C. A. L. Massie, J. L. Stackpole, and Ralph L. Scott, all of New York City, for appellants.

George C. Dean and Drury W. Cooper, both of New York City, for appellee.

Before COXE and ROGERS, Circuit Judges, and MAYER, District Judge.

COXE, Circuit Judge. The peculiar merit of the Klaxon horn seems to be that it is capable of making a more strident, insistent and insolent noise than any which has preceded it. The sound has been described in this, and previous litigation, as "harsh," "raucous," "horrible," "dia-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied October 7, 1914.

bolical" and "villainous." There can be no doubt that these adjectives are more or less applicable. Why it was thought necessary, with the musical and merry notes of the coach horn and the hunter's horn as guides, to mar the pleasure of automobiling and shiver the air with such discordant sounds, the court has been unable to understand. However, as both parties are almost equal offenders in this regard, it is unnecessary to dwell upon this phase of the case, further than to say that the ideal auto-horn has yet to be invented.

The first patent in suit, No. 923,048, has for its object the production of a signaling or alarm horn capable of using as much power and of producing as loud a sound as may be desired by means of simple, strong and reliable combinations. This is accomplished by the mechanical vibration of an elastic diaphragm which, when divorced from technicalities and terms of art, does not seem to be a particularly difficult object to accomplish. A ratchet wheel revolving on the upturned bottom of a tin pan would probably produce a somewhat similar result. We entirely agree with the statement in the brief of the appellee that:

"The 'horn or resonator' of the patent has been the subject of discussion out of all proportion to the simplicity of the subject."

And this is true whether the diaphragm is agitated by a cam or by a crank and link arrangement. The gist of the invention, from the appellee's point of view, is stated in its brief as follows:

"It is with the bodily diaphragm-movements that this case has to do; and the issues are further limited to the 'part-positively-forced and part wholly-free' movement of an elastic diaphragm."

In other words, the diaphragm must be elastic, it must be held in place at its periphery by clamps, and, when struck at or near its center, it must vibrate; the movement in each vibration being initiated by great force and completed under the natural conditions of the diaphragm.

The construction shown in Fig. 9 of the drawings illustrates the Hutchinson improvement in its simplest form. The diaphragm is here shown as agitated by the disk having cam projections arranged to engage suitable surfaces on the diaphragm which displace it in one direction without the necessity of a separate reciprocating member. The abrupt faces on the back side of the cam allow the free elastic return of the diaphragm at its own natural rate, thus permitting a lost motion engagement. The drawing shows a disk having two cams, but the description says that:

"The periphery of the disk 15 may be greatly increased and the number of cams greatly multiplied."

The patent to A. N. Pierman for an alarm is, we think, the best reference produced by the defendants. It was applied for August 18, 1898 and was granted March 14, 1899, ten years prior to the Hutchinson patents in suit. Pierman had in view the same object as Hutchinson, namely:

"To provide a simple, inexpensive, easily attached and loud-sounding alarm adapted for general use, but more especially for vehicles, as bicycles; and my invention consists, essentially, in the combination, with a point or button carried by a resonant diaphragm, of a transversely corrugated wheel whose periphery engages the point or button."

This patent is criticised because the description occupies "less than a single page in length." But for his brevity and conciseness in this regard the patentee should, we think, be commended rather than criticised, for in this single page he has made his invention perfectly clear. His horn is shown attached to a bicycle. He says that an essential feature of the alarm is a resonant diaphragm which may be made of metal or any suitable material having "at its center a hard point or button" which contacts with a corrugated wheel revolved by the bicycle wheel which vibrates the diaphragm and so produces the alarm. Hutchinson says:

"I make the diaphragm of any desired diameter and thickness and of * * * soft iron, spring steel, wood, etc. * * * having a suitable surface 55 on the diaphragm 5 to forcibly displace the latter in one direction without the necessity of a separate reciprocating member."

An enlarged resonator, which appears to us to be fairly made after the Pierman model, is in evidence and seems to possess all the essential features of the Hutchinson horn although, perhaps, the peculiar snarl which terminates the Klaxon note is wanting. It should be borne in mind that the patents in issue are not for "a noise." A noise, as such, is not patentable and if it be considered at all, as throwing light upon the mechanism, it must be admitted that the Newtowne note resembles Pierman's rather than Hutchinson's. We have no doubt that the Pierman horn is an operative device. Pierman's first claim is as follows:

"1. An alarm comprising a resonant diaphragm having at its center a hard point or button, a transversely corrugated or roughened wheel adapted to be engaged by the said point or button to produce vibration of the diaphragm, and a movable case in which said diaphragm is mounted and with which said wheel is connected so as to be movable with said case when the alarm is moved into or out of operative position."

Hutchinson certainly has an alarm comprising a resonant diaphragm. He has at the center of this diaphragm a hard point or button (Figs. 9, 55). He has also a transversely corrugated or roughened wheel (the cam wheel) adapted to be engaged by said point or button to produce vibration. He has also a case in which said diaphragm is mounted and with which said wheel is connected (Fig. 1) so as to be movable, etc.

It is also true, we think, that Pierman's alarm if made for the first time to-day, would infringe the Hutchinson claims. Having been made before, it anticipates. Take, for instance, the first claim of patent No. 923,048 which is here involved. It is No. 16 and is as follows:

"In an alarm or signaling apparatus of the class described, a horn or resonator and a diaphragm, in combination with a rotary member and diaphragm actuating means actuated thereby and adapted to positively displace said diaphragm in one direction and then to permit elastic movement thereof, and high-speed means for driving said rotary member at such rate that the

displacements and the elastic movements correspond to a frequency of said horn or resonator."

Pierman's horn is unquestionably an alarm or signaling apparatus. It has a horn or resonator and a diaphragm in combination with a rotary member. It has a diaphragm vibrating means actuated by the rotary member and adapted positively to displace the diaphragm in one direction and permit the elastic movement thereof. It also has high-speed means for driving said rotary member at such rate that the displacements and the elastic movements correspond.

We do not overlook the criticisms made at the argument and in the appellee's brief, but it must be remembered that Pierman was dealing with the situation as it existed in 1898—16 years ago, when bicycles were largely in vogue and before the automobile industry had increased to such enormous proportions. If he had made his improvement ten years later he would probably have shown it in connection with an automobile or would have suggested the few simple mechanical changes necessary, if used in that environment. The criticism that Pierman does not distinctly show a corrugated wheel is not, in our judgment, well founded. Fig. 3, for instance, shows a diaphragm very similar to that of Hutchinson having at its center a hard point or button which is clearly an equivalent for the "suitable surface" of the first patent in suit, and which engages the corrugations on the wheel and carries the sound-producing vibrations on the diaphragm. The language of the specification is so plain as to leave little doubt as to the nature of the invention. How could it be stated in more perspicuous language than the following:

"My invention consists, essentially in the combination, with a point or button carried by a resonant diaphragm, of a transversely-corrugated wheel whose periphery engages the point or button"?

Again, Pierman says:

"The roughened wheel receives motion from the bicycle-wheel, and the corrugations of the wheel are engaged by the point or button carried by the diaphragm, thereby imparting vibration to the diaphragm and producing the alarm, which I find in practice will be heard at a much greater distance than bells and other alarms commonly in use."

We cannot resist the conclusion that all that Hutchinson did was to take the old resonators and connect them up with a rotary electric motor, thereby producing a more startling sound, but adding nothing patentable to the signaling apparatus.

Gieseler in 1900 discloses in his patent No. 21,084 an apparatus very similar to that described in the claim under consideration. Fig. 7 shows a diaphragm clamped at its circumference at the lower end of the horn and made to vibrate by contact with a circular disc having a corrugated edge, which is the equivalent of twelve undulating cam surfaces. These cams actuate a spring-held hammer which is thus made to tap the disc at the lower end of the horn.

Hope-Jones, in 1901, produced an improved apparatus for producing sound and obtained a patent therefor. He shows a diaphragm vibrated by a rotary electric motor. There are other patents in the record show-

ing various elements of the claims in suit, alone or in somewhat similar combinations, but it is unnecessary to consider these further as they add nothing essential to the Pierman disclosure.

Our general conclusion is that the broad claims in controversy of the Hutchinson patents are invalid and that the claims which cover specific details, if valid, are not infringed.

The decree is reversed, and the District Court is directed to enter a decree dismissing the bill with costs to the defendants-appellants.

ALVORD et al. v. SMITH & WATSON IRONWORKS et al.

(District Court, D. Oregon. July 27, 1914.)

No. 6145.

1. PATENTS (§ 66*)—ANTICIPATION—PRIOR PATENT.

The date when a patent is actually issued, rather than the date when the application therefor was filed, determines whether or not it anticipates another patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 79, 81; Dec. Dig. § 66.*]

2. PATENTS (§ 66*)—ANTICIPATION—PRIOR PATENT.

A patent in suit is not anticipated by another patent which, although prior in date, was not issued until after the filing of the application for the patent in suit, unless it is shown that the invention of the prior patent was in public use prior to such application.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 79, 81; Dec. Dig. § 66.*]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—HOISTING OR LOGGING DEVICE.

The Corbett patent, No. 807,109, for a hoisting or logging device, the invention consisting specifically of clutch-operating mechanism for throwing in and out of operative engagement a friction band and friction cone, was not anticipated, but shows a marked advance in the art. Also *held* valid as against the claim that the patentee was not the original and first inventor of the device, and infringed.

4. PATENTS (§ 209*)—LICENSE—CONSTRUCTION OF CONTRACT.

A contract between the patentee of the patent in suit and a defendant who was the owner of another patent, both relating to improvements of the same machine, by which they agreed to combine their inventions in a new machine, which each should be at liberty to make and sell, paying the other a royalty, construed, and *held* not to operate as a license to defendant to use the invention of the patent in suit otherwise than in the new form of machine agreed upon.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 300, 303; Dec. Dig. § 209.*]

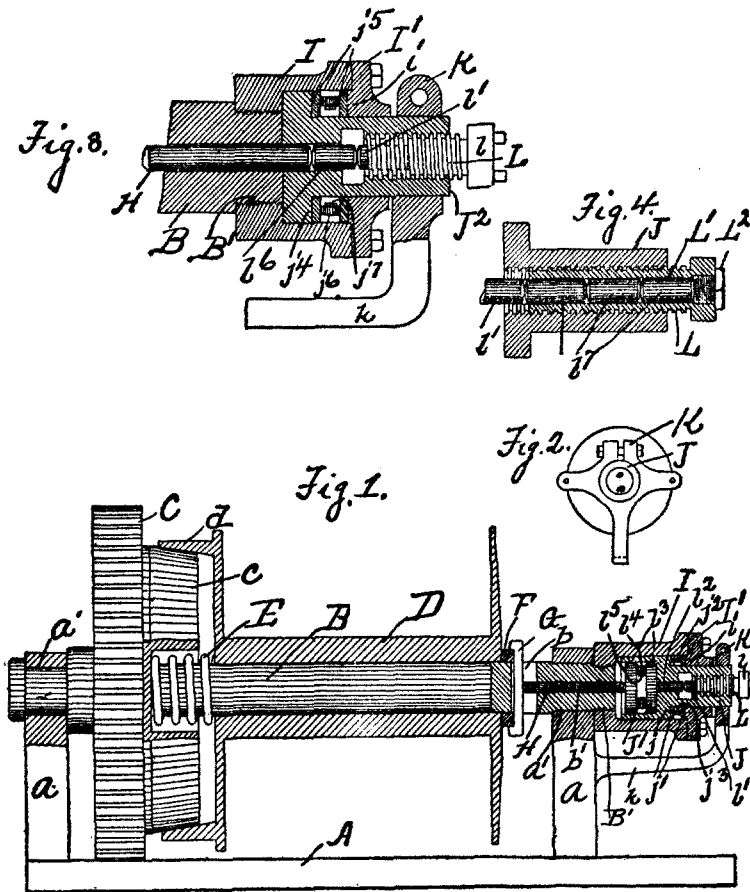
In Equity. Suit by William C. Alvord, administrator, and Ethel W. Corbett, administratrix, of William H. Corbett, deceased, against the Smith & Watson Ironworks and Edward Turney. On final hearing. Decree for complainants.

Hugh C. Lord, of Erie, Pa., and Reed & Bell, of Portland, Or., for plaintiffs.

T. J. Geisler, of Portland, Or., for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

WOLVERTON, District Judge. William H. Corbett in his lifetime secured certain letters patent, of date December 12, 1905, and numbered 807,109, upon a hoisting or logging device, of which he claimed to be the original and first inventor. The supposed invention is well illustrated by the following drawings, figure 3, containing the elements of the invention claimed:



The drum arrangement is carried on a shaft, journaled in bearings *a'*, the shaft being supplied with a gear *C*, which by other suitable gearing is connected with the engine. This gear carries a friction-cone *c*, and, one end of the drum being provided with a friction-band *d*, the drum is caused to revolve with the shaft by bringing the friction-band *d* into engagement with cone *c* by a thrust imposed by the device of which Corbett claimed to be the inventor, and thus the drum is utilized, through means of rope or wire cable, for drawing, hauling into place, or lifting objects of great weight. The drum is released when the

thrust is withdrawn, by means of a spring *E*, and ceases again to revolve with the shaft. These elements, namely, the cone *c* and the friction-band *d*, constitute the friction-clutch. Further, to illustrate how the thrust is imposed upon the drum, a key *G* extends through a slot *b* extending through the shaft, which engages collar *F*. This in turn engages the end of the drum opposite the end containing the clutch arrangement, and the whole is driven endwise into engagement by a thrust exerted by means of the pin *H* upon the key *G*.

So far as the drum and its mechanism are concerned, including the slot in the shaft and the key and collar, there is no present claim for invention. It is only to the device for the operation of this drum mechanism that the claim pertains.

Corbett's specific invention consists of the carrier *I*, threaded on the end of the shaft *B*, to the outer end of which is bolted a flange-plate *I'*, this flange-plate forming a shoulder *i* on the inside of the carrier opposite the end of the shaft. This carrier is sometimes called a sleeve, either designation being appropriate, as some one or more of its elements is taken into account.

A nut *J*², referring to figure 3, is journaled in the flange-plate *I'*, which has a shoulder *j*⁴ opposed to and facing shoulder *i* formed by the flange upon the sleeve. Between these shoulders are interposed two disks or washer-plates, between which are roller-bearings. The rollers are held in place by a spreading-ring *j*⁷, which has but the one purpose. The plates are of very hard material. The nut *J*² is internally threaded, and is locked against rotation by means of clamp *K*, which, having an arm *k*, is secured to some part of the frame. This nut so adjusted is called the fixed screw member. It does not revolve with the shaft, although carried on it, but the carrier or sleeve revolves about and outside of it, and always with the shaft. Within the threaded cavity of this fixed screw member is inserted a screw *L* on the outer end of which is adjusted a lever with which to operate the screw. This is called the active screw member. A socket is provided in the inner end of the screw, in which is inserted a pin *l'*. This pin co-operates with another or floating pin *l*⁶, and the latter with the thrust pin *H* which extends through the center of the shaft longitudinally free to rotate, and engages the key *G*, extending crosswise through the slot *b*, and is thus brought into engagement with the drum. In operation, the lever is thrown forward, which advances the active screw member, and through the pins *l'*, *l*⁶, and *H*, the drum friction-band is thrust upon the friction-cone, and locked, thus enabling it to take the coil of the cable and draw the load desired. When the screw is advanced, the shoulders of the fixed screw member are drawn back against the shoulders of the sleeve or carrier, and the latter, revolving with the shaft, causes friction at the shoulders. By reason of the great power exerted by the fixed screw member on the thrust, the friction becomes so intensified at the shoulders and at the contact of the pins as to generate heat to such an extent sometimes as to cause a welding, and, to provide against heating, the roller-bearings were introduced, and the thrust-pin divided into three or more parts, which seems to have solved the problem. In unlocking the mechanism, the lever is simply thrown back to place.

Twelve claims are made under the patent, of which Nos. 1, 2, 5, and 12 are invoked to sustain the allegations of the infringement. No. 1 is as follows:

"In a hoisting or logging device the combination with the main bearings; the shaft journaled in said bearings and having an attaching end; a driving friction-wheel mounted on said shaft; a drum mounted on said shaft; a driven friction-wheel locked against rotation relatively to said drum, said driving and driven friction-wheels being adapted to be brought into frictional engagement by an axial movement of one of them; thrusting devices in the attaching end of the shaft, extending from without the bearing to within the bearing; and a connection between said thrust devices and the one of the friction-wheels free to move axially into engagement; of an apparatus mounted on the attaching portion of the shaft for actuating said thrust devices, comprising a carrier attached to the shaft; a relatively fixed screw member mounted on the carrier, the carrier being arranged to receive the axial thrust of said screw member; means for locking said relatively fixed screw member from rotating with the carrier; an active screw member operating in connection with the relatively fixed screw member, and adapted to exert a thrust on said thrust devices."

No. 2 is a repetition of the first, with an additional element in words, "And a roller-bearing between said relatively fixed screw member and the carrier."

No. 5 has the additional element, "And a loose pin interposed between said active screw and said thrust devices."

No. 12 varies the last part of No. 1 to read as follows:

"Of an apparatus mounted on the attaching portion of the shaft for actuating said thrust devices comprising a screw member fixed against axial movement relatively to the shaft, said screw member being mounted outside of the bearing, the shaft being free to rotate without rotating the screw member; and an active screw member arranged to operate with said relatively fixed screw member for exerting thrust on the thrust devices."

The alleged infringing device consists in a nut, circular in form, screwed on the end of the shaft and revolving with it, which extends beyond the circumference of the shaft, forming a shoulder outside of it. The fixed screw member extends beyond the shaft in which the active screw member is adjusted, co-operating with a thrust-pin extending through the shaft and forming an engagement with the drum device. The fixed screw member also extends back, in a sleeve arrangement or carrier, over the circular nut, and, closing in on the shaft, forms a shoulder opposing the shoulder on the nut. Between these shoulders are two disks, and between these roller-bearings like those in the Corbett patent. The circular nut, as stated, revolves with the shaft, but within the sleeve of the fixed screw member, which latter remains stationary, thus reversing the order as found in the Corbett patent, where the nut or sleeve revolves about the fixed screw member. When the fixed screw member is brought into engagement with the thrust-pin and drum by means of a lever adjustment, as in the Corbett patent, the shoulder of the fixed screw member is brought into engagement with that of the circular nut, and the latter revolving and the other not causes friction at the point of contact, which the disks and roller-bearing device interposed are designed to obviate.

The plaintiffs, having succeeded to the Corbett patent, bring this suit to declare the Smith & Watson Iron Works, which, it is alleged, is or has been manufacturing the last described device, an infringer of the Corbett patent. The defendant E. Turney, who claims a right to this device, and also a license, by virtue of a certain contract with Corbett, to manufacture and sell under the latter's patent, has been permitted to intervene. Three defenses are interposed, namely: (1) Anticipation of the Corbett patent, by several patents previously issued to Turney. These are patent No. 607,557, for friction-clutch, of date July 19, 1898; No. 680,900, for friction-clutch, August 20, 1901; No. 709,567, for clutch-operating mechanism, September 23, 1902; No. 728,521, for clutch-operating mechanism, May 19, 1903; and No. 760,089, for mechanism for operating friction-clutches, May 17, 1904. (2) Prior discovery by Turney of the primary invention, and disclosure to Corbett. And (3) license by Corbett to manufacture and sell the device.

Preliminarily, it is not to be questioned that the Smith & Watson Iron Works has been manufacturing the alleged infringing device. It is submitted, however, that it is manufacturing for E. Turney, that E. Turney pays \$50 for each machine, and immediately sells to the company for \$60, and that the company utilizes the same upon its logging engines. But the testimony of Smith, who was called as a witness for defendants, leads to the conclusion that the ironworks is manufacturing by permission of Turney, and pays Turney a royalty for each machine manufactured. Such is the virtual effect of the arrangement to which Smith testifies, and to call it by any other name would not change the relationship.

The defense of anticipation requires an inquiry respecting the state of the prior art at the time of Corbett's alleged invention. The last-named patent, No. 760,089, pleaded as anticipatory of the Corbett device, cannot be so considered, for the reason that its date is subsequent to the date of Corbett's application. By reference to the two patents, it will be found that Turney made application September 4, 1903, and his patent was issued May 17, 1904, while Corbett's application bears date November 4, 1903, and his patent December 12, 1905. Thus, while Corbett's patent issued later than Turney's, his application was prior to the latter's patent.

[1] The third defense which may be interposed to infringement under the statute (R. S. § 4920 [U. S. Comp. St. 1901, p. 3394]) is that the device had been patented or described in some printed publication prior to the patentee's supposed invention or discovery thereof, or more than two years prior to his application for patent. In order to sustain this defense the patent produced for the purpose must have been duly issued, or a complete description of the invention published in some printed publication, prior to the patented invention in suit.

"And the patent offered in evidence or the printed publication," says the Supreme Court, "will be held to be prior, if it is of prior date to the patent in suit, unless the patent in suit is accompanied by the application for the same, or unless the complainant introduces parol proof to show that his invention was actually made prior to the date of the patent, or prior to the time the application was filed." *Bates v. Coe*, 98 U. S. 31, 33 (25 L. Ed. 68).

As stated in another of the cases:

"An application prior to the patent in suit can have weight only if there has been some actual use of the invention, so that there may be elements of publicity. Such an application cannot be said to be a part of the prior art unless this element of publicity is present." *Thomson-Houston Electric Co. v. Ohio Brass Co.* (C. C.) 130 Fed. 542, 546.

And so, in a later case, it is concluded that:

"Under the authorities, the date when the patent is actually issued, rather than the date when the application therefor was filed, determines whether or not it anticipates another patent." *General Electric Co. v. Allis-Chalmers Co.* (C. C.) 190 Fed. 165, 170.

See other authorities there cited.

[2] Corbett's application is in evidence, and its filing shows an earlier date than patent No. 760,089, which is sufficient to render the latter unavailable as an anticipation of Corbett's invention. There is no evidence of any use by Turney of his device under patent No. 760,089 prior to the date of Corbett's application.

[3] Now, as to the prior art. The first Turney patent for friction-clutch, No. 607,557, has a nut screwed on the end of the shaft, which becomes a part of and rotates with it. In the end of this nut is inserted an adjusting screw corresponding with the active screw member in later patents, to which is attached at the outer end a hand-wheel. The adjusting screw co-operates with a slidable pin extending through the center of the shaft, and engages a key in a slot of the shaft, which engages the drum. The adjusting screw rotates also with the shaft. The thrust on the pin for locking the drum is effected by a brake-shoe brought into contact with the hand-wheel, which retards the action of the hand-wheel and screw, while the shaft continues its revolutions, so that the screw moves inwardly to engagement with the pin and the drum, and thus the latter is locked. To unlock the drum the engine must be stopped, and the hand-wheel and screw turned back to their previous position. The principle involved by the art is that the entire interlocking mechanism revolves with the shaft, and the locking is effectuated by retarding the action of the adjusting screw, thus producing engagement of the parts with such force as to cause the drum to revolve also with the shaft. The shaft in its revolutions, including the engine which propels it, must be stopped, or its speed reduced, and the hand-wheel and screw must be readjusted, in order to unclutch the drum.

The next Turney patent for friction-clutch, No. 680,900, involves a construction similar to the first as it relates to the nut and the adjusting screw member, but it has an improvement, consisting of a complex mechanism, whereby the adjusting screw may be advanced by retarding its revolutions, and released by accelerating its movement to greater rapidity than the rotation of the shaft, and may be so regulated while the shaft is in motion as to pay out the cable on the drum at the desired rate of speed. The principle involved in the locking device is the same as in the former patent, with the added improvement for effectuating the locking and unlocking and regulating the paying out of the cable while the shaft is in motion.

Turney's patent No. 709,567, for clutch-operating mechanism, exhibits a locking device which is not wholly carried on the shaft, as in the former devices, but the active screw member is contained in a fixed screw member, which latter is screwed to the base of the engine, and is separate from the shaft; that is, it is not carried on the shaft. The active screw member, or the adjusting screw, as it is called in the former patent, is operated by a lever in conjunction with a pull-rod. When advanced, which is done by a side thrust, it co-operates with a pin adjustment passing through a nut screwed upon the end of the shaft, and thence through the center of the shaft longitudinally to an engagement with the drum mechanism. The particular feature which differentiates this device from the two former is that the fixed screw member and the active screw member are carried on a standard affixed to the bed of the engine, and are not carried on the shaft and nut attached thereto, but are independent thereof; the thrust becoming a side thrust from an independent source, not exerted directly through mechanism contained upon the rotating shaft.

Turney's patent No. 728,521 for clutch-operating mechanism also covers an invention of the same type, in so far as the fixed and active screw members are carried by a frame affixed to the bed of the engine, and not by the shaft, the primary distinction between the two later patents as compared with the two earlier.

Another device, called the "Standard Friction Device," which is characterized as very old and having been in use prior to Corbett's invention, has been brought into the case. This device, like the last two patents of Turney, carries the fixed and active screw members by independent attachment. In it there is a shaft-nut, with a shoulder, and the thrust-nut, which is the fixed screw member, extends back of the shaft-nut, with a shoulder also, so that when the thrust screw is advanced the shoulders are brought into frictional contact. The evidence shows that, so great is the friction generated at the face and point of contact between the shoulders and the end of the thrust screw with the thrust pin, a welding heat is sometimes generated, in the heavy logging that is now carried on, which constitutes a very great objection to the operation of the device.

Now, a comparison of the Corbett device with these devices reveals a marked advance in the art in several particulars: First, the thrust nut and screw are carried on the shaft and as a part of it; second, they do not revolve with the shaft, which eliminates the necessity of retarding the screw member in order to set the screw, or of stopping the engine or accelerating the screw member in order to unlock the drum; third, it affords ample convenience and facility for lubricating; and, fourth, the friction is largely eliminated by the disks and roller-bearings between them, and by the introduction of a loose pin or pins between the active screw member and the thrust-pin. All these cannot be regarded as having been suggested by the prior art. Hence I conclude that there has been no anticipation as it respects the Corbett patent.

The next question is a more difficult one, and pertains to the invention itself. It is, Who was the original and first inventor of the broad and essential distinction, that is to say, the manifest and obvious ad-

vance in the art that we have attempted to explain? It is in effect conceded that the Turney device No. 760,089 and the Corbett device No. 807,109 practically embody the same primary invention, in so far as it is covered by the Corbett patent, that is, the idea of carrying the locking device wholly upon the drum shaft, and of providing fixed and active screw members which do not revolve with the shaft. The difference between the two patents is essentially and simply this: That in the Corbett device the active screw member is threaded on the inside of the fixed screw member, while in the Turney device No. 760,089 the active screw member is threaded on the outside of the fixed screw member. The difference is not functional, and is not so considered. It is not claimed that the Corbett device infringes any of the claims of the Turney patent No. 760,089. While Turney might have broadened his claims to cover Corbett's primary invention, for some reason he did not do so.

There has been intimation that Corbett surreptitiously and in bad faith obtained his patent in contravention of the prior rights of Turney. This feature will be dealt with as we go forward with the examination of the main question.

Corbett was the manager of the Willamette Ironworks (later the Willamette Iron & Steel Works), which was engaged, among other things, in the manufacture of logging engines and locking devices for logging purposes. Turney was, for a long time, employed by the company in selling the locking devices, at a salary of \$20 per week and a commission. Indeed, all the experimental work upon Turney's several devices was done at the company's shops, except as it relates to his last patent, No. 760,089. The drawings for this were made by Harry Turney, the son of E. Turney, at the Turney residence.

Recurring again to the Corbett device, the patent was issued December 12, 1905, and the application was filed November 4, 1903. From certain exhibits contained in the record, consisting of drawings showing the device, and upon which the patent was probably based, it is quite certain that Corbett had evolved his device some time prior to June 20, 1903. A shop file-mark on the drawing shows this date, and the evidence shows that it was completed some time earlier, but how much does not appear. Later drawings bear date August 11, 1903, which were completed some time earlier than that. These drawings show a completed device, and practically the device that Corbett patented. So it may be said that his invention dates back to June 20, 1903, and not later than August 11th of that year. E. Turney claims that he heard nothing of Corbett's invention until long after his (Corbett's) application was filed, namely, some time in 1904 or 1905. But he frankly admits that he is confused as to dates, and does not claim to state them accurately, except where the records fix them for him. Turney is evidently mistaken as to the time of his first knowledge of Corbett's device, which was early known as the "Universal Friction Device," for it is in evidence that Corbett began manufacturing his device even prior to filing his application for patent, which, as we have seen, was November 4, 1903. Further than this, the Willamette Iron & Steel Works

issued a catalogue, which was in print as early as December 1st of that year. This catalogue contains Corbett's device, and also a cut of E. Turney & Son's combination lever friction device—not the device claimed under patent No. 760,089, but that claimed under the earlier patent, No. 728,521. There is some dispute as to this, but it is borne out by the fact that there was never one of the devices under patent No. 760,089 manufactured for the market at the Willamette Iron Works, but a number of those under 728,521 were manufactured there. And the purpose of publishing the cut was to advertise the machine, and to continue the manufacture of the same. Turney was all this time in the employ of the Willamette Iron Works, specially delegated and engaged in selling these devices, that is, the Universal and No. 728,521.

We come now more particularly to the device No. 760,089. The principle is invoked on the part of the plaintiffs that the date of the filing of the application must be taken as the time when the invention is constructively reduced to practice, and therefore the burden is cast upon the party claiming an earlier invention of showing that such invention was actually made prior to that date. In the present controversy, however, the defendants have introduced patent No. 760,089; and, not only this, they have introduced the file-wrapper (which was done, under leave of the court, after the evidence had been closed), showing that the application for such patent was filed September 4, 1903, an earlier date than the filing of Corbett's application. Applying the rule, therefore, which plaintiffs invoke, the burden is cast back upon them to show that Corbett's invention was evolved prior to the date of Turney's application. This makes the legal issue clear.

E. Turney testifies that he had all his work done in making friction devices at the Willamette Iron & Steel Works, excepting the gear, referring to the device in 760,089, which he made at a little shop of his own. He and his son started getting out the drawings in 1902, and the work ran into 1903. He and Corbett were friendly, and he discussed his ideas with regard to improvements freely with Corbett. Defendants' Exhibit G, which is one of the drawings made during the development of his device, represents the first drawing in the course, with others introduced. This he showed to Corbett along in the fore part of 1903. Exhibit H does not show the device covered by patent No. 760,089, but Exhibit I does. A blueprint of this latter was sent to his attorneys for applying for patent. His son made the drawing "along about the latter part of 1903." Turney showed the drawing to Corbett before sending the blueprint to his attorneys. "That was along in the latter part of 1903, somewheres along in there." Corbett approved of the device, and said it was "just what we had been trying to get." Turney further states that he first found out that Mr. Corbett was making an application for a patent somewhere along in 1905. With respect to the time he showed the drawing to Corbett, it was "anywhere from ten months to a year, or something like that, after that." In fact, the witness says, "Corbett saw all my drawings and approved of them." When asked if there was ever any dispute between them respecting the devices covered by the two patents, he answered:

"There was a dispute there over it all the time. * * * I told him he had no right—he had nothing there; it was simply my part of my patent. He said we would see, and he meant we would see when he got his patent."

Harry Turney testifies in effect that he made the drawings for the device, patent No. 760,089. They were made at the residence of his father and himself. He and his father showed them to Corbett first along in the spring of 1903. He showed Corbett a blueprint of device marked "Exhibit G." He showed Exhibit H to Corbett along about the same time, and Exhibit I about the time of applying for patent, but before. Corbett thought the idea was all right, but said nothing about having invented an improvement of his own. The first time witness heard of the "Universal" was probably in the winter of 1903-1904. The drawings were around the shop, and the device was being manufactured. Corbett did not talk to him about any dispute.

Mr. Charles E. Mack, who was in the employ of the Willamette Iron & Steel Works at the time, testifies that the device shown in patent No. 760,089 was first brought to his attention by Harry Turney, at the Turney residence, prior to the issuance of the patent, but he "couldn't say how long it was." He remembers the fact of Corbett having drawings made in the Willamette shop as represented in patent No. 807,109, and saw them on the drawing-board. This was about the same time he was informed of the Turney invention. He saw the Turney drawings first, but does not know when the Corbett tracings were drawn. He is under the impression that the experimental work was done on the Turney device first. On further examination witness states he saw tracings "G" and "H" some time in the spring of 1903. He also saw Exhibit I, but could not fix the day or month, but it was in warm weather of the same year, within two or three months after seeing the first drawings.

Analysis of the testimony is attended with much uncertainty as to the particular time when Turney had arrived at a clear and intelligent idea of his alleged invention, that is, as to just when he had sufficiently evolved his concept to reduce it to a definite and perfected device. He and his son and Mack seem to agree that the earlier tracings were gotten out some time in the spring of 1903. These were Exhibit G and Exhibit H. But Exhibit I, according to the statements of Turney and his son, was the one of final development. It is this of which the blueprint was made, and shown to Corbett, and transmitted to Turney's attorneys for procuring the patent. The son says the blueprint was made of "G," but in this he is probably mistaken, for it does not appear that a blueprint was made of more than one of them, and that was most likely of Exhibit I. Turney says his son made the drawing Exhibit I "along in the latter part of 1903, somewheres along in there," and that Corbett approved of the device, and said it was just what he had been trying to get. Further he says he first knew of Corbett's application along in 1905, which was anywhere from ten months to a year after he showed Corbett the drawing, which corroborates his statement that it was along in the latter part of 1903 that he showed the blueprint to Corbett. Harry Turney thinks they showed "G" and "H" to Corbett along in the spring of 1903, and Exhibit I about the

time of applying for a patent, the patent being applied for September 4th. The testimony, therefore, as it respects the last exhibit, is perfectly consistent with the idea that Corbett had first invented his device and perfected his concept by the 11th of August, and most certainly, if the date be carried back to the 20th of June. Mack saw "G" and "H" some time in the spring of 1903 and Exhibit I in the warm weather, within two or three months, he thinks, after seeing the first drawings, but could not fix the day or the month. It is necessary, therefore, to refer back to the testimony of Turney and his son to fix any probable date.

Resting the controversy here, it would yet be far from clear as to who first conceived the device comprising the broad and primary idea of the invention. But the doubt, to my mind, is satisfactorily and conclusively resolved by the fact that Turney did not embody the idea in his claims under his patent. Turney and Corbett undoubtedly consulted much together during all the time that these inventions were in course of development. Turney was, as we have seen, in the employ of the Willamette Company, and undoubtedly had access to Corbett's drawing-room, and in all probability saw all the drawings with reference to the Corbett patent as they were being developed. Turney says that Corbett saw all his drawings and approved them, thus showing a condition of confidence and trust between them. If that condition existed relative to the Turney device, it is fair to presume that it existed as to the Corbett device also. Corbett is dead, and is not here to testify, and we get only one side of the case. Notwithstanding the confidential relations, Turney says, "There was a dispute there over it all the time." If this be so, it speaks against Turney's position, for he says he knew nothing of Corbett's application until in 1905. Furthermore it shows that Turney had full and ample notice of Corbett's claim. Yet, having that notice, he failed to broaden the claim under his patent to include the device, as Corbett did. Mr. Justice Bradley, who was a most learned and profound patent jurist, in *Miller v. Brass Co.*, 104 U. S. 350, 352 (26 L. Ed. 783), says:

"But it must be remembered that the claim of a specific device or combination, and an omission to claim other devices or combinations apparent on the face of the patent, are, in law, a dedication to the public of that which is not claimed. It is a declaration that that which is not claimed is either not the patentee's invention, or, if his, he dedicates it to the public."

Further illustration of the principle is to be found in *Hutchinson v. Everett et al.* (C. C.) 26 Fed. 531.

Considering the relations that existed between these parties at the time, it is highly probable that Turney knew of Corbett's invention, and was willing to concede it to him, and his action in not claiming the device accords perfectly with that idea. Turney was working out new mechanical ideas all the time, and obtaining patents from the government, and it is fair to presume that he was not dedicating any of his inventions to the public. The device unquestionably was apparent on the face of the patent, and yet he did not apply for a reissue. Had his claims included the device, a contest would have been brought on by the filing of Corbett's application for patent, and the matter would have been settled before the Commissioner of Patents; or had he ap-

plied for a reissue, the result would have been the same. This goes to show unmistakably that, if Corbett was not the original and first inventor, Turney was conceding the fact to him. But it is more probable that Corbett was the first inventor, and Turney, in their then friendly relations, was willing to concede to him what was justly his right, and hence the applications for the two patents were made as they were, and the patents in due time issued with the respective claims as made. I am impressed that no bad faith whatever can be attributed to Corbett in the premises.

Another fact which tends to strengthen the view thus entertained is that Turney and his son and Corbett entered into a contract for a combination of certain elements of the Corbett device with certain of those of Turney's invention, forming another contrivance called the "Turbett." The contract is of date August 31, 1906, a date subsequent to the issue of all of the patents. At that time both parties were fully apprised of what each was claiming, and yet the Corbett patent was made a subject of the agreement, and thus Turney recognized its entire validity. Other acts of Turney might be mentioned conducing to the same inference and conclusion, but it is unnecessary to extend the inquiry. I am impelled irresistibly to the conclusion that Turney was not the original and first inventor of the device, but that Corbett was.

[4] The last problem is respecting the meaning and effect of the contract of August 31, 1906. In this contract E. Turney and H. Turney are named as the parties of the first part and W. H. Corbett as the party of the second part. The contract then proceeds:

"That whereas the said parties of the first part are the owners of certain inventions and letters patent of the United States relative to what is known as the E. Turney & Son Combination Friction Device, and the said party of the second part is the owner of certain inventions and letters patent, known as the Willamette Universal Friction Device; and, whereas the parties hereto have agreed to combine the use of the said inventions and manufacture a friction device for logging and hoisting engines which shall be a combination of the two said patents, and shall be known as the 'Turbett Friction Device' upon the conditions and respective rights and interests of the parties as hereinafter mentioned: It is now therefore mutually agreed between the parties that the minimum selling price of the said new device embodying such combination of the two patents before mentioned and which is to be known as the 'Turbett Friction Device' shall be sixty (\$60.00) dollars and the maximum price shall be seventy-five (\$75.00) dollars until otherwise mutually agreed between the parties hereto.

"The interests of the respective parties in the said Turbett Friction Device shall be as follows: The party of the second part shall have the right to manufacture the said device at the Willamette Iron & Steel Works, Portland, Oregon, and for all of the said devices so manufactured and placed upon engines manufactured by the Willamette Iron & Steel Works after the 6th day of July, 1906, the said party of the second part shall pay or cause to be paid to the said parties of the first a royalty of five (\$5.00) dollars for each and every one so manufactured, placed and sold.

"It is further understood and agreed between we the parties hereto that for any and all of the said devices manufactured and sold by the said party of the second part to be placed on any other engines than those manufactured by the Willamette Iron & Steel Works after the 6th day of July, 1906, the said party of the second part shall pay or cause to be paid to the said parties of the first part a royalty of (\$10.00) dollars for each and every one of the said devices.

"The said parties of the first part shall have the full right to manufacture the said Turbett Friction Device and shall pay to the said party of the second part five (\$5.00) dollars royalty for each and every one manufactured, sold and placed upon engines, except as hereinafter provided.

"It is further understood that the provisions herein defined as determining the payment of royalties shall not apply to the sale of the Turbett Friction Device by one of the parties hereto to the other, but they may be sold to each other at any reasonable price agreed upon, but all sales to third parties shall be subject to the payment of the royalties as hereinbefore mentioned.

* * * * *

"It is hereby mutually understood and agreed between the parties hereto that the above combination of the said two patents and the manufacture therefrom of the Turbett Friction Device is for the mutual benefit of the parties to this contract and that neither of the parties hereto without the written consent of the other shall have the right to sell or dispose of any rights, interests or property therein whatsoever or hire or let any interest or right in the said Turbett Friction Device to any person, company or corporation whatsoever without the mutual consent of the other in writing."

The clauses omitted provide for an accounting between the parties and its binding effect upon them, their heirs, etc.

Some controversy seems to have arisen, and the contract resulted as a settlement of their differences.

Turney seems to be impressed that both devices, namely, No. 728,521 and No. 760,089, were the subject of the contract on the part of himself and his son, while it is claimed, on the other hand, that it is the former device only that was in contemplation. The terms of the contract show, however, that the combination was of two patents, and not three, and, taking the entire testimony into account, there can scarcely be a doubt that these two were the Turney patent No. 728,521 and the Corbett patent No. 807,109. Several machines had been made in pursuance of the composite device before the contract was entered into, and it is a matter of moment to ascertain the elements of such device, and which of them were taken from the Turney device and which from Corbett's. This is settled by Turney's own testimony, as follows:

"Q. I see. Now, then, when did this discussion—when was the first Turbett device made? A. That was made along in 1906; well, along in July some time. Q. Yes. As a matter of fact, this contract was dated back to July 6th, to take in the first one, was it not? A. That is about the size of it, yes. Q. At the time this contract was made, the Willamette were selling the Universal Friction Device, were they not? A. They were. Q. Now, in your combination, 'E. Turney & Son Combination Friction Device,' as it was on the market, the fixed screw member was attached to the frame, was it not? A. Yes. Q. In the Universal device, the fixed screw member was carried by the shaft, was it not? A. Yes, it was. Q. Now, the combination or composite device, which made the Turbett device, put the Universal feature, that is, the fixed screw member, on the shaft? A. Yes. Q. And that was what made the combination device that you called the Turbett? That is, you had the follow-up mechanism that had been previously used on the E. Turney & Son combination friction device? A. All right. Q. And you had the fixed screw member mounted on the shaft, which was the essential feature of the Universal device? A. All right. Go ahead. Q. That made the composite device? A. Yes. Q. And that was the Turbett? A. That was the Turbett device."

So that the composite device consisted of Turney's holding device, that is, the mechanism that operated to hold the thrust fast after it had been set up by the applying device, and allowed the lever to be released

and the friction eliminated, and Corbett's device for mounting the thrust-screw and the active screw members on the drum-shaft. This was the machine called the "Turbett Friction Device." Henceforth the contract construes itself. It is simply that the parties, each being the owner of certain inventions, agreed to combine certain elements of the Turney invention with certain of the Corbett invention; and as to the composite device, resulting from the combination of elements, it was further agreed that certain royalties should be paid by the party manufacturing to the other party to the contract. The contract relates specifically to manufacture and use of the new or composite device, and does not affect the parties in their respective rights to continue in the manufacture, use, and sale under their original inventions. This construction was acted upon by the parties, for Corbett continued from the date of the contract to manufacture Universals, and there was no protest by the Turneys until a much later date. The Turneys ceased to manufacture under their patents, but did manufacture the Turbett, and presumably they were better satisfied with the Turbett for use and sale than with the former inventions.

Much stress is placed upon the last clause of the contract above quoted as evincing a purpose that all the parties should cease to manufacture under the patents intended to be comprised by the negotiations; but to my mind it does not bear that interpretation. It is agreed thereby "that the above combination of the said two patents and the manufacture therefrom of the Turbett Friction Device is for the mutual benefit of the parties," and it is further stipulated that neither of the parties, "without the written consent of the other, shall have the right to sell or dispose of any rights, interests or property therein whatsoever." The word "therein" obviously relates to the Turbett Friction Device, a composite product of the two patents, and not to the Turney and Corbett devices, or either of them, or any other, and the language of the clause has reference solely to this device, so that there is no contractual inhibition of either party against manufacture and sale under their respective inventions. The inhibition is against either party disposing of any interest in the Turbett device. Nor do I conceive the operation and effect of the contract to be an equitable transfer from either party to the other of any right or interest in his patent. It is tantamount to a license of each to use certain elements of the patent of the other for constructing the Turbett, and to that extent and in that way only.

Now, the device which is being manufactured by Smith & Watson Iron Works is the Turbett Friction Device without the follow-up or holding mechanism taken from the Turney invention. This device, as previously described, differs from the Corbett device only in that the circular nut affixed to the end of the shaft revolves with the shaft, but within the sleeve of the fixed screw member, which latter remains stationary, while in the Corbett device the nut or sleeve revolves about and outside of the fixed screw member, which is not a functional difference, but a mechanical equivalent only. The device, therefore, infringes the Corbett patent. Not only does it infringe such patent, but the Turneys are precluded from any sale or disposition of any interest therein by the very terms of the contract in question, and are also precluded by

the same contract from the manufacture or use of the same in that form.

The injunction should be decreed as prayed. The accounting is a matter for further inquiry.

HANSEN v. SLICK.

(District Court, W. D. Pennsylvania. July 23, 1914.)

No. 173.

1. PATENTS (§ 114*)—SUIT TO OBTAIN PATENT—SCOPE.

A suit in equity to obtain a patent, brought under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), is in the nature of a proceeding *de novo* to determine whether or not the complainant is entitled to a patent, and involves, in addition to other issues which may be raised, the question of the patentability of the invention covered by the claims.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 166; Dec. Dig. § 114.*]

2. PATENTS (§ 34*)—INVENTION—SCOPE OF PRIOR ART.

In considering the question of invention relating to the reforging or re-rolling of a worn article of iron or steel, the court cannot exclude from consideration patents in which the application of principles is involved which may be applied to the case in hand merely because they relate to forms of iron or steel products different from that in the case before it.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 38; Dec. Dig. § 34.*]

3. PATENTS (§ 328*) — INVENTION — PROCESS FOR REFORGING WORN CAR WHEELS.

The Slick patent, No. 1,055,672, for a method of treating steel car wheels, which consists of reforging or re-rolling worn-out wheels, thereby reshaping the flange and tread so that they may be used again, *held* void for lack of invention in view of the prior art.

4. PATENTS (§ 328*)—PRIORITY OF INVENTION—LACHES.

Complainant, Hansen, *held*, on the evidence, to have first conceived the method of reforging worn car wheels embodied in the Slick patent, No. 1,055,672, and to have acted with due diligence in reducing the same to practice which would entitle him to the patent therefor if the process disclosed patentable invention.

5. EQUITY (§ 67*)—"LACHES."

"Laches" has been defined to be such negligence or omission to assert a right as, taken in conjunction with lapse of time and other circumstances causing prejudice to an adverse party, operates as a bar.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 191-196; Dec. Dig. § 67.*]

For other definitions, see Words and Phrases, vol. 5, pp. 3969-3972; vol. 8, p. 7700.]

In Equity. Suit by John M. Hansen against Edwin E. Slick. On final hearing. Bill dismissed.

James I. Kay, of Pittsburgh, Pa., for plaintiff.

C. C. Linthicum, of Chicago, Ill., for defendant.

ORR, District Judge. Plaintiff filed a bill under the provisions of section 4915 of the Revised Statutes (U. S. Compiled Statutes, 1901,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

page 3392). The defendant has filed his answer, and the case has come on for trial under the rules. The bill of complaint sets forth that the complainant was the original inventor of a new and useful improvement in a method of reworking worn forged car wheels, that he made due application therefor, and that pending his application his claims were adjudged to interfere with claims of a certain application filed by the defendant for a method of treating steel car wheels, which claims are as follows:

"1. The herein described method of re-forming a worn car wheel, consisting in heating the worn wheel and forging the same to increase the diameter of and reshape the tread, and reshape and thicken the flange."

"4. The herein described method of re-forming a worn car wheel, consisting in heating the same and forging the rim portion thereof outwardly to increase the diameter of and reshape the tread, and reshape and thicken the flange."

"7. The herein described method of forming and reforming a car wheel, consisting in forming a wheel having rim and hub portions, and after wear heating the worn wheel and subjecting the rim portion to pressure to force the metal outward and so reshape the tread and flange portions, and subjecting the hub portion to pressure inward to decrease the axle eye.

"8. The herein described method of forming and reforming a car wheel, consisting in forming a wheel with a hub portion and an axle eye, and after wear heating the worn wheel and subjecting the hub portion to pressure in a manner to force the metal inward and so decrease the axle eye.

"9. The method of utilizing worn-out car wheels, consisting in heating them, reshaping the tread and flange, and simultaneously increasing the diameter.

"10. The method of utilizing worn steel car wheels, consisting in heating the wheels, then rolling them between opposing die surfaces to reshape and simultaneously increase the diameter of the flange and tread portions.

"11. The method of restoring worn car wheels, consisting in reheating the wheels and applying pressure thereto to force the metal of the wheel into the worn portions to give the proper form of tread and flange.

"12. The method of remaking worn steel wheels, consisting in reheating them and then applying pressure to force the metal of the wheel into substantially the original shape and contour of the tread and flange.

"13. The method of remaking worn steel wheels, consisting in reheating the wheels, applying pressure thereto and forcing the metal in a radial direction to reshape the tread and flange and give them the proper contour.

"14. The method of remaking worn steel wheels, consisting in reheating them, applying pressure thereto, and causing the metal to flow outwardly in a radial direction in the worn portions and reshape them to the desired contour.

"15. The method of remaking worn steel wheels, consisting in reheating them and then applying pressure, to force the metal of the wheel radially outward to increase the diameter of the wheel and reshape the tread and flange into the desired contour."

The bill further sets forth that after the declaration of said interference the case was heard successively by the Examiner of Interferences, the Examiner in Chief, and the Commissioner of Patents, each of which tribunals decided in favor of the plaintiff; that finally the case came on to be heard by the Court of Appeals of the District of Columbia, which decided against the plaintiff and rendered a decision holding that the defendant was the first and original inventor of the matter specified in the claims in said interference proceeding. The bill further avers that the decision of the Court of Appeals was duly certified to the Patent Office and that in pursuance thereof the Commissioner of Patents refused to grant the plaintiff a patent in pursuance of his application. The bill contains the further formal averments as to

invention, as to absence of prior invention, publication, and public use. It also contains an averment as to due diligence on the part of the plaintiff, and prays that this court should decree the plaintiff to be entitled to letters patent, and that the defendant should be restrained from asserting any title or monopoly against the plaintiff as a result of said interference proceedings and for further relief. The answer denies the averment of invention by the plaintiff, admits the averments with respect to the proceedings had in the several tribunals as stated in the bill, and admits that the Commissioner of Patents, in pursuance of the decision of said Court of Appeals, issued to the defendant letters patent of the United States, No. 1,055,672, for a new and useful method of treating steel car wheels. The answer avers that the defendant was the original and sole inventor, and that the action of the said Court of Appeals was correct and proper, and sets up that the plaintiff was lacking in diligence and guilty of laches in doing nothing toward the perfection of his invention between the date of his alleged conception and the date of filing his application for letters patent.

It will thus be seen that both parties to this proceeding insisted that the subject-matter of the interference proceeding was patentable. The only real issue raised by the bill and answer is whether or not the plaintiff was guilty of laches in the reduction to practice of the invention between the time of his alleged conception and the date of his reduction to practice. The section of the Revised Statutes under which the bill is filed is as follows:

"Section 4915. Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expense of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

[1] Section 9 of the "act to establish a Court of Appeals for the District of Columbia" and for other purposes, approved February 9, 1893, chapter 74, 27 St. at Large, 434, 436 (U. S. Comp. St. 1901, p. 3391), vests in the Court of Appeals created by that act the determination of appeals from the decisions of the Commissioner of Patents which had previously vested in the general term of the Supreme Court of the District of Columbia. In *Frasch v. Moore*, 211 U. S. 1, 29 Sup. Ct. 6, 53 L. Ed. 65, and *Johnson v. Mueser*, 212 U. S. 283, 29 Sup. Ct. 390, 53 L. Ed. 514, it is held that the decision of the Court of Appeals of the District of Columbia in appeals from the Commissioner of Patents were not reviewable by the Supreme Court, and the reason given for so holding is because the final judgment of that court "in either an ex parte or an interference proceeding is not conclusive of their patentability or priority." We see, therefore, that inasmuch as

such decision is interlocutory, and inasmuch as section 4915 provides a method, it must be concluded that that method is, if not entirely so, yet in the nature of a proceeding de novo to determine whether or not the applicant is entitled to a patent. This involves much more than the mere issue raised by the plaintiff and defendant in the case at bar. It involves at least the question of the patentability of the inventions covered by the claims. This seems to have been squarely ruled in *Hill v. Wooster*, 132 U. S. 693, 10 Sup. Ct. 228, 33 L. Ed. 502. It is the view expressed by the late Judge Lanning in *Davis v. Garrett* (C. C.) 152 Fed. 723.

[3] The principal question therefore is whether or not the patent No. 1,055,672, issued to Slick, for a method of treating steel car wheels, is valid. In the specifications Slick states:

"My invention relates to utilizing worn-out steel car wheels, which have either been worn with flat spots or have been uniformly worn down to less than the desired diameter, or have otherwise been rendered unfit for further use. These wheels are ordinarily worked up into scrap for charging at the open hearth, and hence are of small value.

"My invention is designed to utilize these wheels by re-forging or re-rolling them, and thereby reshaping the flange and tread and preferably increasing the diameter. I thus convert the old wheel into a new wheel of practically the same value as when originally made, and at a comparatively low expense, and the wearing surfaces of the reformed wheel are made as dense as the wearing surfaces of the original wheel.

"* * * I reheat this wheel to the ordinary forging or rolling temperature, and then force the metal of the web out into the flange and tread and reshape this flange and tread to the desired form. In this re-forming, I also preferably apply pressure to the hub to decrease the diameter of the hole therethrough so that this can be rebored to the desired size; and I also may force metal from the hub into the web of the wheel. In carrying out this reshaping operation, I may roll the metal outwardly or forge it outwardly, or both; but the operation is preferably carried out within dies having a shaping cavity, or cavities which give the proper flange and tread shape."

The patentee sets forth the advantages of the process as follows:

"The advantages of my invention will be apparent to those skilled in the art, since instead of converting the worn wheels into scrap they are made of practically original value by a single mechanical operation, which may be cheaply and rapidly carried out. The amount of work done in reshaping the tread and flange to their original form is of course very much less than that necessary to originally form the wheel from the blank."

He further says:

"Many changes may be made in the form and arrangement of the die or dies, the mechanism for re-rolling or re-forging the wheel, and wheels of different shapes may be reformed without departing from my invention, since I consider myself the first to reshape the tread and flange of a worn wheel while hot."

The following are the claims:

"1. The method of utilizing worn-out car wheels, consisting in heating them, reshaping the tread and flange, and simultaneously increasing the diameter, substantially as described.

"2. The method of utilizing worn car wheels, consisting in heating them, then thinning the web by rolling and forcing the displaced metal radially outward into the tread and flange to reshape the periphery of the wheel, substantially as described.

"3. The method of utilizing worn car wheels, consisting in heating the wheel, then thinning the web by rolling and forcing the displaced metal radially outward into the tread and flange to reshape the flange and tread, and simultaneously increase the diameter of the wheel, substantially as described.

"4. The method of utilizing worn steel car wheels, consisting in heating the wheels, then rolling them between opposing die surfaces to reshape and simultaneously increase the diameter of the flange and tread portions, substantially as described.

"5. The method of restoring worn car wheels, consisting in reheating the wheels and applying pressure thereto to force the metal of the wheel into the worn portions to give the proper form of tread and flange, substantially as described.

"6. The method of remaking worn steel wheels, consisting in reheating them and then applying pressure to force the metal of the wheel into substantially the original shape and contour of the tread and flange, substantially as described.

"7. The method of remaking worn steel wheels, consisting in reheating the wheels, applying pressure thereto, and forcing the metal in a radial direction to reshape the tread and flange and give them the proper contour, substantially as described.

"8. The method of remaking worn steel wheels, consisting in reheating them, applying pressure thereto, and causing the metal to flow outwardly in a radial direction in the worn portions and reshape them to the desired contour, substantially as described.

"9. The method of remaking worn steel wheels, consisting in reheating them and then applying pressure to force the metal of the wheel radially outward to increase the diameter of the wheel and reshape the tread and flange into the desired contour, substantially as described.

"10. The herein described method of reforming a worn car wheel, consisting in heating the worn wheel and forging the same to increase the diameter of and reshape the tread, and reshape and thicken the flange.

"11. The herein described method of reforming a worn car wheel, consisting in heating the same and forging the rim portion thereof outwardly to increase the diameter of and reshape the tread, and reshape and thicken the flange.

"12. The herein described method of forming and reforming a car wheel, consisting in forming a wheel having rim and hub portions, and after wear heating the worn wheel and subjecting the rim portion to pressure to force the metal outward and so reshape the tread and flange portions, and subjecting the hub portion to pressure inward to increase the axle eye.

"13. The herein described method of forming and reforming a car wheel, consisting in forming a wheel with a hub portion and an axle eye, and after wear heating the worn wheel and subjecting the hub portion to pressure in a manner to force the metal inward and so decrease the axle eye."

It is unnecessary to consider and analyze each of the claims separately. The variations between them are slight, and all must fall if it be found that the method described in the specifications is not invention. It is of course beyond question that the reshaping of old car wheels to allow of their use in the same manner as new wheels are used and in association with new wheels is of great value. The measure of economy, while not definitely fixed in the evidence, must surely be great. It is true that the treatment of worn-out car wheels does not appear to have been adopted, or even considered as feasible, until about the time the parties to this suit filed their applications in the Patent Office. This court has concluded that the reason for the failure to reshape worn-out car wheels was the doubt that existed as to the durability of the reshaped wheel. This is fairly found from the evidence when taken in connection with the disclosures of the prior art.

The re-treatment of metal articles, which have already been sub-

jected to heavy use, has always presented the problem as to whether or not, after re-treatment, the mechanical and physical properties of the metal remain the same. In other words, it was doubted whether a different crystallization or a different chemical relation might not exist in the re-treated article which had not existed in the article as originally made. Such doubts could only be resolved by careful tests, and especially by the important test of use. So far as the flow of metal is concerned, no doubt has ever existed that metal at greater or less degree of heat, would flow under pressure. The familiar illustration of that fact is found in the coinage of money, and as well in the effect of the submission of a penny after the manner of boys to the pressure of a railroad train.

The evidence discloses that used articles of steel and iron have been re-treated to bring them again to the necessary length, and that others have been re-treated to bring them again to the necessary width; that others again may be brought to the same circumference was to be expected. A search of the patent for something peculiar in the treatment proposed by the patentee is in vain. The used wheel is reheated to the ordinary forging or rolling temperature. Pressure is then applied as needed. If the process of rolling be used, the pressure of the rolls is given as required. If the process of forging by dies is used, the same is true.

But it is said, in order to make the reshaped wheel answer its purpose, there must have been an excess of metal placed in the original wheel, because some of the metal of the original wheel is lost by the wear and tear of the track and brake, and it is urged that because of the insertion of excess metal in the original wheel, invention should be found. To this we cannot agree. As men of the former generation and as boys of the present had some excess of metal in the molding of lead bullets, and as every blank which is used in dies has more or less excess metal, else it might not completely fill the dies and receive the shape intended, so the used car wheel in principle is nothing more than a blank of metal intended to be forged or rolled into a new, though slightly different, shape. This theory that the addition of more metal than is necessary to the original wheel should be deemed a feature of invention is not apparent in the Slick patent, but was made a feature in the Hansen application, and is urged on the part of Hansen in the present case. We cannot regard it as of importance.

This court has failed to find anything substantially new in the process. In United States patent to McConnell, No. 393,775, under date of December 4, 1883, for reamer and method of constructing the same, there is a disclosure of a method of expanding reamers by pressure to compensate for wear and tear.

In United States patent No. 522,228, to McKenna, for a process of renewing old steel rails, there is a disclosure of a re-treatment of the metal by pressure so that it may be reused, although with reduced cross-section.

[2] It is urged, however, that such patents as those last referred to do not relate to the art involved, and the phrase "the art of making car wheels" is used. Without further comment than that the subdivi-

sions of the subjects of patents by the profession, and perhaps by the Patent Office, are becoming somewhat unduly extended, the court cannot exclude patents in which the application of principles are involved which may be applied to the case in hand simply because they relate to a form of iron or steel product which is not found in the present case. Referring, however, to patents more intimately connected with wheels, we find that United States patent to Baker, No. 793,814, for a method of forging wheel blanks, discloses a method of causing excess metal to flow inwardly toward the center of the hub, and also outwardly in latterly opposite directions under pressure.

United States patent to Wheeler, No. 664,799, for car wheel rolling mill and method of rolling car wheel blanks, discloses a method for causing the metal while under pressure to be expanded toward the flange or toward the hub of the wheel.

In U. S. patent to Schoen, No. 848,927, under date of April 2, 1907, for method for making car wheels, the patentee discloses a method of making wheels in which subjecting the blank to pressure in circular dies is clearly shown. The wheels contemplated in that patent are made from wrought metal, but the fact of die pressure upon the metal is clearly shown.

In the consideration of the question here presented with the utmost care and with a realization that all the witnesses called were favorable to invention, yet the court cannot find anything substantially new in the patent. The use of great presses is old. The use of dies with different shapes with which the pressed metal is bound to conform is old. The only thing that is new is the fact that people began to use old processes in order that old wheels may be renewed and subjected to a longer life. The treatment of worn-out car wheels was a mere step in the art of subjecting metals under pressure to force them to reach the desired dimensions. That such treatment has resulted in great economy should not control the judgment of the court upon the question of invention. In the present state of the art, in which great presses with a variety of dies are used, the steps taken by Hansen and Slick were little more than the step of the country carpenter who straightens a used and bent nail and uses it a second time. It is therefore the duty of the court to dismiss the bill because invention is not found.

[4] We come next to the only issue raised by the parties, and that is the question of priority of the alleged invention, and it is proper that that question should be decided, although, as has been pointed out, the case goes off on another question. Both parties to this proceeding are skilled in the manufacture of steel car wheels. The plaintiff is president of the Forge Steel Wheel Company, the Standard Steel Car Company, and the Standard Truck Company. He filed his application in the Patent Office on the 13th of June, 1908, serial number 438,421. The defendant filed his application on the 12th of December, 1907, serial number 406,132. The plaintiff conceived the method of the patent on the 11th of August, 1906. The defendant conceived the method of the patent November, 1906. The plaintiff constructively reduced his method to practice by filing his application June 13, 1908;

the defendant constructively reduced his method to practice by filing his application December 12, 1907. It is plain that priority should be awarded to Hansen unless his right was lost by some neglect on his part. At or about the time of his conception he began the erection of a large steel plant for the making of forged steel car wheels. Embraced in that plant was a variety of necessary apparatus. Some of that apparatus, particularly the presses, were necessarily of great size. The delay in the construction of the plant was not caused by Hansen nor his associates, but by contractors who had stipulated for the supply of the parts. The entire plant necessarily had to be completed and tested before forged steel car wheels could be made. Hansen's conception was intended to be put to practice upon the completion of the plant for the making of new wheels. It was only at that time that he could have under his personal control presses of sufficient power to treat a worn wheel according to the method conceived by him. That plant was just about, but not completely, finished by the time his application was filed. There was due diligence on Hansen's part in procuring the completion of the plant with which he could test the method conceived by him without running a risk of disclosure to others. The use of steel car wheels at the time Hansen conceived the method was of comparatively recent date. According to the witness Gulick, who testified on the 23d of June of this year, "the only concerns making forged or rolled steel wheels now" are Schoen Steel Wheel Company, the Forge Steel Wheel Company, the Standard Steel Company, and the Midvale Steel Company.

While Hansen could have found presses in other places, as, for instance, in the Bethlehem Steel Company, with power enough to have afforded the pressure required for his method of re-treating worn-out steel wheels, yet it is so doubtful that he would have been afforded permission to have used any of such presses for his own purposes that this court must find as a fact that permission would not have been given him to use the presses without at least a full disclosure of what he intended to use the same for, and it is fair to find that permission would not have been granted him. In the consideration of this subject, it must be found that Hansen's connection with the steel car wheel industry was well known because of his connection with the Schoen Steel Wheel Company prior to his connection with the Forge Steel Wheel Company, and that a request by him to use the powerful press of another would have created a suspicion that it had something to do with forged steel wheels, and might have caused his experiments with the press to be watched.

This court can reach no other conclusion than that Hansen acted with due diligence in endeavoring to reduce his method to practice. He and his associates were investing upwards of a million dollars in a plant intended to be used, not only for the making of new forged steel wheels, but for the re-treatment of old ones. It should not be that, because the double purpose was combined by him, he should be deemed lacking in diligence.

[5] But it is urged that, notwithstanding the diligence of Hansen in perfecting his plant by which the method conceived by him could

be tested, yet because he did not wait to put his method in actual practice, but before doing so constructively reduced it to practice by filing his application, therefore such rights as he had were lost. It is plain that if he had not filed his application but continued his due diligence to reduce his method to actual practice, he would not have been charged with laches until at least a few days after the date upon which his application was filed. Clearly up to the time, therefore, of the filing of his application no laches could be imputed to him. Laches has been defined to be such neglect or omission to assert a right as, taken in conjunction with lapse of time and other circumstances causing prejudice to an adverse party, operates as a bar. It has been used synonymously with the phrase "inexcusable negligence and inattention to his interests." It is difficult to see upon what theory the defendant would hold the lapse of time prior to the filing of the application would operate to the prejudice of anybody just because the application was filed prior to the actual reduction to practice. It was but natural that as the plant approached completion Hansen should have filed his application. On this branch of the case the court is of the opinion that laches cannot be imputed to Hansen under all the circumstances, and that he was the first to conceive the method of the patent, and would be entitled to a decree in his favor were the patent valid.

As the patent is not valid, the bill must be dismissed; the costs to be divided equally between both parties.

LIBBEY GLASS CO. v. McKEE GLASS CO. et al.

(District Court, W. D. Pennsylvania. July 21, 1914.)

No. 16.

1. PATENTS (§ 211*)—LICENSE—CONSTRUCTION.

A license granting the right to use a patented process in the making of glassware, but limiting such use to pressed glass blanks, made and sold for cutting by others, construed, and *held* not limited to blanks made of lead glass, but to apply as well to lime glass, and the use of the process in the making of finished articles of lime glass *held* a violation of the contract, which, under its terms, authorized the termination of the license by the licensor.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 304-311; Dec. Dig. § 211.*]

2. PATENTS (§ 286*)—LICENSE—SUIT BY LICENSEE FOR INFRINGEMENT.

A licensee under a patent, having exclusive rights less than the entire grant of the patent, is entitled to enjoin trespass upon those rights in a suit brought in its own name, in which the owner of the legal title is joined as a defendant, where such owner cannot maintain the suit in its own name.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 453-456; Dec. Dig. § 286.*]

3. COURTS (§ 508*)—JURISDICTION OF FEDERAL COURT—ENJOINING PROSECUTION OF SUIT IN STATE COURT.

The owner of a patent obtained an injunction against its infringement, and afterward, with the consent of complainant, which, as general licensee, had certain exclusive rights therein, granted a limited license to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the infringer, which contained provisions for the protection of complainant's rights. Later, on a supplemental bill, the licensor obtained a decree that the infringer had violated the conditions of its license and of the injunction and adjudging it in contempt, and thereupon the licensor and complainant joined in a notice terminating the license in accordance with its terms. The infringer then commenced a suit in a state court against the licensor, and obtained a preliminary injunction restraining it from terminating the contract on the ground that it had not been violated. *Held*, that complainant had such interest in the contract as entitled it to maintain a suit to enforce its rescission and to enjoin further prosecution of the suit in the state court, making both licensor and the infringer parties defendant, and that the federal court, having first acquired jurisdiction of the subject-matter, had jurisdiction to grant such relief as ancillary to its former decree.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1423, 1425-1430; Dec. Dig. § 508.*]

In Equity. Suit by the Libbey Glass Company against the McKee Glass Company and the H. C. Fry Glass Company. Decree for complainant.

O. R. Barnett, of Chicago, Ill., and Thos. Patterson, of Pittsburgh, Pa., for plaintiff.

George E. Reynolds, of Pittsburgh, Pa., for defendants.

ORR, District Judge. The plaintiff by its bill seeks to restrain the defendant McKee Glass Company from further proceeding in a certain suit in equity instituted by it in the Beaver county, Pa., courts against H. C. Fry Glass Company, and from further use of a process covered by United States patent to Owens, No. 628,027, to have a license agreement adjudged to be rescinded and terminated, and to have defendant McKee Glass Company account to plaintiff for breach of such license agreement and for general relief.

The defenses of the McKee Glass Company are, briefly, that the court is without jurisdiction to restrain it from proceeding with the suit in the state court, or to adjudge the license agreement to be or to have been rescinded; that plaintiff has no rights to said license agreement which could be infringed; and that if there had been a breach of such agreement, which said defendant denies, yet plaintiff would not be entitled to any damages by reason thereof.

The court finds the facts to be as follows: The plaintiff is a corporation of the state of Ohio and a citizen of said state. Each of the defendants is a corporation of the state of Pennsylvania and a citizen of said state. The amount in controversy exceeds the sum of \$3,000, exclusive of interest and costs. The plaintiff, for a long time prior to the events leading up to this controversy, has been and is now engaged in the manufacture and sale of glassware, and among other articles manufactured and sold by it are what are known as "pressed glass blanks for cutting." The defendant the H. C. Fry Glass Company is the owner of a number of letters patent of the United States for methods and apparatus pertaining to the manufacture of glassware. Among said letters patent under which the plaintiff is licensed is one known as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

letters patent No. 628,027, for the making of glass articles, granted to Michael J. Owens, under date of July 4, 1899.

The defendant the H. C. Fry Glass Company, being the owner of the letters patent last named, brought two successive suits for the infringement thereof in this court against the National Glass Company, the McKee-Jeannette Glass Works, and A. J. Smith, president, at No. 3 of November term, 1906, and at No. 1 of May term, 1908, respectively. In the suit last mentioned a decree was entered adjudging the said Owens' patent to be in all respects good and valid in law and to have been infringed by the defendants therein, and directing an injunction against further infringement to be issued, and directing as well an ascertainment of profits and damages. The said decree was dated September 21, 1909. Thereafter the defendant herein, the McKee Glass Company, was organized and incorporated under the law of Pennsylvania and purchased the property, plant, and business of the said McKee-Jeannette Glass Works. Thereafter the said H. C. Fry Glass Company filed its bill in the nature of a supplemental bill against said McKee Glass Company in the proceeding at No. 1 of May term, 1908, aforesaid, complaining of the intention of the McKee Glass Company to continue the infringement of said Owens patent as theretofore carried on by the said McKee-Jeannette Glass Works. The said McKee Glass Company by memorandum admitted in said proceeding its intention to continue the manufacture of glassware at the plant formerly operated by the said McKee-Jeannette Glass Works by the means and methods formerly employed by its predecessors. It adopted as its answer the answer of the said McKee-Jeannette Glass Works already on file in said suit. It further adopted the proofs taken in support of said answer, and waived all further or additional proofs. Said bill, in the nature of a supplemental bill, was filed on June 7, 1910, and on the same day, counsel for the said H. C. Fry Glass Company appearing in court upon the said supplemental bill and the said memorandum, a decree was entered against the said McKee Glass Company adjudging the said Owens patent to be in all respects good and valid in law; that the McKee Glass Company was threatening to infringe the same, and awarding an injunction against the said McKee Glass Company to restrain any infringement of said letters patent. Said injunction was duly issued and served and remains of record in this court unreversed and in all respects still in force.

As a result of negotiations theretofore carried on, the said H. C. Fry Glass Company, with the consent and allowance of the plaintiff herein, granted a license to the said McKee Glass Company to practice the invention of the said Owens patent, together with the inventions of certain other patents. The said license authorized the said McKee Glass Company to practice the invention of said letters patent only in the manufacture of pressed glass blanks for cutting; it being especially provided therein that the licensee should not practice any of said inventions in finishing glassware other than pressed glass blanks for cutting. It is also further provided that the said McKee Glass Company should not sell or otherwise dispose of any pressed glass blanks for cutting, which previous to such sale or disposal should not have been sub-

jected to a finishing operation involving the practice of one or more of the inventions covered by the letters patent included within the license.

In said license agreement it appears that the Libbey Glass Company had certain manufacturing and selling rights under each of said letters patent named in the agreement, including the Owens patent aforesaid, which rights were exclusive of all persons, except the said H. C. Fry Glass Company, and the consent of the Libbey Glass Company was required and given to the grant of said license in consideration of and subject to all the terms and conditions therein set forth, and said license agreement provided for monthly accounts to be made by the licensee to the licensor and the said Libbey Glass Company of the extent of the licensee's operations under said license, and in other ways provided for the protection of the Libbey Glass Company in all the rights it had acquired, or was intended to acquire, in the said several patents, which were the subject of the license agreement. Said license agreement was dated the 9th of June, 1910. At that time, and prior thereto, and continuously to the present, the defendant McKee Glass Company was and is largely engaged in the manufacture of glass articles known as cut table ware, which articles are made of an inferior quality of glass, known as lime glass, or lime soda glass, whereas pressed glass blanks for cutting had, down to the time mentioned, been made only of a higher quality of glass, known as lead glass. In the year 1911 the said McKee Glass Company began putting upon the market and selling to manufacturers of cut glass ware pressed articles to be cut which were made of lime glass. Shortly thereafter the H. C. Fry Glass Company filed a bill in equity against the McKee Glass Company in the court of common pleas of Westmoreland county, Pa., praying for an injunction to restrain the McKee Glass Company from the violation of the condition under which it had obligated itself to employ some one or more inventions of the patents which were the subject of said license agreement in the manufacture of all pressed glass blanks for cutting, which it should sell or otherwise dispose of. The defendant in that suit by its answer pleaded that since, down to the date of said license, lead glass had been exclusively used in the manufacture of pressed glass blanks for cutting, said term "pressed glass blanks for cutting," as used in the license, could only mean pressed glass blanks for cutting made of lead glass, and that therefore the defendant herein, so long as it did not use the invention of said Owens patent and other inventions included within its license in the manufacture of pressed glass blanks for cutting made of lime glass, had not violated the conditions of its license in any respect. In said case such proceedings were had that the defense therein set up was sustained, and the bill finally dismissed on or about January 16, 1913. Shortly thereafter the said H. C. Fry Glass Company, in the original case at No. 1 of May term, 1908, instituted proceedings in this court against said McKee Glass Company for contempt, charging the latter with violating the injunction theretofore issued against it in such manufacture of lime glassware. Evidence on behalf of both parties was submitted at great length, and it was decided that the McKee Glass Company, in its manufacture of lime glass articles, had violated the

conditions of its said license and infringed said letters patent and was in contempt of this court. A decree was accordingly entered on December 24, 1913, adjudging that the said defendant McKee Glass Company had in its manufacture of lime glassware and lime blanks for cutting unlawfully and wrongfully employed the process of the Owens patent, and that in so doing it had violated the injunction theretofore issued against it and was in contempt of court. Said decree also referred the case to a special master to take and state an account of profits and damages for the information of the court. That decree is still in full force and effect and unreversed.

[1] By the terms of the said license agreement it was provided that, in case the said licensee should at any time violate provisions or conditions of said license, the said license at the option of the said H. C. Fry Glass Company, or of the plaintiff in the present bill, the Libbey Glass Company, should immediately cease and determine.

On December 22, 1913, the said H. C. Fry Glass Company and the Libbey Glass Company notified the McKee Glass Company that they elected to rescind and determine the said license agreement, for the reason that the said McKee Glass Company had made use of the invention covered by the Owens patent in the manufacture of articles of glassware in which they were forbidden to use it, and called attention to the section of the license agreement wherein appears the following language:

"The rights herein granted are expressly limited to the practice of the inventions hereby covered in the manufacture of pressed glass blanks for cutting, to be sold only to cutting houses for use in the manufacture of cut glassware, and it is understood that the practice of any of said inventions by the licensee in finishing glassware to be put upon the market without cutting, otherwise known as pressed glassware, or sold to other than cutting houses, will be an infringement of the letters patent therefor and a violation of the injunctions heretofore issued as above recited; it being the intention and purpose of this license that the said patented inventions shall not be used by the licensee in the manufacture of 'imitation cut glassware' or other pressed glassware."

Within a few days after said notice of rescission, the McKee Glass Company filed a bill in equity against the H. C. Fry Glass Company in the court of common pleas of Beaver county, Pa., in which it set up many of the matters hereinbefore recited; that the license agreement was made as one of the terms of compromise of litigation, "with the express understanding and agreement between the parties thereto that your orator (McKee Glass Company) should have the right to use said methods and processes in its manufacture of pressed glass blanks for cutting, made of lead glass, for and during the entire period of time specified in said license agreement as aforesaid, and with the further express agreement and understanding between said parties that said final decree in said equity suit should never in any manner apply to the manufacture by your orator (McKee Glass Company) of any glassware made of lime glass; the subject-matter of said suit in equity being lead glass and not in any way relating to lime glass."

In the Beaver county bill it was further alleged in brief that the said H. C. Fry Glass Company and the Libbey Glass Company had served notice of their rescission of the said license agreement, and prayed the

court for an injunction to restrain the H. C. Fry Glass Company from revoking, canceling, or in any way annulling the provisions of said license agreement, and from interfering in any way with the operations of the said McKee Glass Company in the manufacture of pressed glass blanks for cutting made of lead glass. Upon the filing of said bill in the Beaver county court, that court issued a temporary restraining order against the H. C. Fry Glass Company in accordance with the prayers of the bill, which restraining order is in full force and effect.

From the foregoing it will be seen that the contention of the defendant McKee Glass Company throughout all the litigation has been and is to-day that the Owens patent relates to articles made of lead glass only; that the decrees entered at No. 3 of November term, 1906, and especially the decree against it at No. 1 of May term, 1908, were based upon the fact that the said patent related to articles made from lead glass only and not to articles made from lime glass, and the entire record at the number and term last mentioned was introduced by the defendant McKee Glass Company for the purpose of showing that fact. The court finds the fact to be otherwise. The patent and the proceedings aforesaid relate to the manufacture of glassware without reference to any particular kind. In the contempt proceedings instituted in 1913, the said McKee Glass Company filed an answer which was inconsistent with its present contention. The intent of a portion of its answer is that the parties to that original litigation, with a view to deceiving the public, consented to the entry of the decree adjudicating the patent as valid with respect to glassware generally, but that, as between themselves, it should have relation to lead glass blanks for cutting only. Even if the averment be true, the defendant ought not to be heard in support of it, because it was intended to be a fraud upon the public. But, apart from that, the court now finds the fact to be, as it has been found before in previous litigation in which the parties hereto were interested, that the processes of the Owens patent and the decrees relate to glass generally and not to any particular kind of glass.

Hitherto the interest of the plaintiff in the subject-matter of the litigation has appeared to rest wholly upon the license agreement between the H. C. Fry Glass Company and the McKee Glass Company and the provisions therein and the notice of the cancellation thereof. The agreement between the H. C. Fry Glass Company and the Libbey Glass Company, wherein the rights of the latter are clearly set forth, is dated the 19th of May, 1908. By that agreement the Libbey Glass Company acquired the right to make the apparatus and to use in its manufacture of glassware the methods and apparatus described and claimed in certain enumerated letters patent, including the said Owens patent, exclusive of all persons except the H. C. Fry Glass Company. By that agreement the H. C. Fry Glass Company covenanted and agreed to institute proper proceedings against infringers, to diligently prosecute the same, and to endeavor in all ways to maintain and preserve the exclusive rights secured by said letters patent, and the licensee covenanted and agreed to pay the licensor one-half of the expenses incurred by it from time to time in bringing and prosecuting all such suits. That agreement further provided that the licensee should be notified of the

institution of all such litigation and should have the right to be represented therein by counsel, but that all such litigation should be conducted and controlled by the licensor.

In addition to the foregoing it must be found that the plaintiff in this bill has a substantial pecuniary interest in the subject-matter thereof; that the defendant McKee Glass Company has been and is using the processes of the Owens patent in the manufacture of lime glass blanks and lime glassware; that in so doing the latter has exceeded the terms of the license agreement in prejudice of the rights of the plaintiff; that the defendant the McKee Glass Company is continuing to manufacture, since the date of the said notice of rescission, under no other permission or license than the agreement of June 9, 1910; and that it was still subject to the jurisdiction of this court in unfinished litigation at the time it filed the bill in the Beaver county court, and that the matters involved in the unfinished litigation in this court were matters involved in the litigation in Beaver county.

From the foregoing facts the following conclusions of law must naturally follow:

First. Because of the violation of the terms of the license agreement of June 9, 1910, the plaintiff had a right to join with the H. C. Fry Glass Company and the H. C. Fry Glass Company had a right to join with the plaintiff in rescinding the said license according to its terms.

[2] Second. Even if the Libbey Glass Company be only a licensee, having exclusive rights less than the entire grant of the patent, it is entitled to enjoin trespass upon those rights in this action in which the owner of the entire legal title is joined as a defendant.

Third. That, because it is necessary for the court to protect the equitable rights of the plaintiff, the latter may maintain this suit in its own name, making the owner of the legal title a party defendant, where the owner is unable to institute the action in its own name.

[3] Fourth. The real serious question in the case is whether or not this court has jurisdiction to restrain the plaintiff in the Beaver county suit. Under all the facts, this court has concluded that it has jurisdiction. Obviously the purpose of the Beaver county suit was to nullify the action of this court in enjoining the McKee Glass Company from using the Owens process on lime glass and to tie the hands of the H. C. Fry Glass Company so as to prevent it from instituting further contempt proceedings in case of the McKee Glass Company continuing the use of the processes on lime glass. The result would be that, if the plaintiff in that case were not restrained, the Libbey Glass Company might be deprived of its right under its contract with the H. C. Fry Glass Company to be protected against such proceedings. If the H. C. Fry Glass Company be enjoined in Beaver county from proceeding against the McKee Glass Company to have it adjudged in contempt for further violations of its license agreement, the Libbey Glass Company would be deprived of substantial rights, even though the Libbey Glass Company was not a party to that litigation. The construction of the license agreement, under which the McKee Glass Company claims to be operating, became necessarily incident to the decision of the proceedings instituted against it for contempt, and was therefore within the

jurisdiction of this court, and is still within it, because the contempt proceedings of 1913 are still pending. This is not a case where it is sought to have a court interfere with proceedings instituted for the first time in the state court, but a proceeding in support of the jurisdiction of this court, which first attached to and embraced the subject-matter of the proceedings subsequently instituted in the state court.

A review of the authorities supporting this contention would extend this opinion to unnecessary length. Reference may be made to *Julian v. Central Trust Co.*, 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 629, where the principle is found. The bill in this case seems to be ancillary to the proceedings instituted originally at No. 1 of May term, 1908, for the benefit of that decree was obtained by the H. C. Fry Glass Company for the joint benefit of itself and the Libbey Glass Company.

The plaintiff is entitled to the relief prayed for, and a decree, in accordance with the prayers of the bill and this opinion, may be presented.

ROBINSON v. AMERICAN FRUIT MACHINERY CO. et al.

(District Court, E. D. Pennsylvania. July 13, 1914.)

No. 553.

1. PATENTS (§ 75*)—"PRIOR USE"—ABANDONED EXPERIMENT.

A prior use, in order to negative novelty in a later patented device, must be something more than an accidental or casual one, and must be so far understood and practiced or persisted in as to contribute to the sum of human knowledge and be accessible to the public, becoming an established fact in the art.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 92-97; Dec. Dig. § 75.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—VEGETABLE PARING MACHINE.

The Robinson patent, No. 942,932, for a vegetable paring machine, claim 18, *held* not void for prior invention by another, nor for prior public use, but to disclose invention and utility; also *held* infringed.

In Equity. Suit by Henry Robinson against the American Fruit Machinery Company and another. On final hearing. Decree for complainant.

H. S. MacKaye, of New York City, for plaintiff.

Ernest Howard Hunter, of Philadelphia, Pa., for defendants.

THOMPSON, District Judge. This is a suit for an injunction and accounting based upon the complainant's letters patent for improvement in vegetable paring machine, No. 942,932, issued December 14, 1909.

The defendant the American Fruit Machinery Company is charged with infringement in the manufacture and sale, and the defendant V. Clad & Sons, in the sale of potato paring machines, which the defendants admit by stipulation conform to the terms of claim 18 of the patent. The defenses are that the claim is invalid for want of inven-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion and prior knowledge and use, and that if the claim describes a patentable invention it is the invention of one Orson W. Brenizer and not of the patentee. On April 9, 1910, after the issue of the complainant's patent on December 14, 1909, an application was filed by Brenizer, a former employé of the defendant, the American Fruit Machinery Company, claiming priority of invention of the subject-matter of claim 18. This application was assigned to the American Fruit Machinery Company, and was placed in interference with the Robinson patent for the purpose of determining the question of priority. This issue was determined in favor of Robinson by the tribunals of the Patent Office, and, at the time of the hearing, was pending before the Court of Appeals of the District of Columbia, patent appeal No. 854. Since the hearing in this court, the attention of the court has been called to a decision of the Court of Appeals of the District of Columbia affirming the decision of the Commissioner of Patents. It is apparent that Brenizer's claim of priority has been carefully and thoroughly considered by the tribunals vested by Congress with power to determine such questions in interference cases. The decision of the Court of Appeals, however, does not preclude the defendants herein from the right to contest the validity of the patent in this court. Comp. St. § 4914 (U. S. Comp. St. 1901, p. 3392).

The evidence of prior invention by Brenizer has been carefully considered, and, without reviewing it, or passing upon the question of res judicata as to this question, it is sufficient to say that the defendants herein have failed to prove Brenizer's priority of invention by proof of such satisfactory character as to be convincing beyond a reasonable doubt. By an amendment to their answer, the defendants alleged invalidity of the claim in suit because of prior knowledge and use by W. A. Case & Sons Manufacturing Company, Fred A. Mason, the Niagara Specialty Company, and Walter Northrup.

The patented machine consists of a cylindrical pot or container having at its bottom a rotary disc with an irregular surface. The potatoes are thrown into the container and the bottom disc is rotated, causing the potatoes to be revolved within the container and agitated so that they will come in contact with the abrading surfaces of the rotary disc and side walls, causing removal of the skin. The potatoes are moved outwardly by centrifugal force, crowding up against the sides of the container so that those at the top are forced again towards the center and fall back upon the central part of the disc. By this circulation all portions of the skins are subjected to the operation of the abrading surfaces. When there is rapid rotation of the abrading disc, however, there is a tendency of the potatoes to circulate horizontally in the container without the desired vertical circulation. The improvement consists in a lug or projection secured to the wall of the container which tends to prevent this horizontal circular motion by diverting the course of the potatoes at the top and forcing them towards the center so that they will circulate vertically. Claim 18 of the Robinson patent is as follows:

"In a machine of the character described, a container having a cylindrical wall provided with a scoop-shaped lug in combination with a rotating abrading member, said lug overhanging the rotating abrading member."

The device which constitutes the improvement and is called the "diverter" is described in the patent as follows:

"A further device that I may employ for compelling the flow of vegetables toward the center of the container is a scoop-shaped lug 1a formed on or affixed to the wall of the container, preferably immediately opposite the door opening therein, projecting in a curved line in the direction of motion of the vegetables and incurved toward the center of the container. Its surface, or the part thereof subjected to the impact of the vegetables, is, as shown, smooth, or may be covered with the same abradant material as the rest of the container wall. Such a lug acts, not only centripetally on the vegetables, preventing clogging of the latter against the container wall, but, arranged as here described immediately opposite the discharge door, serves to positively direct the vegetables through the door opening when the door is opened—the rotating motion of the bottom being maintained. Preferably, as shown, the lug 1a is hinged at 1b to the side wall of the container and adapted to automatically reverse its position from side to side when the direction of rotation of the bottom plate is reversed so as to always offer to the advancing mass of vegetables the surface of the lug having the proper scooplike form."

[1] An exhibit, designated as the Niagara Specialty Company's machine, was produced in evidence which, according to the testimony of Fred A. Mason, superintendent of W. A. Case & Sons Manufacturing Company, is one of a number made for a corporation called the Niagara Specialty Company in 1906 by the Case Company. This machine has the cylindrical containers and an abrading rotary bottom disc, and is further supplied with what Mr. Mason calls "two little cleats on the side of the cylinder." Upon the drawings from which the machines were made these cleats are called "kickers." There was evidence that about a dozen of these machines were made and are still in the possession of W. A. Case & Sons Manufacturing Company, with the exception of one, which was sent to some one upon the Pacific Coast. According to the testimony of Walter Northrup, he invented the machine in question, and the "kickers" or "diverters" were provided for the purpose of guiding the potatoes towards the center. The diverters in the Niagara Specialty Company's machine are curved plates attached to the inner walls and extending of the same width from the top to the bottom of the cylinder. There is no evidence to show that they are capable of performing the function of the diverters in the complainant's machine. It is apparent from the construction of the complainant's diverter, in that it is wide at its top and tapers to a point at its bottom and does not reach to the bottom of the container, or, to use the language of claim 18, is constructed with "said lug overhanging the rotating abrading member," that the result of its use would be to force the potatoes at the top towards the center so that they will circulate vertically, and that the result of the overhanging lug and the tapering shape would be not to divert or interfere directly with the course of the potatoes at the bottom of the container. In the Niagara Specialty Company's machine the diverter, which is claimed to be Northrup's invention, reaching as it does from the top to the bottom of the container of the same width and extent of projection, would operate to divert the course of all the potatoes which rotate against the side of the container, whether at the top or bottom, away from their course and crowd them towards the center, and there is no evidence to show that this device would accomplish the same result as that in

the complainant's patent. Mr. Mason testified that he did not consider the diverter successful, and it is apparent that so far as its use in this country is concerned it was abandoned after its experimental use had failed, and the company which was organized to sell the machine went out of existence without succeeding in introducing or selling them.

"A prior use, in order to negative novelty in a later patented device, must be something more than an accidental or casual one, and must be so far understood and practiced or persisted in as to contribute to the sum of human knowledge and be accessible to the public, becoming an established fact in the art." *Anthracite Separator Co. v. Pollock et al.* (C. C.) 175 Fed. 108.

Mr. Northrup testified that 200 or 300 of the machines were sold in Canada. This statement is entirely uncorroborated and, if true, would not affect the validity of the patent in suit. While the Niagara Specialty machine shows an effort upon the part of some one to accomplish the result which is intended to be accomplished by the complainant's improvement, there is not sufficient substantial identity in the two contrivances to negative novelty in the complainant's invention. It is urged by the defendants, however, that the device lacks patentability because it is not a product of the inventive faculty, but rather of mere mechanical skill. In the potato paring machines in use prior to the Robinson patent, the difficulty experienced was in overcoming the tendency of the rapid centrifugal motion to prevent the vertical circulation of the potatoes so that those at the top would reach the bottom. The defect in the old machines was obvious, and the problem was to find a means to overcome the difficulty, which would be effective in causing uniformity in the pared potatoes and in the saving of very considerable time in removing the peeled potatoes and starting anew with those which had not reached the abrading surfaces. While the device of the complainant is certainly not one requiring the exercise of a high degree of inventive genius, yet it is apparent that the complainant discovered in his scoop-shaped diverter a means to cause the potatoes at the top to reach the bottom and to cause the whole mass of potatoes thereby to be evenly and uniformly peeled. This was clearly a new and useful improvement and the fact that in the Niagara Specialty machine the same result had been attempted without success is evidence that more than mere mechanical skill was required to produce the result.

"The fact that a new combination or device may be simple and obvious to the ordinary understanding, when once produced in concrete form, is not necessarily proof that invention was not involved. This is almost a commonplace in the jurisprudence of patent law." *Buchanan v. Perkins Electric Switch Mfg. Co.*, 135 Fed. 90, 67 C. C. A. 564.

[2] It is concluded, therefore, that the complainant's device is patentable; that so far as appears by the evidence in the case he was the first inventor, and he is therefore entitled to the relief prayed for.

A decree will be entered accordingly.

HOHLFELD v. PATTERSON.

(District Court, E. D. Pennsylvania. July 10, 1914.)

No. 935.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SETTEE HAMMOCK.

The Hohlfeld patent No. 947,546, claim 23, for a settee hammock, was not anticipated, and covers a patentable, though simple, combination as applied to hammock construction; also *held* infringed.

In Equity. Suit by Herman L. Hohlfeld against James B. Patterson. On final hearing. Decree for complainant.

Horace Pettit, of Philadelphia, Pa., for plaintiff.

Augustus B. Stoughton, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The complainant sues to restrain the defendant from infringement of letters patent, No. 947,546, for an improved settee hammock, for which application was filed September 9, 1908, and letters patent issued January 25, 1910, and for an accounting of damages and profits arising by reason of the alleged infringement. The defendant denies infringement, and defends also upon the ground that the complainant's patent is anticipated by the prior art.

The complainant relies upon alleged infringement of claim 23, which is as follows:

"A settee hammock comprising a seat, a flexible end connected to each end of said seat, a flexible back connected to the rear of said seat, a spreader secured to the free edge of each of said flexible ends and to the free edge of said flexible back, means for detachably connecting the spreaders, and means connected to the end spreaders for suspending the hammock, and whereby said end spreaders are held detachably connected to said back spreader."

The defendant, to show anticipation, offered evidence that as early as 1902 E. L. Rowe & Son, Incorporated, made and sold at Gloucester, Mass., hammock couches alleged to answer to the claims in the complainant's patent; also, *inter alia*, patent No. 807,797, issued December, 1905, to George H. Winans for a hammock; and evidence by witnesses and illustrations in publications of the manufacture and sale by the defendant in April, 1908, some five months prior to the application for the patent in suit, of hammocks alleged to anticipate that of the complainant.

The claim calls for a settee hammock comprising a seat, and a flexible end connected to each end of said seat. The defendant's structure has these flexible ends. The flexible ends in the complainant's hammock contain pockets through which spreaders or rods are inserted to which are attached the clue cords. The flexible ends, as shown by the drawings and specifications and the hammock in evidence, carry the weight of the seat. The flexible ends with spreaders at the top to which the cords are attached are also present in defendant's construction and operate as a means to support the weight of the seat, additional support being procured by means of steel rods attached to

*For other cases see same topic & § NUMBER 'n Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

each corner of the couch and attached to the ends of the end spreaders to which the clue cords are attached. The claim calls for a flexible back connected to the rear of the said seat. This is embodied in the defendant's structure. Further, the claim calls for a spreader secured to the free edge of the flexible back. This is also embodied in the defendant's structure. All of the elements of the claim thus far enumerated are present, not only in the defendant's structure, but in the Gloucester hammock made and sold as early as 1902 and in some of those hammocks a spreader was secured to the free edge of the flexible back. It is shown that the defendant sold hammock couches with detachable flexible backs, or wind shields, and with valances, both having spreaders, as early as April, 1908. Further, the claim calls for a means for detachably connecting the spreaders.

The feature of claim 23, which distinguishes it from the Winans patent and from the Rowe or Gloucester hammocks, consists in the means provided for detachably connecting the back and end spreaders. This feature was apparently considered by the Patent Office, as appears by the file wrapper, in connection with the Winans patent, and claims in which the means for detachably connecting the spreaders were not set out were rejected in view of Winans' patent. In that patent the back or wind shield is attached at its top by means of cords through eyelets to the fabric of the end, and the same is true of the Rowe or Gloucester hammock. So far as the evidence shows, the means for detachably connecting the spreaders themselves, not by means of the fabric of the back or end, but by means secured to and integral with the spreaders themselves, is new as applied to hammocks, unless it was anticipated by the defendant's alleged hook hammock. A model identified by the witness, Renton, and known as the Renton exhibit, shows a detachable connection between the ends of the spreader of the back and the fabric of the end; the union being made by means of a cord or string. The defendant has also produced evidence and a model made from memory to show that the back spreader was connected by means of an iron hook with the end spreader. None of the hammocks alleged to have been so made and sold were produced. While the evidence as to the defendant's construction of a hammock with spreaders for the back and the ends may be sufficient to show that this feature was used by the defendant prior to the application for complainant's patent, the evidence that hooks were used to directly connect the back and end spreaders is not sufficiently clear and satisfactory as to the date of the alleged use of the hook feature to satisfy the court beyond a reasonable doubt of its existence as an anticipation of the connecting feature of the patent in suit. There was considerable argument and testimony of experts as to the feature of rigidity in the complainant's fastening device to hold the end spreaders at right angles to the back spreader. There is, however, no mention in the specifications or claims of this element of rigidity as a feature of the patent, and, while the complainant is entitled to all advantages arising from the results of his device, he is not limited to the rigid connection. I am of the opinion that with the limitations in claim 23 as to the means for detachably connecting the back and side spreaders, com-

plainant's patent is valid as a combination construction as against the prior art, notwithstanding the Kutz patent, No. 853,927, for corner fastening for beds; the Ellsworth patent No. 780,163 for rail joint for bedsteads, and the Ebert patent No. 523,337, for folding crib. As to the Kutz and Ellsworth patents, which are joints or connections for fastening the side rails of beds, while they might have a bearing upon a patent for the complainant's interlocking device alone, they were invented and intended to be used for entirely different purposes involving absolute rigidity in the frame of the bed itself. Even if the connecting device in itself is old, it involves a new and improved construction in which the complainant has combined it with the spreaders of his hammock. As is stated by Judge Gray in the case of *Buchanan v. Perkins Switch Mfg. Co.*, 135 Fed. 90, 67 C. C. A. 564 (C. C. A. 3d Cir.):

"The fact that a new combination or device may be simple and obvious to the ordinary understanding, when once produced in concrete form, does not necessarily prove that invention was not involved. This is almost a commonplace in the jurisprudence of patent law."

See, also, *Kisinger-Ison Co. v. Bradford Belting Co.*, 97 Fed. 502, 38 C. C. A. 300; *Barbed Wire Case*, 143 U. S. 283, 12 Sup. Ct. 443, 450, 36 L. Ed. 154; *Diamond Tire Co. v. Consolidated Rubber Tire Co.*, 220 U. S. 435, 31 Sup. Ct. 444, 55 L. Ed. 527.

The similarity of the defendant's means for detachably connecting the back and side spreaders to that of the complainant is obvious. The construction in the patent comprehends two members, constituting the interlocking connection between the spreaders of the back and the spreaders of the ends of the hammock. These metallic devices are secured to the wooden ends of the spreaders, and are so shaped that they interlock, or engage, in such a manner that, when engaged, the back spreader and side spreaders are positively connected so as to be held at substantially right angles, and thus form a substantially rigid structure which may be maintained in that condition during the normal use of the hammock. This connection is such that when the weight of the hammock or a person in the hammock draws the clue cords tight in suspending the hammock, the interengaging parts are caused to engage each other in such a manner that the back is held in place and in a substantially rigid connection. By releasing the weight upon the clue cords the end spreaders may be depressed or the back spreader raised and the two disengaged. As clearly stated by the complainant's witness, Mr. Hunter:

"In the defendant's structure, there are metallic interengaging parts for precisely the same purpose. At each end of the upper spreader bar of the back there is a metallic casting, which has a T-shaped hole or slot, and at the end of the spreader bars of the end portions of the settee there are metallic castings which are provided with T-shaped tongues. These T-shaped tongues correspond to the T-shaped construction of the complainant's patent, and they interengage with the slotted portions or sockets in the castings of the end of the spreader bar of the back."

In other words, while the defendant's fastening device consists of two parts which are not identical in construction with the complain-

ant's device, they operate upon precisely the same principle and perform the same mechanical function.

The suspension of the seat of the defendant's hammock, however, is accomplished in a somewhat different manner from that of the complainant, the entire weight of complainant's hammock being supported by the fabric forming the ends, while in the defendant's hammock there are steel rods attached to the ends of the end spreaders and attached by links to the four corners of the seat of the hammock, so that the weight may be either upon the fabric ends or upon the steel rods. It is apparent that in either construction they come within the complainant's claim of a hammock having flexible ends. The addition of the steel rods, which operate to make a mechanically flexible suspension, does not avoid infringement. The device of the rods is claimed by the defendant to be for the purpose of support so as to allow the flexible ends or curtains to be removed for the purpose of washing. When the fabric end of defendant's hammock is in position, the suspending rods are, by reason of their linked ends, equally flexible with the edges of the fabric end, and are in alignment with the edges of the fabric in whatever motion the hammock is given. It is apparent that they are merely additional contrivances which add nothing to the patented device to eliminate its essential features, and therefore are not sufficient to relief from infringement. *Western Electric Co. v. La Rue*, 139 U. S. 607, 11 Sup. Ct. 670, 35 L. Ed. 294; *Cochrane v. Deener*, 94 U. S. 786, 24 L. Ed. 139; *Union Paper Bag Co. v. Murphy*, 97 U. S. 120, 24 L. Ed. 935.

The defendant's fasteners and steel rods are a mere adaptation of equivalents to perform the same functions as in the complainant's patent in the same manner. *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122; *Western Electric Co. v. La Rue*, 139 U. S. 601, 11 Sup. Ct. 670, 35 L. Ed. 294.

It is concluded, therefore, that the defendant's hammock is substantially similar in construction and mode of operation to complainant's patented hammock, and is a combination of the elements contained in claim 23 of complainant's patent, and infringes that claim.

A decree may be entered in favor of the complainant.

UNITED STATES EXPANSION BOLT CO. v. H. G. KRONCKE HARDWARE CO.

(District Court, W. D. Wisconsin. August 5, 1914.)

No. 18-E.

1. PATENTS (§ 290*)—SUIT FOR INFRINGEMENT—PARTIES.

A manufacturer of an alleged infringing device, who assumes the defense of a suit for infringement against a customer, is a substantial party to the suit and is entitled on application therefor to be made a formal defendant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 470-472; Dec. Dig. § 290.*]

2. PATENTS (§ 310*)—SUITS FOR INFRINGEMENT—COUNTERCLAIMS.

Act March 3, 1897, c. 395, 29 Stat. 695 (U. S. Comp. St. 1901, p. 589), providing that in infringement suits District Courts shall have jurisdiction in the district of which the defendant is an inhabitant or in which he shall have committed acts of infringement and have a regular and established place of business, does not relate primarily to the jurisdiction of the federal courts, but is rather a provision affecting the place of suit, enacted for the benefit of the defendant, and confers a privilege which he may waive, and a complainant which has brought a suit for infringement in the district of the defendant's residence subjects itself therein to any counterclaim or set-off which the defendant is given the right to plead by new Equity Rule 30 (201 Fed. v, 118 C. C. A. v).

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507-540; Dec. Dig. § 310.*]

3. PATENTS (§ 310*)—SUITS FOR INFRINGEMENT—COUNTERCLAIMS.

Under new Equity Rule 30 (201 Fed. v, 118 C. C. A. v), which provides that the answer must state any counterclaim arising out of the transaction which is the subject-matter of the suit and may set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, in a suit for infringement of a patent, defendant may set up a cause of action for infringement of other patents relating to the same subject-matter or for unfair competition involving the rights of the respective parties under their patents.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507-540; Dec. Dig. § 310.*]

In Equity. Suit by United States Expansion Bolt Company against the H. G. Kroncke Hardware Company. On motion by the Diamond Expansion Bolt Company to be made a party defendant and by complainant to strike out counterclaims and interrogatories. First motion granted, and complainant's motion denied.

Banning & Banning, of Chicago, Ill., for complainant.
Alan M. Johnson, of New York City, for defendant.

SANBORN, District Judge. [1] This is an infringement suit on patent No. 623,809, dated April 25, 1899, upon an expansion bolt. Defendant is a local hardware dealer, and purchased the alleged infringing bolts from the Diamond Expansion Bolt Company of New York, which has assumed defense of the suit with the acquiescence of the plaintiff. When the suit was begun, plaintiff's attorneys wrote a letter to the Diamond Company, inclosing a copy of the bill of complaint, and saying they presumed the latter company would undertake the defense of the suit. Accordingly, it is so defending, and signs the answer along with the Kroncke Company. The Diamond Company is thus a substantial party under the rule of this circuit, as held in *General Electric Co. v. Morgan*, 168 Fed. 52, 93 C. C. A. 474, and of the Sixth circuit in *Foot v. Parsons Non-Skid Co.*, 196 Fed. 951, 118 C. C. A. 105, and is entitled to be made a formal party as well. It has applied to be made a party, and the application is granted.

[2] Other features of the motions now made present more difficulty. Complainant has applied for an order striking out three counterclaims pleaded by defendants, one for unfair competition, the others for in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

fringement of two patents covering expansion bolts similar to those covered by plaintiff's earlier patent.

From examination of the pleadings it appears that plaintiff claims under the McCreery patent of April 25, 1899, and the defendants under the Cook patent of November 5, 1901, No. 685,820, and the Pleister patent of October 25, 1910, No. 973,559. Defendant Diamond Company charges infringement of these patents by plaintiff, also unfair competition by plaintiff in making and illustrating its articles so as to look like those of the Diamond Company, with the purpose of deceiving the public and injuring defendants.

It appears further that both plaintiff and the Diamond Company are corporations organized and existing under the laws of New York, and that three patent suits are pending in the Southern district of New York, involving the Cook and Pleister patents, in which the plaintiff in this suit is the defendant. These suits cannot be heard before some time in the winter of 1914-15 or spring of 1915. The Diamond Company has also brought a suit for unfair competition in the Supreme Court of the state of New York against the plaintiff in this suit; the latter suit being still pending and undetermined.

The defendants in this suit have also filed seven interrogatories, the first of which has been answered, and the plaintiff moves to strike out all the others. These interrogatories inquire whether the plaintiff has sold in the Southern district of New York or in the Western district of Wisconsin any shields or anchors advertised by it as two part malleable lag shields, one piece lead anchors, or improved screw anchors, and, if so, how many. Plaintiff has moved to strike out the three counterclaims and the six interrogatories above referred to.

Plaintiff makes its objection to the counterclaims and interrogatories referred to on the ground that it has brought a patent suit in this district, which it is entitled to have there determined without bringing in matters properly determinable in the Southern district of New York. Jurisdiction in this suit being based upon the act of 1897, providing that District Courts shall have jurisdiction in the district of which the defendant is an inhabitant, or in any district in which the defendant has committed acts of infringement and has a regular and established place of business, plaintiff argues that this court can have no jurisdiction of the two patent suits sought to be brought here by the Diamond Company through its counterclaims, or of the suit for unfair competition covered by the other counterclaim. The Diamond Company relies upon the second paragraph of Equity Rule 30 (201 Fed. v, 118 C. C. A. v), which reads as follows:

"The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject matter of the suit, and may, without cross-bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims."

As I understand it, the act of 1897 does not relate primarily to the jurisdiction of the federal court, but is rather a provision affecting the place of the suit or venue. The District Court is given jurisdiction of

suits for the infringement of patents, and the act of 1897 has for its object the fixing of the proper place of suit. This statute was passed for the benefit and convenience of defendants in patent suits, and confers the privilege upon them to have the suit tried either in the district of their residence, or where they may have committed acts of infringement and have an established place of business. Not relating strictly to jurisdiction, but rather to the place of suit, this privilege is subject to waiver. The act of 1897 has not had a uniform interpretation by the federal courts. Several of the Circuit Courts held that the act of 1897 relates to jurisdiction, and that the suit must be brought in one of the districts referred to in the act. *Bowers v. Atlantic, etc., Co.* (C. C.) 104 Fed. 887; *Streat v. American Rubber Co.* (C. C.) 115 Fed. 634; *Westinghouse Elec. & Mfg. Co. v. Stanley, etc., Co.* (C. C.) 116 Fed. 641, approved by Judge Ray in *Underwood, etc., Co. v. Fox, etc., Co.* (C. C.) 158 Fed. 476, where there was no question of waiver; *Rumford, etc., Works v. Egg, etc., Co.* (C. C.) 145 Fed. 953; *Feder v. A. B. Fiedler* (C. C.) 116 Fed. 378.

The contrary rule was held by some other courts. *U. S. Consol. Seeded Raisin Co. v. Phoenix Raisin S. & P. Co.* (C. C.) 124 Fed. 234. See, also, *Thompson-Houston Electric Co. v. Electro Mfg. Co.* (C. C.) 155 Fed. 543, and *Cheatham Electric Switching Device Co. v. Transit Development Co.* (C. C.) 191 Fed. 727.

There was a like conflict of authority in the Circuit Courts in regard to the national bank venue statute, providing that suits against the bank might be had within the district where it was located. It was, however, held by the Supreme Court that this provision was for the convenience of the bank, and if it saw fit to waive the privilege there was no reason why it should not do so. *First National Bank v. Morgan*, 132 U. S. 141, 10 Sup. Ct. 37, 33 L. Ed. 282. Moreover, it seems that the purpose of the act of 1897 and section 51 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [U. S. Comp. St. Supp. 1911, p. 150]), providing that no civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, is the same. Uniform construction of this general provision has been that it does not relate to the jurisdiction, but creates a privilege of the defendant to be sued where he resides, and one which he may waive. *In re Moore*, 209 U. S. 491, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164.

[3] Plaintiff having brought a suit in this district thereby subjected itself to any counterclaim or set-off which is fairly within the Equity Rule above quoted. The counterclaims pleaded in the answer grow out of the very same transactions and matters covered by the original bill. The three patents referred to in the answer upon expansion bolts are all along the same line, and the question of unfair competition is intimately connected with the rights of the respective parties under these patents. These matters ought to be all disposed of in one suit, as they relate to questions very closely connected together. It is probable that a decision may be reached in this district long before it could be had in the Southern district of New York or in the Supreme Court of the state of New York, where the unfair competition suit is pending. It seems

to me that the ends of justice will be promoted by allowing these interrogatories and counterclaims to stand, and have the whole matter in the suit between these parties decided at an early date.

The motion of the defendant to intervene is allowed, and the motions of the plaintiff to strike out portions of the answer and six interrogatories are denied.

I do not think it is necessary to consider the rulings of the District Court upon Rule 30 (201 Fed. v, 118 C. C. A. v) which are cited in the briefs. The ruling of Judge Chatfield in *Marconi Wireless v. National Electric Signaling Co.* (D. C.) 206 Fed. 295, I think should be approved.

SANITARY STREET FLUSHING MACH. CO. v. CITY OF AMSTERDAM.

(District Court, N. D. New York. September 9, 1914.)

PATENTS (§ 328*)—INFRINGEMENT—STREET FLUSHING MACHINE.

A preliminary injunction against a city as a user to restrain alleged infringement of the Ottofy patent, No. 795,059, for a street flushing machine denied, on evidence leaving it in doubt whether the patent, as limited in prior decisions, was infringed by the machine as used by defendant.

In Equity. Suit by the Sanitary Street Flushing Machine Company against the City of Amsterdam. On motion for preliminary injunction. Denied.

C. V. Edwards, of New York City, for complainant.

Duell, Warfield & Duell, of New York City, for defendant.

RAY, District Judge. Complainant sues for an injunction to restrain alleged infringement by defendant, *as a user* of a flushing machine, of United States letters patent No. 795,059, dated July 18, 1905, for "street flushing machine," issued to Leopold F. Ottofy, assignor to the American Street Flushing Machine Company, and also to recover, on an accounting, profits and damages for such infringement. An action by complainant is also pending against the maker of such alleged infringing flushing machine, in which action an injunction is sought and also a recovery of profits and damages. The validity of this Ottofy patent has been adjudicated and sustained in this circuit. By that this court is bound. The patent was so narrowed, however, by that decision that defendant's flushing machine does not infringe unless defendant uses and operates it with the discharge nozzles so set or adjusted that the water from the tank is discharged on the pavement at an angle of 20 degrees or less.

It seems that no element of this machine is new; that the combination is not new except in the single feature of the setting of the discharge nozzles so as to discharge the water from the tank of the machine upon the pavement to be flushed at an angle of 20 degrees or less. The defendant, the City of Amsterdam, owns one of these traveling flushing machines, known as the Studebaker street flushing machine,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and it is claimed by the complainant that the city, by its employés, so sets the nozzles of this machine that when in operation the water forced from the nozzles actually strikes the pavement at a prohibited angle. It is evident that the water ejected from the nozzle in a straight line, parallel with the surface of the street, would eventually drop down upon the surface, some in the form of spray or very small drops, etc. Each and every drop, or particle, would have more or less of the scouring effect spoken of in the patent and then would move on an incline, if any, and move the dust or dirt more or less. The idea of the patent is, however, to have the stream, a broad, flat, and thin stream, strike the pavement under the impulse of the pressure from within the tank, and so act to scour and stir up the dirt on the surface, and then under the same impulse, but of a much lesser degree, move on towards the gutter, carrying with it the loose and loosened dirt. The patent says,

"In flushing or washing devices, on the contrary, it is necessary to localize the distribution of water and to have it strike with considerable velocity at an angle *depending upon the nature of the surface*, so as to have first a scouring and then a flushing effect to carry off before it the loosened material."

Also:

"At the same time the water is delivered in a flat sheet nearly parallel with the street, and washes the dirt forward and outward without injuring the pavement."

This patent had reference particularly, in some of its details, to pavements constructed of blocks of wood or stone laid side by side and having the interstices filled in with sand, dirt, or other material liable to be washed out by a stream of water forcibly applied downwardly. If we elevate the mouth of the long nozzle throwing a thin stream above the horizontal line, the water will fall in a spray or drops, and the machine will act as a sprinkler. The water will run downhill into the gutters of course, and if in sufficient quantity carry the loose dirt, or most of it, with it, but the idea of the patent was to have the water strike the pavement at such an angle that, under the impulse given by the pressure behind it, it would be forced along towards the gutter. It is the old idea of the boy or man who, in washing the sidewalk with the ordinary hose and using the flat, elongated nozzle, or making the stream flat and wide by applying his thumb to the mouth of the ordinary round nozzle, by changing the elevation or direction of the stream or the distance of the nozzle from the walk, scours certain points on the walk, merely sprinkles others, and by changing angle and position forces the water and loosened dirt along on the surface in any desired direction. By means of joints in the connections of the nozzles of the sprinkling cart or flushing cart (it may be used as both) the discharged water is or may be sent in any direction, forward, backward, sidewise, or up or down at any desired angle almost. This patentee has *monopolized one direction* out of the many for throwing the stream. In *St. Louis Union Trust Company v. Studebaker Corporation et al.*, the Circuit Court of Appeals (Second Circuit), 211 Fed. 980, 128 C. C. A. 478, where the various litigations as to this patent were referred to, discussed the breadth and scope of the claims of the patent, and then (sustaining the defense of want of proof to warrant a finding of infringement), said:

"We are also satisfied that defendant's machine has all the elements of the patent claims, except the angle less than 20 degrees, and that it is a very simple and easy job to modify it, so that it will be a complete infringement. The mere lengthening of the pipes a very few inches, and a trifling regulation of the position of the nozzle, will make any one of defendant's machines an infringing device. As at present organized these machines would probably not commend themselves to a municipality which had streets paved with cobble or blocks with earth interstices, but the changes which would adapt it for use there are so slight that there must be a constant temptation to make them. However, until that temptation has been yielded to, we cannot find that the patent has been infringed, and therefore affirm the decree dismissing the bill, with costs of this appeal to defendants."

The only question for this court on this motion is, therefore, Does the city of Amsterdam, in using its Studebaker flushing cart (or machine), discharge water at such an angle as to infringe? The complainant presents affidavits on this subject, as does the defendant, and these conflict materially. There has been no opportunity for cross-examination, the best and really the only way of determining satisfactorily whether or not defendant so operates its flusher as to infringe. As I am not satisfied in view of this conflict that defendant operates its machine so as to infringe, I think the motion should be denied, the suit brought to trial, or a final hearing, the witnesses brought into court, where they may be seen, and heard and cross-examined. The court can then get at the merits speedily and much more satisfactorily. The city of Amsterdam is amply responsible, and the delay will be inconsequential. No great and irreparable damage is being inflicted even if there is infringement which is not free from doubt.

It is suggested and was suggested by the court that an injunction restraining defendant from using the machine so as to discharge the stream within the prohibited degree will do no harm. The answer is it would be a finding that defendant has infringed.

Motion denied.

MILLER PASTEURIZING MACH. CO. v. RICH.

(District Court, W. D. New York. June 11, 1914.)

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ICE CREAM FREEZER.

The Hoefler & Schantz patent, No. 921,837, for an ice cream freezer, was not anticipated, discloses a patentable combination of old and new elements, and is entitled to a reasonably liberal construction, also *held* infringed.

2. PATENTS (§ 234*)—INFRINGEMENT—TESTS—INTERCHANGEABILITY OF PARTS.

The interchangeability of parts in two structures is a good test in determining the question of infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 370, 381; Dec. Dig. § 234.*]

In Equity. Suit by the Miller Pasteurizing Machine Company against Paul J. Rich. On final hearing. Decree for complainant.

Edward R. Alexander, of Washington, D. C. (Geo. B. Pitts, of Washington, D. C., of counsel), for complainant.

James L. Norris, of Washington, D. C. (C. A. Bateman, of Washington, D. C., of counsel), for defendant.

HAZEL, District Judge. [1] This action relates to the infringement by the defendant of letters patent No. 921,837, dated May 18, 1909, granted to Alexander G. Hoefler and Karl W. Schantz, for an ice cream freezer, wherein the refrigeration of the cream is produced by circulating brine through a jacket surrounding the ice cream container. The object of the patentees was to assemble the freezing instrumentalities in such a way as to enable the freezer to be readily dismembered for cleaning and quickly emptied of the frozen contents without interrupting the flow of the brine. To accomplish their object they supported the freezer at the bottom, and provided suitable connections between the refrigerating jacket, the brine supply, and the discharge pipes.

The single claim in controversy is descriptive of an upright ice cream freezer possessing old elements and new elements, the latter consisting of swinging or rotary joints for connecting the supply and discharge pipes with the refrigerator jacket. The swing joints of the patent in suit are shown to consist of rotary casings connected with the upper end of the refrigerating jacket and located on opposite sides thereof to secure the immovability of the connecting parts and pivoting. The inlet swing joint is provided with an axial passage and the outlet swing joint with a radial passage opening into the interior of the casing.

Although the various elements of the claim are old, they had not heretofore been combined to achieve the result, obviously in the minds of the patentees herein. In view of the prior devices the inclusion of the swinging joints as elements in an old combination was new and useful, and performed a new function, enabling the brine in the brine jacket to flow in a radial and axial direction, and permitting the container to be quickly emptied and the interior parts quickly cleaned without interrupting the flow of the brine. By means of the pivot arrangement the frozen cream can be withdrawn at the bottom of the freezer in an exceedingly short period of time and the can cleaned. I am of the opinion that by the addition of the swinging joints and their arrangement with the inlet and discharge pipes, even though the joints were of a standard design, the patentees modestly progressed the art of manufacturing ice cream, and to do this involved invention. With the exception of reference to the Gerner patent, to which attention will later be directed, the record makes no disclosure of prior ice cream freezers of the vertical type which could be tilted by pivoting at the bottom, and in the tilting operation carry with them the connecting parts and pipes. Slight as the improvement was, it unquestionably attained favor with the manufacturer of the machine used by the defendant, who appropriated the swinging joint feature of complainant's combination, and by its adaptation achieved the same result as complainant in relation to the axial and radial flow of the brine and the nondisturbance thereof. Furthermore, by the arrangement and connection of pipes and coacting parts a tilting of the can on its pivot was secured in substantially the same way as in complainant's patent. Indeed it appears that the Dairy Machinery Construction Company, manufacturer of defendant's machine, first learned of the Hoefler & Schantz invention from patterns furnished it by the patentees for the purpose

of making the structure. In fact in March, 1907, the company built a freezer for the patentees. While some changes—patentable improvements perhaps—were made by this company in the manufacture of the infringing machine (Exhibit 6), the structure nevertheless embodies every element of claim 2 in suit, and infringement thereof is not avoided by such changes or improvements.

[2] In the machine used by the defendant, a freezer of the upright type, by somewhat different instrumentalities from complainant's the freezer can is tilted on bottom pivots. There is a double swinging joint inclosed in a rotative casing attached to the side of the can which has two chambers, one being a connecting medium for a stationary plug from the inlet pipe, and the other from the discharge pipe. When the can is being tilted the interior parts remain stationary as in complainant's structure. By this arrangement the double swinging joints and connecting parts in combination with the other elements perform the same function as in complainant's machine, operating in precisely the same way and producing the same result. There is no doubt in my mind but that by a very simple mechanical change in the pipe fitting, the swinging joints of complainant's and defendant's structures might be operated interchangeably, which of course is a good test in determining the question of infringement. *Ball Bearing Co. v. Star Ball Retainer Co.* (C. C.) 147 Fed. 721; *Miller v. Eagle*, 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121. In accordance with a reasonable construction of the claim in dispute—a construction to which it seems to me it is entitled—it is not thought that any material difference in the two structures is created by the unison of two elements in one, i. e., the double joint of defendant's machine operated on one side only of the freezer, in place of complainant's separate swinging joints located on opposite sides of the can, or that infringement is thereby avoided. *General Electric Co. v. Yost Electric Mfg. Co.* (C. C.) 131 Fed. 874, affirmed 139 Fed. 568, 71 C. C. A. 552.

In my opinion there is nothing anticipatory in the prior art requiring a strict construction of claim 2. In prior ice cream freezers of the horizontal type there may be seen many of the precise elements contained in the complainant's patent, but in neither the horizontal nor the upright types are discerned the combination of old elements in suit, together with the new element of a separate swinging joint. The novelty and usefulness of the claim resides chiefly in the adaptation of the swinging joints to permit tilting the can without interrupting the flow of the brine in the jacket which surrounds the cream receptacle. In using a double joint on one side of its machine, instead of separate joints on opposite sides, the defendant simply attempted an evasion of the Hoefer & Schantz patent.

There was considerable discussion at the trial regarding the patent granted to Gerner, August 20, 1907, on application filed November 12, 1906, and defendant claims that as Gerner shows a tiltable ice cream freezer, the claim in suit must be strictly construed. But notwithstanding such feature Gerner's method of producing ice cream is different from complainant's, and his tilting of the freezer is for emptying purposes, and not to facilitate cleaning the inside or removing the

mechanical parts therefrom. Moreover, the Gerner freezer is without the swinging joints which are the subject of this controversy, and accomplishes a different result than that attained by patentees herein.

There were other questions argued arising out of the action of the Patent Office, as shown by the file wrapper, from which a strict construction of the claim is contended, and there was also testimony to show that the Hoefler & Schantz patent antedated the Gerner patent, but in view of what has already been stated herein, such matters do not require attention. The claim in suit is thought valid and infringed by defendant, and a decree for complainant may therefore be entered, with costs.

GREENWALD BROS., Inc., v. COHN.

(District Court, E. D. Pennsylvania. July 30, 1914.)

No. 1269.

PATENTS (§ 328*)—INFRINGEMENT—IMPROVEMENT IN SKIRTS.

A preliminary injunction granted against infringement of the Feuchtwanger patent, No. 662,714, for an improvement in skirts, on a prior decision of the Circuit Court of Appeals adjudging the patent valid.

In Equity. Suit by Greenwald Bros., Incorporated, against Max Cohn, trading as the Nufit Petticoat Company. On motion for preliminary injunction. Motion granted.

Fraley & Paul, of Philadelphia, Pa., for plaintiff.

Bernard Harris and Hector T. Fenton, both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. A statement of all the facts necessary to an understanding of the points involved in this case appears in the report hereinafter referred to of what is in substance the same case.

The plaintiff in this case, in addition to having established the necessary jurisdictional facts, has shown itself to be the owner by mesne assignments of patent No. 662,714, granted November 27, 1900, to Henry J. Feuchtwanger, for certain new and useful improvements in skirts. In its bill it charges the defendant with an infringement of this patent. The plaintiff stands upon the ground of the issuance of the patent, manufacture thereunder, and the absence of any challenge of the validity of the patent for a number of years after its issue. The plaintiff further maintains that the improvement in skirts for which the patent issued is novel and useful, and that there had been no prior use or patent which anticipated the invention of the patentee, and that the commercial value of the improvement sufficiently appears. In addition to this basis for the assertion of a proprietary right, the plaintiff has shown that this right has been confirmed by an adjudication in his favor in the case of this very plaintiff against Enochs and others, by the Circuit Court of Appeals in this Circuit, reported in 183

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Fed. 583, 106 C. C. A. 351, on an appeal from the decree of this court in the same case, reported in 180 Fed. 478.

Prima facie, therefore, the plaintiff is entitled to the injunction prayed for. This is conceded by the defendant. He does not contest the validity of the patent on the present application, but contends that the scope of the claim or claims in suit should be limited and restricted in accordance with the facts now submitted by him, which were not presented in the case in which the proprietary right of the plaintiff was adjudicated and upheld, which facts, he contends, if presented in that case, would have induced a different ruling.

Strength is given to this position of the defendant by what is disclosed from an examination of the record in the case referred to, in that while the answer filed in that case sets up a state of facts bearing upon the patentability of the improvement claimed by the plaintiff, no evidence was offered in support of the answer in this respect, and the case was therefore heard and ruled as if upon a demurrer to the bill, and in this respect there has been no adjudication upon the facts bearing upon the proprietary right as claimed by the plaintiff.

A closer examination of the record of the case referred to, however, shows the strength of this position of the defendant to be determined by the fact that the case was ruled in the court below against the plaintiff on the point of a lack of novelty in the invention, as claimed by the patentee, based upon the finding of the trial judge that all the elements in the claimed invention were old, and that the invention claimed consisted merely of an aggregation of devices in prior use, and a denial of the existence of any combination in the use of these known devices which would make the aggregation patentable as a combination.

This, in substance and effect, is precisely the finding which we are now asked to make upon the evidence presented in defendant's counter affidavits. As, however, the Circuit Court of Appeals disapproved of any such conclusion as to the merits of this device, and specifically found merit in the device as a combination, and as therefore patentable, we do not deem ourselves at liberty to disregard this expression of opinion on the part of the appellate court, even if it be true that the case, strictly regarded, was decided without evidence bearing upon the prior state of the art.

We feel constrained to give effect to the opinion thus expressed, and therefore award a preliminary injunction, and a decree to this effect may be prepared by counsel and submitted to the court, with a bond in the sum of \$5,000 for approval.

KRYPTOK CO. v. HAUSSMANN & CO.

(District Court, E. D. Pennsylvania. August 3, 1914.)

No. 587.

PATENTS (§ 301*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

The fact that the owner of a patent is not a manufacturer thereunder, but grants licenses under which he receives royalties, is not ground for refusing a preliminary injunction against infringement to which he is otherwise entitled on the giving of a bond by defendant to secure dam-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ages which may be recovered, nor is the pendency of a suit in another court in which the same defenses are about to be passed on.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 489-495; Dec. Dig. § 301.*]

In Equity. Suit by the Kryptok Company against Haussmann & Co. On motion for preliminary injunction. Motion granted.

See, also, 216 Fed. 267.

Horace Pettit, of Philadelphia, Pa., and Rosenbaum, Stockbridge & Borst, of New York City, for plaintiff.

Wm. C. Schwebel and I. S. Prenner, both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The general facts of this case sufficiently appear in the cases cited. The pleadings and the affidavits submitted show the plaintiff in this application to stand upon the grounds of the issuance to it of a patent, an adjudication in its favor of the proprietary rights claimed under this patent, and the issuance of a preliminary injunction in a case in which all the defenses here urged are set up. The plaintiff is therefore entitled to the preliminary injunction for which it now asks. The awarding of the writ after the oral argument at bar was withheld to enable the parties to submit briefs and file supplemental affidavits. These have been placed before us and fully considered. There is no very confident denial of the *prima facie* right of the plaintiff to relief. The point is made that the plaintiff is not the manufacturer of the patented article, but the recipient of royalties from licensees, and that in consequence the extraordinary remedy of a *pendente lite* injunction may be withheld without injury to the plaintiff, who may be fully compensated in damages, and this may be secured to plaintiff by the requirement of the defendant to give bond to render a full accounting. In support of this we are pointed to the fact that the same view of the case was successfully presented to Judge Ward in the case of the same plaintiff against Harris, 216 Fed. 642, arising in the Southern District of New York, Second Circuit.

Another reason for the withholding of this emergency relief is urged in the fact that the defenses now set up are before and about being submitted to Judge Hazel in the case of the same plaintiff against Bifocal Co., and that the awarding of the writ asked for may well await a hearing on the merits in that case; the plaintiff being protected by a bond to secure an accounting.

The conclusion tentatively reached at the oral argument at bar has not been shaken by a careful perusal of the submitted briefs. One right which a patentee has is to secure to himself the receipt of royalties for the agreed use of his proprietary right. If any user (although a piratical one) may be permitted to continue an unauthorized use on like terms of payment of a royalty, the plaintiff would be unable to find any one to enter into agreements with it. To refuse the plaintiff the relief to which it is entitled because of the case pending in the Second Circuit until that case is decided upon its merits is to accord to the defendant here, because of that case, an indulgence which the court

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

there refused to accord to the defendant in that case. *Kryptok Co. v. Stead Lens Co.*, 190 Fed. 767, 111 C. C. A. 495, 39 L. R. A. (N. S.) 1; *Id.* (D. C.) 207 Fed. 85; *Same v. United Bifocal Co. et al.*, Western District of New York, 214 Fed. 983; *Same v. Harris* (Southern District of New York) 216 Fed. 642.

A preliminary injunction is therefore awarded, the writ to issue upon bond being given in the sum of \$10,000, and counsel may submit a formal decree and a bond, with sureties, for approval.

KRYPTOK CO. v. ROTHSCHILD.

(District Court, E. D. Pennsylvania. August 3, 1914.)

No. 1273.

In Equity. Suit by the Kryptok Company against Marcus Rothschild. On motion for preliminary injunction. Motion granted.

Horace Pettit, of Philadelphia, Pa., and Rosenbaum, Stockbridge & Borst, of New York City, for plaintiff.

Eugene A. Thompson and Howard P. Denison, both of Syracuse, N. Y., for defendant.

DICKINSON, District Judge. This case was argued with that of *Same Plaintiff against Haussmann & Co.*, 216 Fed. 196, and a preliminary injunction is awarded herein for the reasons stated in the opinion filed in that case.

Counsel may submit a formal decree to this effect, and a bond to be given by the plaintiff in the sum of \$10,000, with sureties. Writ to issue upon the decree and bond as filed being approved by the court.

THE T. H. SYMINGTON CO. v. MINER.

(District Court, N. D. Illinois, E. D. August 6, 1914.)

No. 30700.

1. PATENTS (§ 328*) — VALIDITY AND INFRINGEMENT — DRAFT-RIGGING FOR RAILWAY CARS.

The Emerick patent, No. 693,643, for a draft-rigging for railway cars, while very narrow in scope, was not anticipated and discloses patentable invention; also, *held* infringed.

2. PATENTS (§ 45*) — VALIDITY — ESTOPPEL BY INFRINGEMENT.

While novelty cannot be supplied by the defendant's use of a patented device, such use amounts to a quasi estoppel.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 51-53; Dec. Dig. § 45.*]

In Equity. Suit by The T. H. Symington Company against William H. Miner for infringement of letters patent No. 693,643 for a draft rigging for railway cars, issued to Emerick February 18, 1902, on an application filed May 24, 1901. On final hearing. Decree for complainant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Edwin F. Samuels, of Baltimore, Md., Steuart & Steuart, of Baltimore, Md., and Washington, D. C., and Rufus S. Simmons, of Chicago, Ill., for plaintiff.

Munday, Evarts, Adcock & Clarke and Haight, Brown & Haight, all of Chicago, Ill., for defendant.

SANBORN, District Judge. [1, 2] This is the common case of a specific patent, strictly limited to the particular construction described in the claims, covering a draft-rigging for railway cars. Its merit is entirely practical, the sole claim to invention being the production of a simple, workable device in an art where practicability, economy of space, easy and rapid detachment and putting back in place, are the only considerations of any importance, not only from the standpoint of the earlier art, but from the impossibility of getting any device on a railroad car except one of the highest efficiency. Defendant's device, as described in its patent, could not infringe, nor could it probably be put on railroad cars. Instead of constructing it as described, defendant has adopted plaintiff's construction. It makes a strong argument that Emerick shows no invention, but adopts his device for its own construction. While novelty cannot be supplied by defendant's use of a patent device, such use amounts to a quasi estoppel. As a specific combination of old elements, designed for practical use, the Emerick construction should be narrowly sustained, especially in view of defendant's adoption of that construction, unless the Byers patent of May 7, 1901, No. 673,419, is prior to Emerick. As to this question, testimony was taken in open court to carry back the date of invention of Emerick so as to antedate Byers, and was abundantly sufficient for that purpose. I was satisfied at the time, and on review of the testimony am confirmed in the conviction, that Emerick's invention was considerably earlier than that of Byers.

While very narrow in scope, the Emerick device is so simple, and so easy to repair and maintain, that it should be sustained, especially in view of defendant's leaving its own precise construction and adopting it.

Decree for plaintiff sustaining its patent, declaring it infringed, and for profits, damages, and costs.

WESTERN UNION TELEGRAPH CO. v. FREAR, Secretary of State.
PHILADELPHIA & READING COAL & IRON CO. v. DONALD, Secretary
of State, et al.

(District Court, W. D. Wisconsin. August 10, 1914.)

1. CORPORATIONS (§§ 636, 651*)—FOREIGN CORPORATIONS—LOCAL BUSINESS—REGULATION.

So far as local business is concerned, a state may impose any conditions, not in conflict with the Constitution and laws of the United States, on the right of a foreign corporation to do business within its territory, or, having given a license authorizing the corporation to do business within the state, may revoke the same with or without cause.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2505-2509, 2571, 2574, 2575; Dec. Dig. §§ 636, 651.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CORPORATIONS (§ 636*)—FOREIGN CORPORATIONS—DISCRIMINATION.

An attempt by a state to substantially discriminate between domestic corporations and foreign corporations admitted to do business within the state, prejudicially to the latter, is invalid, and may be restrained, whether it be by unequal taxation or other substantial inequality.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2505-2509, 2571; Dec. Dig. § 636.*]

3. REMOVAL OF CAUSES (§ 3*)—AGREEMENT NOT TO REMOVE SUITS—FOREIGN CORPORATIONS—DOING BUSINESS WITHIN STATE.

A state statute requiring a foreign corporation, as a condition of being permitted to enter or remain in the state, to stipulate expressly or impliedly that it will not exercise its constitutional right to remove suits to the federal courts or prosecute suits therein is invalid as requiring a corporation to forego a constitutional right and the revocation of its license to do local business, for a violation of such statute may be restrained.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 4, 5; Dec. Dig. § 3.*]

4. CORPORATIONS (§ 636*)—FOREIGN CORPORATIONS—OCCUPATION TAX.

St. Wis. 1898, § 1770b, subd. 7, par. "e," added by Laws 1905, c. 506, requires foreign corporations to report annually the amount of business done in Wisconsin and pay \$1 a thousand on any increase not previously reported. *Held*, that such tax is only a license fee payable on substantially the same terms as fees charged domestic corporations, and that the act is for that reason not discriminatory against foreign corporations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2505-2509, 2571; Dec. Dig. § 636.*]

5. REMOVAL OF CAUSES (§ 3*)—STIPULATIONS TO NOT REMOVE CAUSE.

Wisconsin Statutes 1898, authorizing foreign corporations to do business within the state, declares as a condition that such a corporation shall state in its application and in its annual reports that it will comply with all the laws of the state relative to foreign corporations, and section 1770f, added by Laws 1905, c. 506, declares that, whenever any foreign corporation doing business in the state shall remove or make application to remove into any District Court of the United States any action or proceeding commenced against it by any citizen of the state on a claim or cause of action arising within the state, it shall be the duty of the Secretary of State, on such fact being made known to him, to revoke the corporation's license to do business in Wisconsin. *Held*, that such provision was in effect a prohibition against the exercise of a constitutional right, so as to be invalid.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 4, 5; Dec. Dig. § 3.*]

In Equity. Suit by the Western Union Telegraph Company against James A. Frear, as Secretary of State of Wisconsin, and by the Philadelphia & Reading Coal & Iron Company against John S. Donald, as such Secretary of State, and Walter C. Owen, as Attorney General, to restrain the enforcement of St. Wis. 1898, § 1770f, added by Laws 1905, c. 506. Decree for complainants.

A. G. Zimmerman and Rufus B. Smith, both of Madison, Wis., and Percy B. Eckhart, of Chicago, Ill., for Western Union Telegraph Co.

M. H. Boutelle, of Minneapolis, Minn., and Luse, Powell & Luse, of Superior, Wis., for Philadelphia & Reading Coal & Iron Co.

Walter C. Owen, Atty. Gen., and J. E. Messerschmidt, Asst. Atty. Gen., both of Madison, Wis., for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before KOHLSAAT, Circuit Judge, and GEIGER and SANBORN, District Judges.

PER CURIAM. Application for similar injunctions in both of these cases were heard together, under section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 236]), before Christian C. Kohlsaat, United States Circuit Judge, and Ferdinand A. Geiger and Arthur L. Sanborn, District Judges, November 24, 1913; preliminary injunctive orders having been previously entered in both cases, restraining the Secretary of State from revoking the respective licenses to do business in Wisconsin theretofore issued to complainants, respectively.

These corporations have always been rightfully in the state, because they are engaged in interstate and foreign commerce; the telegraph company being also a government agent under certain acts of Congress. They were lawfully in the state, engaged in such business, long before 1898, when the first statute was passed requiring foreign corporations to take out local licenses under penalty of being unable to make contracts relating to local business, or to acquire or dispose of title to property in such business. As to other than local business they are lawfully in the state, since the statute referred to does not relate to interstate or foreign commerce transactions. *Elwell v. Adder Machine Co.*, 136 Wis. 82, 116 N. W. 882.

In 1905 the Wisconsin Legislature passed an act providing as follows:

"Sec. 1770f. Whenever any foreign corporation doing business in this state shall remove or make application to remove into any District or Circuit Court of the United States any action or proceeding commenced against it by any citizen of this state, upon any claim or cause of action arising within this state, it shall be the duty of the Secretary of State, upon such fact being made to appear to him, to revoke the license of such corporation to do business within this state." Laws 1905, c. 506.

Each of these corporations has removed to the federal court a case against it of the kind referred to in the statute. The Secretary of State having threatened to revoke their licenses, these applications for temporary injunctions were made, and heard as already stated.

[1] So far as purely local business is concerned, the state has the right to impose conditions, not in conflict with the Constitution or the laws of the United States, to the transaction of business within its territory by an insurance company chartered by another state, or to exclude such company from its territory, or, having given a license, to revoke it, with or without cause. *Doyle v. Continental Insurance Co.*, 94 U. S. 535, 24 L. Ed. 148.

It is argued by counsel for the state that the mere revocation of the license of a foreign corporation doing both a local and interstate business will in no way affect its right to continue the transaction of business in interstate and foreign commerce. If, however, it makes a contract or acquires property wholly in its local business, then it comes within the disabilities and penalties prescribed in section 1770b.

The Supreme Court of the United States has laid down certain rules in deciding cases similar to these, and, so far as that court has settled

the law, it is, of course, the duty of this court to apply it. The following propositions are established:

[2] 1. Any attempt to substantially discriminate between domestic corporations and foreign corporations admitted to do business in a state, prejudicial to the latter, is invalid, whether it be by unequal taxation or other substantial inequality. Under such circumstances, the cancellation of the foreign corporation license by a state officer will be restrained. *Herndon v. Chicago, R. I. & P. R. Co.*, 218 U. S. 135, 30 Sup. Ct. 633, 54 L. Ed. 970, and *Roach v. Atchison, T. & S. F. R. Co.*, 218 U. S. 159, 30 Sup. Ct. 639, 54 L. Ed. 978.

[3] 2. If the state statute requires the foreign corporation, as a condition of being permitted to enter or remain in the state, expressly or impliedly to stipulate or agree that it will not exercise its constitutional right to remove suits to the federal courts, or prosecute suits therein, such statute is invalid because requiring the corporation to give up a constitutional right; and the revocation of its license to do local business may be restrained. *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. Ed. 365; *Barron v. Burnside*, 121 U. S. 186, 7 Sup. Ct. 931, 30 L. Ed. 915, 1 Interst. Com. Rep. 295; and other cases approving the *Barron* Case, cited by Mr. Justice Day in *Security Mutual Ins. Co. v. Prewitt*, 202 U. S. 246, 263, 26 Sup. Ct. 619, 50 L. Ed. 1013, 1020, 6 Ann. Cas. 317.

The rulings referred to seem decisive of this application, so that it is unnecessary to consider other points.

The only discrimination we are able to perceive in the Wisconsin law, in favor of domestic and against foreign corporations, is a very narrow one. Foreign corporations are not allowed to remove cases against them by citizens of Wisconsin, on causes of action there arising. The same rule applies to domestic corporations, under section 28 of the Federal Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1094 [U. S. Comp. St. Supp. 1911, p. 140]), which does not allow defendants to have removal for diverse citizenship unless they are nonresidents of the state. Hence domestic corporations cannot exercise such a right. If, however, the suit against the domestic corporation presents a federal question, and more than \$3,000 is in dispute, it may remove the case, though a citizen and resident of the state, and though the plaintiff is a citizen of the same state and the cause of action arose therein. To this limited degree there is discrimination; but instances of such cases would be very rare. The question of the right to remain in the state may also be litigated by the foreign corporation in the state courts, with a final right of review in the Supreme Court by writ of error to the highest state court. It is unnecessary on these motions for injunctions to pass on this narrow question, because a consideration of the second point referred to seems to require the court to direct the temporary injunctions prayed.

[4] On first reading the Wisconsin statutes seem to discriminate against foreign corporations by exacting an occupation tax from which domestic bodies are exempt; but a careful consideration of the acts shows that this is not true. Paragraph "e" of subdivision 7 of section 1770b requires foreign companies to report annually the amount of

business done in Wisconsin, and to pay a dollar a thousand on any increase not previously reported. Domestic companies are not required to include in their annual reports any such facts, or make any such payment. But a complete and thorough comparison of the statutes demonstrates that this tax on business is really on the capital stock, and is not required to be paid unless the charter is amended so as to increase the capital locally employed beyond the amount already paid for. So the tax is only a license fee, payable on substantially the same terms as domestic fees. It is a well-known fact in Wisconsin that this is the construction adopted by the state officers, under which they have uniformly acted. The consistent policy in Wisconsin has been to encourage foreign corporations to do business in the state by making their status the same as that of domestic companies, but to prevent them from carrying on business there unless licensed, so as to collect from them taxes or license fees commensurate with those exacted from local bodies, and making them readily suable there. This policy of equality appears from the statute, and is emphasized by subdivision 10 of section 1770b, adopting from Illinois a provision that foreign corporations shall have no other or greater powers than like domestic bodies, and from the uniform construction of these statutes by the state officers. Provisions designed to prevent the removal of causes to federal courts, like that of section 1770f and the insurance statute under review in *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148, were found necessary by the unreasonable and oppressive conduct of the foreign corporations themselves in removing cases merely for greater delay, vexation, and expense. It used to be common practice in Wisconsin for foreign corporations under injunction from state courts to remove the case on a Saturday afternoon, thus ipso facto vacating the state injunction, and then hustle a gang of men upon the enjoined work and get it done by Monday, before any other restraining order could issue.

[5] The second point, resting on the *Morse* and *Burnside* Cases, raises the question whether the statute requires foreign companies, as a condition of coming in or staying in, to agree that they will not remove cases to the federal courts. If so, the legislation is invalid under those decisions. The statute provides that the foreign corporation, as a condition of doing business in the state, or continuing it, shall state in its application to come in, and its annual sworn reports, that it will comply with all the laws of the state relative to foreign corporations. One of these laws provides that, if the corporation shall avail itself of the right of removal, it shall lose its local license. The question is whether the company, thus compelled to state that it will comply with the local law, is in substance compelled to contract, as a condition of its admission or continued presence in the state, that it will not exercise its constitutional right of removal, but consent to litigate certain cases only in the state court. Counsel for the state officers urge that the corporation is required to stipulate only that it will comply with certain positive requirements, such as making annual reports, paying license fees when it amends its articles, and keeping out of trusts, pools, or combinations in restraint of trade. It is given the option, it is said, to remove or refrain

from removing. Whether it does one or the other, it is still complying with the Wisconsin law.

The question is whether section 1770f is substantially a command or prohibition to refrain from taking a removal. It is evident that such a stipulation in the ordinary private contract would not be a prohibition, but merely a condition. But contracts such as those here in question are not between citizens or subjects, but between a political superior and a subject—between the state as a local sovereignty and a citizen or subject of another state. The object of such statutes is public policy. The corporation cannot elect whether it will stay out, being practically coerced to come in by threatened loss of contract and property rights. The parties are by no means on equal terms. One is a sovereign, dictating what the subject, in these cases lawfully in the state for some purposes, shall do if it remains therein for other purposes closely related. So when the state enacts that, if the subject does something it has a perfect abstract right to do, it shall be punished, it is thereby substantially prohibited. The federal Penal Code of 1909 (Act March 4, 1909, c. 321, 35 Stat. 1088 [U. S. Comp. St. Supp. 1911, p. 1588]) contains very few express commands. Most of its sections provide that whoever shall do certain acts shall be punished. This is the same as enacting that these are unlawful and prohibited. No one would contend that these were not commands to refrain from those acts. They are prohibitions from a political superior to a subject, enacted for the public welfare. The state says to the telegraph company or coal company:

"You are in the state lawfully for interstate and government business. If, however, you do any other kind of business, you must have a local license. If you remove to a federal court any case, whether in your interstate or local business, brought against you by a citizen of Wisconsin on a cause of action arising therein, your license to do a local business will be revoked. Any contract not in interstate commerce you may thereafter make will be void in your favor but valid against you, and any conveyance of land for local purposes which you may take will not vest any title."

This is a substantial command or prohibition. It is the same as saying, "You shall not remove such a case."

In the *Morse Case*, 20 Wall. 445, 22 L. Ed. 365, there was an express stipulation not to remove actions against the company. But in the *Burnside Case*, 121 U. S. 186, 7 Sup. Ct. 931, 30 L. Ed. 915, 1 Interst. Com. Rep. 295, the prohibition was implied, as it is here. The application of the foreign corporation to be permitted to do business in Iowa was required to contain a stipulation "that said permit shall be subject to each of the provisions" of the foreign corporation statute. A removal to a federal court by the corporation was made a forfeiture of the permit. No application had ever been made by the company to be permitted to do business in the state, and one of its servants was arrested for running an interstate train in Iowa. The court said:

"The locomotive engineer is arrested for acting as such in the employment of the corporation, because it has refused to stipulate that it will not remove into the federal court suits brought against it in the state court, as a condition of obtaining a permit, and consequently has not obtained such permit.
* * * As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the

Constitution and laws of the United States, the statute requiring the permit must be held to be void."

This decision has been many times approved by the Supreme Court and Circuit Courts of Appeals. The citing cases are discussed by Mr. Justice Day in the dissenting opinion in the Prewitt Case, *supra*.

Being unable to distinguish these cases from the Burnside decision, the duty to grant the applications for a preliminary injunction is plain. The case of *Harrison v. San Francisco Co.*, 232 U. S. 318, 34 Sup. Ct. 333, 58 L. Ed. 621, decided since the hearing, seems to strengthen our position.

STOCKWELL v. SUPREME COURT I. O. F.

(District Court, W. D. New York. August 5, 1914.)

INSURANCE (§ 712*)—MUTUAL BENEFIT INSURANCE—ASSESSMENTS—LAW GOVERNING.

Under an act of the Parliament of the Dominion of Canada, authorizing a benefit insurance society, incorporated by an act of such Parliament, to apportion a deficiency in the fund for paying certificates of members, who joined prior to a specified year, among such members, the society was authorized to assess the proportionate share of such deficiency against the holder of a certificate, delivered, and accepted in New York, and constituting a New York contract, especially where the right to alter, amend, or repeal the charter was expressly reserved to Parliament; the act being entitled to the same recognition ordinarily given to the acts of the Legislatures of other states.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 173-175, 293, 1934; Dec. Dig. § 712.*]

At Law. Action by Carrie E. Stockwell against the Supreme Court of Independent Order of Foresters. Judgment for plaintiff for a part only of the amount sued for.

Michael L. Coleman, of Warsaw, N. Y., for plaintiff.

Love & Keating, of Buffalo, N. Y. (Thomas G. Long, of Washington, D. C., and Elliott G. Stevenson, of Detroit, Mich., of counsel), for defendant.

HAZEL, District Judge. This is an action at law on two certificates of membership issued by the defendant, a fraternal beneficiary society, incorporated by an act of Parliament of the Dominion of Canada (St. 52 Victoria, c. 104). By virtue of said certificates dated July 28, 1892, and March 10, 1902, respectively, the plaintiff, the wife of the deceased holder thereof, was to have become entitled to receive as a benefit the amount of \$4,000. The undisputed evidence shows that the decedent joined a branch of the order at Attica, N. Y., and that he was in good standing at the time of his death, except that he had not paid a special assessment of \$780, levied by the defendant upon the first dated certificate and payable October 1, 1913, and which, according to a resolution of the society, became a lien thereon. The question to be decided herein is whether the defendant had the legal right, by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

virtue of an act of Parliament of the Dominion of Canada, to levy a lump sum against the said certificate after its issuance.

An outline of the facts, together with the procedure adopted in increasing the rates and making the levy, follows: The decedent was 36 years of age when he joined the order. He agreed to pay a monthly assessment of \$.84 per \$1,000, the society stipulating that such monthly payments would remain at that figure as long as he remained in good standing. In the year 1908, however, the society amended its constitution, materially increasing its rates to \$1.91 per \$1,000, with the apparent acquiescence or consent of the deceased, who with other members of the class to which he belonged paid the increased rate without demur. In the year 1913 the Dominion Parliament passed an act amending the charter, to become effective upon its acceptance by a two-thirds vote of the Supreme Court of the order. The record shows that at this time there was an anticipated deficiency in the fund for paying certificates of the so-called pre-'99 members, and that such deficiency was due to the low rate paid by such members. Steps were then taken to replenish the depreciated reserve fund, resulting in the amendment of the charter by an act of the Dominion Parliament. By section 4 of the amendatory act it was provided that the valuation deficiency with respect to members joining the society prior to the year 1899 should be apportioned among those members equally, subject, however, to the condition that the amount apportioned against any particular certificate should not be excessive of the reserve proper to that certificate. In accordance with such statutory provision a resolution was adopted by the society which in effect made an assessment against the beneficiary certificate held by the decedent in the sum of \$260 per \$1,000. Said assessment was not paid by the deceased, and now, after his death, the society withholds payment to his beneficiary of the sum of \$780, the full amount of the assessment on his \$3,000 certificate.

I do not doubt that the acts of Parliament, increasing the assessment and amending the charter, were binding on all holders of membership certificates residing in Canada, but whether they are equally binding upon citizens of this state, the place where the contract in question was entered into, is a question not free from difficulty. This certificate was a New York contract, delivered to the decedent and accepted by him within this state. Several adjudications in this state, among which are *Dowdall v. Supreme Council*, 196 N. Y. 405, 89 N. E. 1075, 31 L. R. A. (N. S.) 417, *Wright v. Maccabees*, 196 N. Y. 391, 89 N. E. 1078, 31 L. R. A. (N. S.) 423, 134 Am. St. Rep. 838, and *Green v. Royal Arcanum*, 206 N. Y. 591, 100 N. E. 411, substantially agree that the rates and conditions of payment may be modified in organizations of this description if the certificate contains language sufficiently comprehensive to indicate the reservation of such right. In *Green v. Royal Arcanum*, *supra*, the Court of Appeals of this state substantially decided that a certificate in which a member agrees to conform to the rules and usages of the order in force at the time he becomes a member, or such as may thereafter be adopted, does not expressly empower the society to change the rate or to amend the by-laws without the consent of the holder, nor are his rights under the certificate affected by the passage

after the creation of his membership of a statute of the state of Massachusetts; the state in which the society was incorporated authorizing such change or modification. This decision appears to have been based upon the failure to expressly reserve in the policy the right to change the rates; the general language relating to modification of the rules and by-laws not being deemed sufficiently explicit to include such right.

But in the case at bar it seems to me another point is involved, namely, the right of the creator of a society to amend or repeal its charter. By sections 11 and 12 of the amendatory act of the Dominion Parliament the rights of only those members who had become such before the passage of the act were affected. The right to alter, amend, or repeal the charter of the defendant was expressly reserved to Parliament, but, irrespective of such reservation, I think plenary legislative authority existed in it over all corporations created by it. *Hodge v. The Queen*, Law Reports, 9 App. Cas. 132; *Liquidators of the Maritime Bank of Canada v. Receiver General of New Brunswick*, Law Reports (1892), App. Cas. 437; *Union Colliery Co. v. Bryden*, Law Reports (1899), App. Cas. 580.

The reservation of power in the Legislature is a part of the contractual engagement, and it has frequently been held by the courts of this state and by the federal courts that such reserve power cannot be abridged or limited by members of the corporation. *Barnes v. Arnold*, 45 App. Div. 314, 61 N. Y. Supp. 85; *Id.*, 23 Misc. Rep. 197, 51 N. Y. Supp. 1109; *Gardner v. Hope Ins. Co.*, 9 R. I. 194, 11 Am. Rep. 238; *Bissell v. Heath*, 98 Mich. 472, 57 N. W. 585. No constitutional authority prevented or interfered with the right of Parliament to reserve to itself the power of repealing or modifying the act under which the society was organized, and indeed a general statute expressly reserving to it such power was actually in force at the time of the passage of the amendments in question.

In such a situation *Canada Southern Ry. Company v. Gebhard*, 109 U. S. 527, 3 Sup. Ct. 363, 27 L. Ed. 1020, is thought to be an authority on the effect of the amendment of the charter upon certificate holders who are citizens and residents of this country; and the presumption obtains that the decedent, who of his own volition associated himself with a beneficiary society organized in another country under its laws and limitations, did so with a view thereto, and must therefore be bound by the amendment of the charter and the increase of his assessment.

The Appellate Division for the Fourth Department in a case against this defendant had before it a substantially similar question, and without writing an opinion, tersely held that the right of the defendant to increase its rates is controlled by the laws of Canada, and not by the laws of this state. *Simmelinck v. The Supreme Court of Independent Order of Foresters*, 152 App. Div. 892, 136 N. Y. Supp. 527. Judges Spring and Kruse dissented on the ground that as the society had obtained the privilege of doing business in this state, it must conform to the state laws and statutory provisions, and that to yield to its claim of a right to increase rates would be vesting it with greater authority than is granted to like organizations incorporated here. But I am nevertheless of the opinion that the acts of the Parliament of Canada are enti-

tled to the same recognition as is ordinarily given to the legislation of sister states. The fact that the defendant transacted business in this state under its license is immaterial, for it presumably complied with the restrictions imposed by the state as a condition of so doing.

For the foregoing reasons I hold that the act of the defendant in levying the assessment of 1913 on the first-dated certificate was lawful and binding upon the plaintiff in this action, and the decree for the plaintiff should therefore be for the amount due the plaintiff on both certificates of membership, less the amount of \$780, the said assessment or levy. So ordered.

N. B. The Simmelink Case came on a second time before the Appellate Division, at which time four of the Justices concurred in the previous decision, Judge KRUSE alone dissenting. 147 N. Y. Supp. 1141. Judge SPRING and Judge McLENNAN having died in the interim, Judge LAMBERT and Judge MERRELL, their successors, voted with the majority.

In re NATIONAL BOAT & ENGINE CO.

BUTTERFIELD v. WOODMAN.

(District Court, D. Maine. July 7, 1914.)

No. 271.

1. BANKRUPTCY (§ 11*)—POWERS OF COURT—ADMINISTRATION OF ESTATE.

Under the broad powers conferred by Bankr. Act July 1, 1898, c. 541, § 2 (7), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3421), to cause the estates of bankrupts to be collected, reduced to money, and distributed, and to determine controversies in relation thereto, when property has thus become subject to a court of bankruptcy, jurisdiction exists to pass on questions relating to its disposition, and to determine the extent and character of liens thereon and rights therein, and to that end to bring in and substitute additional parties whenever necessary for a complete determination of the matter in controversy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 11; Dec. Dig. § 11.*]

2. BANKRUPTCY (§ 267*)—SALE OF PROPERTY FREE OF LIENS—PROCEEDINGS FOR DISTRIBUTION OF PROCEEDS.

As a consequence of the power of a court of bankruptcy to order the sale of property of a bankrupt free of liens, it has jurisdiction to determine the validity, extent, and relative priority of liens on the proceeds which stand as a substitute for the property sold, and in proceedings for the distribution of such fund, the trustee should appear and protect the rights of the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 371, 380; Dec. Dig. § 267.*]

3. BANKRUPTCY (§ 338*) — CONTESTED CLAIMS — HEARING BEFORE REFEREE — EVIDENCE.

The testimony of an officer of a bankrupt corporation, taken on his general examination under Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3430), but not directed to any particular issue, is not admissible on the hearing of a contested claim before the referee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 525-527; Dec. Dig. § 338.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. BANKRUPTCY (§ 175*)—VALIDITY OF LIENS—PLEDGE OF BONDS BY CORPORATION FOR INVALID CONSIDERATION.

A corporation executed to claimant a trust deed on its property to secure him against contingent liability on indorsements for the company, and by express agreement such deed was withheld from record for the distinct purpose of avoiding publicity and injury to the credit of the company. Such company was consolidated with others into the bankrupt corporation to which it conveyed its property by warranty deed and bill of sale which did not mention the trust deed. In consideration of its surrender bankrupt transferred in trust for claimant certain of its mortgage bonds. *Held*, that the trust deed was fraudulent and void, and formed no basis for a valid transfer of the bonds.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248; Dec. Dig. § 175.*]

5. BANKRUPTCY (§ 267*)—VALIDITY OF LIEN—PLEDGE OF MORTGAGE BONDS BY CORPORATION.

A pledge of its mortgage bonds by a bankrupt corporation as security for notes given by another corporation, whose property the bankrupt had taken over with an assumption of its indebtedness, *held* valid, and the holder entitled to share in the proceeds of the mortgaged property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 371, 380; Dec. Dig. § 267.*]

In Bankruptcy. In the matter of the National Boat & Engine Company, bankrupt, wherein Walter I. Woodman is trustee. On petition by William W. Butterfield to review decision of referee disallowing claims. Reversed in part.

See, also, 198 Fed. 407.

Wm. D. Washburn, of Chicago, Ill., Wm. Carpenter, of Muskegon, Mich., and Williamson, Burleigh & McLean, of Augusta, Me., for petitioner.

Woodman & Whitehouse, of Portland, Me., for trustee.

HALE, District Judge. This case comes before the court upon the petition of William W. Butterfield to set aside the finding of the referee in bankruptcy, upon the allowance of claims in which the petitioner holds the only beneficial interest. The proofs of debt embrace the following items:

Cross, Vanderwerp, Foote & Ross, as trustees for William W. Butterfield, \$88,000, with 6 per cent. interest coupons.

William W. Butterfield, assignee of National Lumberman's Bank, holding also Astor Trust Company bonds as security, \$12,000, \$10,456.40, with interest.

Mary E. McCracken, holding also \$10,000 Astor Trust Company bonds as security, \$9,000, with interest.

Hackley National Bank, holding also \$10,000 Astor Trust Company bonds as security, \$10,000, with interest.

George Boyce, \$4,000, with interest.

Old National Bank, \$3,000, with interest.

Two general classes of claims are presented by the record. The first class consists of:

(a) The claim appearing in the proof as represented by Cross and others, trustees, amounting to \$88,000.

(b) The claim of Mary E. McCracken upon \$10,000 of bonds of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
216 F.—14

bankrupt company, that of the National Lumberman's Bank upon \$12,000 of such bonds, and of the Hackley National Bank upon \$10,000 of the bonds, making in all a claim of \$32,000 upon said bonds. The first class (consisting of the above two claims) is proved for a pro rata share upon the face value of the bonds and interest, out of the proceeds of the assets covered by the lien of the so-called Astor Trust Company mortgage.

The second class consists of the claim of the petitioner, Mr. Butterfield, by virtue of the assignment of certain notes given Mary E. McCracken, the National Lumberman's Bank, the Hackley National Bank, George Boyce, and the Old National Bank, amounting in all, upon their face, without interest, to \$39,000. This second class of claims is for a dividend out of the general assets of the estate in bankruptcy, upon the total amount of the claims, without interest, after the application thereto of the pro rata share, out of the assets covered by whatever lien is found to exist upon the bonds.

1. At the threshold of the proceedings, however, the petitioner makes the contention that the trustee in bankruptcy is not a proper party in this proceeding, and should not be allowed to appear in court and object to the claims offered for proof; that, inasmuch as, by its terms, the Astor Trust mortgage covers all the property of the bankrupt estate, therefore the trustee in bankruptcy has no interest whatever in any of the issues involved in these proceedings, and has no right to appear in court and object to any of the claims offered for proof, he being a representative of the unsecured creditors only; and, it appearing that all the property of the estate will be insufficient to pay the trust mortgage in full, there can in no event be anything for the general creditors.

The record shows that, although the original Astor Trust Company mortgage purports to cover all the property of the National Boat & Engine Company, a serious controversy arose between the trustee under the mortgage and the trustee in bankruptcy. The question presented, as stated by counsel, was whether the Astor Trust Company mortgage legally covered and included certain of the personal property, by reason of a failure to record the mortgage as to such personal property, and by reason also of inability to show that any of the after-acquired property was purchased with the proceeds of the mortgage, and for certain other reasons. This controversy came before this court; it appearing that the claim of the invalidity of the mortgage had some foundation, the court sustained the ruling of the referee to the effect that the referee had the right, under the circumstances of the case, to order a sale of the property free from the alleged lien of the Astor Trust Company mortgage.

In the course of the trial of the cause, a matter of some significance has been brought to the attention of the court. The trustee was authorized to sell, and did sell, a part of the assets of the National Boat & Engine Company to a certain reorganization committee for the sum of \$250,000; this sale was authorized by the court. The terms of the offer for the purchase of the property are before the court. It appears that a certain portion of the purchase money was paid down,

and that the balance of the purchase price became due and payable upon the final settlement of the estate. On account of such balance, the trustee was authorized to apply any sums due by way of dividends, or otherwise, upon all old bonds, proofs of debt, and claims deposited by the reorganization committee; and if such sums should be insufficient, neither the reorganization committee nor a new company to be formed should become liable for any deficiency; but if the sums realized from the sale or redemption of bonds or dividends, or other disposition of claims against the old company, and the bonds issued by the old company which may have been deposited, should, when added to the cash payments provided for, amount to more than \$250,000, any surplus should be paid by the trustee to the new company, or its successors. It was further provided that, in addition to the payment therein provided, there should also be delivered to the trustee, as security for the payment of the purchase price, 6 per cent. 20-year gold bonds heretofore issued by the bankrupt corporation, amounting at par value to at least \$300,000, of which not more than \$110,000 should be of the class of bonds of the National Boat & Engine Company known as "collateral bonds." These \$300,000 of bonds were delivered to the trustee as collateral security for a part of the purchase price of \$250,000; the trustee became the pledgee of these bonds; the reorganization committee retained an equity in them. It is clear, then, that the bonds were not surrendered to the trustee, or canceled by this action. It is urged that, as holder of these \$300,000 of bonds, the trustee in bankruptcy has a further interest to protect in these proceedings. I am not called upon by anything in the record to pass upon this question. I base my finding on other grounds. I have stated the facts in order to show the attitude of all the parties to the controversy. It was brought to my attention at the hearing that an agreement was entered into between the trustee under the mortgage and the trustee in bankruptcy for a division of the proceeds arising from the sale to the reorganization committee. After hearing the parties, and duly considering the terms of the sale, the court ordered the sale to be made free and clear of any lien under, and by virtue of, the Astor Trust mortgage. The record shows, then, that there was a controversy between the trustee in bankruptcy and the trustee under the mortgage as to the title to property sought to be sold; that by reason of this controversy a sale of the property was ordered, free of lien, and this sale was made.

[1, 2] The broad powers conferred in section 2 (7), of the Bankruptcy Act, authorize a bankruptcy court to cause the estate of a bankrupt to be collected, reduced to money, and distributed, to determine controversies in relation thereto, and to bring in and substitute additional parties whenever necessary for the complete determination of a matter in controversy. When property has thus become subject to a bankruptcy court, jurisdiction exists to pass upon questions relating to the disposition of the property, and to determine the extent and character of liens thereon, or rights therein. *Whitney v. Wenman*, 198 U. S. 539, 552, 25 Sup. Ct. 778, 49 L. Ed. 1157; *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. In pursuance of this general doctrine of the federal courts, it has been repeatedly held

that a fund derived from the sale of property free of liens will stand as a substitute for the property sold, and will be held by the trustee for the benefit of those holding bona fide claims and liens to the extent their respective interests may appear; as a consequence of the power to order a sale free of liens, the court has jurisdiction to determine the extent and validity, and the relative priority of claims of lienholders to the proceeds. The court should also make provision for protection of the rights of the several lien creditors in the fund derived from the sale, in order that such creditors may prosecute their claims to a preference against the fund; and it follows that the trustee in bankruptcy should appear and protect the rights of the estate in proceedings for the distribution of the fund derived from such sale. *Chauncey v. Dyke Bros.*, 119 Fed. 1, 55 C. C. A. 579; *In re Littlefield*, 155 Fed. 838, 84 C. C. A. 72; *Collier on Bankruptcy* (9th Ed.) page 1034, and cases cited; *Woodman on Trustees in Bankruptcy*, page 482, and cases cited. In speaking for the court in the Eighth circuit, in *Chauncey v. Dyke*, *supra*, Judge Thayer said:

"If, in the exercise of its customary jurisdiction, the Bankrupt Court obtained a lawful custody of the res to which the liens related, or of a fund realized from its sale, then the duty which was thereby devolved upon it of distributing the fund among those to whom it rightfully belonged did empower it to determine the relative priorities of the conflicting claims to the fund." The claimant relies on *Dudley v. Easton*, 104 U. S. 99, 26 L. Ed. 668.

In that case the claimants did not come into the Bankruptcy Court, and did not prove their claims; the Supreme Court said that they could not be drawn into court against their will. In the case before me, the claimant has already proved his claim, and presented himself in court, seeking a dividend out of the fund in its custody. The court has control of the fund to which the liens relate, and jurisdiction to distribute it. As a consequence the court must determine the rightful priority of the conflicting claims, and adjudge whether the claimant has a valid claim to a dividend out of the fund. It is the duty of the trustee to appear and protect the fund in the custody of the court.

[3] Before proceeding to consider the merits of the claims in issue, a question as to the admissibility of evidence must be determined. At the hearing before the referee, counsel for claimant offered testimony of one Walter J. Reynolds, former president of the bankrupt company. This testimony was taken on an examination under section 21a of the Bankruptcy Act; it was not taken as a deposition to be used in these proceedings. Upon objection of counsel for trustee, the testimony was excluded by the referee. To this ruling the counsel for claimant object in their petition for review. This examination, taken generally under section 21a of the Bankruptcy Act, was not directed to any defined issue, and was inadmissible in these proceedings. I therefore sustain the ruling of the referee in this regard. *In re Wilcox*, 109 Fed. 628, 48 C. C. A. 567; *In re Alphin & Lake Cotton Co.*, 131 Fed. 824; *Breckons v. Snyder*, 211 Pa. 176, 60 Atl. 575, 15 Am. Bankr. Rep. 112.

[4] 2. The first claim to be considered is that evidenced by \$88,000 of the first mortgage bonds of the National Boat & Engine Company, secured by the Astor Trust mortgage.

The bonds and coupons were filed with the proof and made a part of it. The consideration stated for the deposit and transfer of the \$88,000, at par value, of bonds, is that the National Boat & Engine Company desired to have Butterfield surrender a certain trust deed, dated January 8, 1909, given by the Racine Boat Manufacturing Company to him, to indemnify him against indorsements upon notes amounting to over \$41,000, assumed by the National Boat & Engine Company; that accordingly the National Boat & Engine Company entered into a certain agreement on April 6th with Butterfield to protect him on his indorsement, and deposited with the trustees named 88 of the bonds, of the par value of \$1,000 each, as security for the fulfillment by the National Boat & Engine Company of its agreement with Butterfield. The surrender of the trust deed is named in the proof of this claim as the consideration for the deposit of the bonds. Certain other considerations are now relied upon by the claimant; but no other consideration has been brought to the attention of the court which seems sufficient to sustain the proof. The trustee in bankruptcy contends that the surrender of the trust deed of the Racine Company was no consideration whatever for the deposit of the bonds, because the trust deed was fraudulent in its inception, was voluntarily withheld from record by the consent, and with the connivance of Mr. Butterfield, and that it is void. Butterfield testifies that the vote of the company authorizing the deed was not transcribed, or inscribed in the original record book, and that it was left in loose sheets because it was hoped that the bond issue and preferred stock issue would wipe out the indebtedness, so that it would not be necessary to have any trust deed, and that in case the stock issue was enough to take care of the indebtedness, there would be no need of having any writing made in the books of the company relating to any trust deed.

With regard to the recording of the deed, the following testimony of Mr. Butterfield is before me:

"Q. Mr. Butterfield, was that mortgage deed covering all the real estate and property and business of this Racine Boat Manufacturing Company ever recorded? A. No, sir.

"Q. Why not? A. It was given with that understanding it was not to be recorded except any loss resulted—if I thought the company was on their last legs or about to fail—and then I was to use my own discretion whether to record it then or not.

"Q. And why wasn't it recorded? A. We thought by recording it it would affect the credit of the company.

"Q. In what way, how? A. It would become publicly known, the conditions set forth in that trust deed, which would naturally affect the credit of the company.

"Q. Publicly known to the creditors of the company? A. Creditors and bondholders.

"Q. And you say this was the understanding—the understanding with whom? A. With Mr. Reynolds and the officers of the company, with myself and others interested, Mr. Reynolds, Mr. Ross, and Mr. McCracken.

* * * * *
 "Q. So pursuant to that understanding, it was intentionally not recorded?
 A. Yes.

* * * * *
 "Q. And what was done in not recording was done with the knowledge of all the other directors of the Racine Boat Manufacturing Company? A. Yes, sir."

It appears, then, from Butterfield's testimony that the mortgage deed was intentionally kept from record; that this was done by agreement between him and certain other directors of the company; that it was done simply because, if publicly known to the creditors and bondholders, it would affect the credit of the company; that if it was found the company was "on its last legs and was about to fail," he was then to use his own discretion whether to record the deed or not; that before any option had been obtained upon the properties of the Racine Boat Manufacturing Company, the plan of substituting bonds for the trust deed was talked over between himself and certain other directors; that it was agreed that no mention should be made in the trust deed of the option; that the trust deed was to be exchanged for bonds to be held in escrow to cover the contingent liability for indorsements upon notes of the company; that he allowed the negotiations to go on with that understanding; that the prospectus issued by the promoters of the consolidation of the Racine and other companies with the National Boat & Engine Company contained no reference to the Racine Company trust deed. It appears, also, that neither the deed nor bill of sale by which the property of the Racine Company was transferred to the National Boat & Engine Company contained any reference to the trust deed, and that the deed of the real estate from the Racine to the National was a warranty deed of the property free from all incumbrances.

It is the doctrine of the Supreme Court that where, by collusion of the mortgagor, the mortgagee withholds a mortgage from record for the purpose of giving the mortgagor a fictitious credit, and inducing others to give him credit, and the mortgagor fails and is unable to pay the debts thus contracted, the mortgage is fraudulent at common law. *Blennerhasset v. Sherman*, 105 U. S. 100, 26 L. Ed. 1080. Such a mortgage is held void at common law, whether the motive of the mortgagee be gain to himself, or advantage to the mortgagor. It is held that such a mortgage will not be made valid by the fact that it was supported by a sufficient consideration, and that a deed, not at first fraudulent, may afterwards become so by being concealed, or by not being produced, if thereby creditors are induced to loan money. *Hungerford v. Earl*, 2 Vern. 261; *Clayton v. Exchange Bank*, 121 Fed. 630, 634, 57 C. C. A. 656; *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; *Blennerhasset v. Sherman*, supra, 105 U. S. 100, 26 L. Ed. 1080. In *Sawyer v. Turpin*, 91 U. S. 114, 23 L. Ed. 235, the Supreme Court held that the evidence did not justify the assertion that there was any agreement that the bill of sale should not be recorded, or that possession should not be taken under it. Wherever such agreement is shown, the Supreme Court has held it sufficient to render a deed void at common law. In the *Perkins Case* (D. C.) 155 Fed. 237, this court held from the facts disclosed that the nonrecording of a "conditional sales contract" was not a mere matter of omission, but was in pursuance of a distinct plan that there should be no record; and the court held the sale invalid. In the *Shaw Case* (D. C.) 146 Fed. 273, this court held a mortgage void for the reason that it was fraudulently withheld from record; there being a distinct and affirmative understanding that the mortgage was not to be recorded. Certain statutes and decisions

of Michigan are cited by claimant, and it is true that local laws are controlling in many transactions in bankruptcy. *Taney v. Penn. Bank*, 232 U. S. 174, 180, 34 Sup. Ct. 288, 58 L. Ed. 558; *Humphrey v. Tatman*, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956. But no Michigan law is brought to my attention in this case which overrides or varies the plain provisions of the Bankruptcy Law.

In *Fourth Nat. Bank v. Willingham*, 213 Fed. 219, just decided by the Circuit Court of Appeals for the Fifth Circuit, the court sustained the contention of the trustee in bankruptcy that a certain mortgage was "withheld from record to bolster the credit of the mortgagor," and held that the mortgage was fraudulent and void because of the agreement between the parties that it should be withheld from record for such purpose. The court affirmed the decision of the court below on the authority of *Clayton v. Exchange Bank*, 121 Fed. 630, 57 C. C. A. 656, and of *The Duggan Case*, 183 Fed. 405, 106 C. C. A. 51. In both the cases last cited, the agreement to withhold the mortgage from record was only a tacit agreement.

In the case at bar, this agreement was distinct, open, and unquestioned. It is brought before the court by the testimony of the claimant. The case shows an intentional nonrecording of the trust deed for the distinct purpose of avoiding publicity, and to avoid injury to the credit of the company. The deed of the Racine Company to the National Company contained a warranty against all incumbrances, and made no mention of the existence of the Racine mortgage. The whole testimony shows a secret scheme and conspiracy to substitute bonds for the trust deed; that the conspiracy was entered into between the claimant, Butterfield, and certain other directors, with the evident purpose of concealing its existence from other members of the board of directors of the National Boat & Engine Company. I am forced to the conclusion that the trust deed of the Racine Company was fraudulent and void, and forms no basis for a valid transfer of the \$88,000 par value of the bonds. The learned counsel for claimant contends that, outside the surrender of the trust deed, there was other consideration for the deposit of the \$88,000 of bonds. He urges that there was an agreement by the claimant to renew his indorsements, and that there were further considerations. I find that under the circumstances of the case there was no other good and sufficient consideration for the transfer of the bonds, which would make such transfer valid as against the trustee in bankruptcy. And I further find that the transfer of the \$88,000 of bonds was invalid as against said trustee, for the reason that the same was a preference voidable by the trustee, both under the general principles of equity and the express provisions of section 60b of the Bankruptcy Act, as amended.

[5] 3. I proceed now to consider the assigned claims of Mary E. McCracken and others upon \$32,000 of the bonds of the National Boat & Engine Company, for a dividend out of the proceeds of the assets covered by the lien of the Astor Trust Company mortgage. Mary E. McCracken, the National Lumberman's Bank, and the Hackley National Bank were creditors of the Racine Boat Manufacturing Company, having total claims of \$29,456, namely, Mrs. McCracken for the

sum of \$9,000, the National Lumberman's Bank for \$10,456, and the Hackley National Bank for \$10,000. They represent money loaned by them to the Racine Company upon notes which have not been paid. In order to secure them, the officers of the National Boat & Engine Company gave to these creditors bonds amounting in all to \$32,000 secured by the Astor Trust Company mortgage, and in consequence of this these creditors allowed their indebtedness to continue when its payment might have been demanded. The transfer of the bonds now in question does not depend upon the same state of facts as that of the transfer of the \$88,000 of the bonds of the National Boat & Engine Company. It does not relate to the Racine trust mortgage, or to matters discussed in passing upon the first claim.

There is a stipulation that these bonds for \$32,000 were delivered by the officers of the National Boat & Engine Company as collateral security for the debts of Mrs. McCracken and the two banks. The trustee contends that the transfer of these bonds was without consideration; that they were deposited with the banks and with Mrs. McCracken as additional security on antecedent debts, namely, upon the original notes on which Butterfield was liable as indorser; that they were deposited, not for the purpose of furnishing additional capital to the company, or to assist in the purchase of manufacturing products; that their transfer was without authority, and in fraud of the rights of stockholders.

The proofs show that the bonds were delivered to creditors of the Racine Boat Manufacturing Company more than six months before the bankruptcy of the National Boat & Engine Company, in order to give security to those creditors. If the physical possession of the pledge had been left with the debtor, the burden of proof would have been upon the trustee in bankruptcy. *Barr v. Reitz*, 53 Pa. 256; *Taney v. Penn. Bank*, 232 U. S. 174, 181, 34 Sup. Ct. 288, 58 L. Ed. 558. But here the transaction was completed. The creditors have not received the protection from the bonds to which they are entitled. No action is shown in behalf of the National Boat & Engine Company to limit its obligations in so transferring bonds for the protection of the creditors of the old company, whose property had been absorbed by the National Boat & Engine Company. I think Mary E. McCracken, the National Lumberman's Bank, and the Hackley National Bank are entitled to the security of the \$32,000 of bonds of the National Boat & Engine Company. The testimony fails to satisfy me that the pledging of the bonds was for any fraudulent purpose. I sustain the claim of the petitioner. I give him the benefit of the security of these bonds to a dividend out of the proceeds of the assets covered by the lien of the Astor Trust Company mortgage.

In reference to the two claims which I have so far considered, I sustain the finding of the referee in disallowing the claim for the proceeds of the \$88,000 evidenced by the first mortgage bonds of the bankrupt company. I reverse the decision of the referee in disallowing the claim of Mary E. McCracken and others upon the \$32,000 of bonds of the National Boat & Engine Company, and hold that this claim may be allowed for a dividend out of the proceeds of the assets covered by the lien of the Astor trust mortgage.

4. The referee has passed upon certain preferences alleged to have been made against the provisions of the Bankruptcy Act, and in violation of the general principles of equity. Some of the contentions as to preferences under general equity principles prior to the four months' period have been withdrawn by counsel for trustee, leaving only the following alleged preferences to be considered by me:

First. The sum of \$1,543.50, paid to the Lumberman's National Bank on June 26, 1911, within four months prior to the filing of the petition in bankruptcy, upon a note on which Butterfield was liable as indorser, and thereby benefited.

Second. The payment of the sum of \$1,000 to the Old National Bank, within the four months' period, upon a note which had been guaranteed in writing by the claimant Butterfield, and who was thus benefited thereby.

Third. The payment of the sum of \$1,000 by the bankrupt directly to the claimant Butterfield, in May or June, 1911, and within the four months' period, to reimburse the claimant for a prior loan of that sum to defray the pay roll of the company.

The determination of whether or not the above payments constitute preferences under the Bankruptcy Act becomes material to the issues here involved; since it is claimed by the learned counsel for trustee that, if these payments are found to constitute preferences under section 60b of the Bankruptcy Act, this would constitute a ground for refusing to allow any claim which might otherwise be allowed, until such preferences shall have been surrendered by the claimant.

Upon examination of the evidence, I find that the above payments were voidable preferences under section 60b of the Bankruptcy Act. I sustain the ruling of the referee as to the same.

In reference to the question of not allowing any of the claims in question, we are met by section 57g of the Bankruptcy Act:

"The claims of creditors who have received preferences, voidable under section sixty, subdivision 'b,' or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision 'e,' have been made or given, shall not be allowed unless such creditor shall surrender such preferences, conveyances, transfers, assignments, or incumbrances."

In relation to this section, it is clear that, as the law now stands, no claim is allowable where the claimant has received any advantage over his co-claimants by means of a preference which is voidable under section 60b, or by means of a conveyance, transfer, assignment, or incumbrance which is void or voidable under section 67e. Collier on Bankruptcy (9th Ed.) page 731; *Stevens v. Nave-McCord Mercantile Co.*, 150 Fed. 71, 80 C. C. A. 25. Having this provision of law in mind, I order that the claims of Mary E. McCracken, the National Lumberman's Bank, and the Hackley National Bank, in which the claimant Butterfield has the only beneficial interest, shall finally have the benefit of the \$32,000 of the bonds of the National Boat & Engine Company, in pursuance of what I have already said in this opinion; but, according to the law which I have just cited, these claims, either upon the \$32,000 bonds deposited as collateral, or upon the original notes,

cannot be allowed until the amount of said preferential payments above found, namely, one payment of \$1,543.50 and two payments of \$1,000 each, with interest on said sums from the date of the decree of this court in these proceedings, shall have been surrendered by the claimant to the trustee in bankruptcy. The claimant Butterfield, then, cannot receive the benefit from the \$32,000 bonds until he shall have surrendered these preferences.

The claims of Mary E. McCracken, National Lumberman's Bank, and Hackley National Bank, upon the original notes offered for proof and assigned to Butterfield for which the \$32,000 par value of bonds are held as security, and also the claims of George Boyce and of the Old National Bank upon the original notes assigned by them to Butterfield and offered for proof, on which no bonds were held as security, are valid claims which should otherwise be allowed, but in face of the provisions of section 57g of the Bankruptcy Act are not allowable at the present time, and cannot be allowed until such preferential payments shall have been surrendered, as I have pointed out in this opinion.

The claimant recovers costs. Let a decree consistent with this opinion be presented in court on or before September 19, 1914; corrections to be presented not later than September 26, 1914; decree to be settled September 29, 1914.

In re RIVKIN et al.

(District Court, D. Connecticut. August 5, 1914.)

No. 3330.

1. BANKRUPTCY (§ 381*)—COMPOSITION—OBJECTIONS—SPECIFICATION—BURDEN OF PROOF.

The burden of sustaining specifications of objection to the confirmation of an offer of composition rests on the objecting creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 591; Dec. Dig. § 381.*]

2. BANKRUPTCY (§ 381*)—COMPOSITION—CONFIRMATION—OBJECTIONS—CONCEALMENT OR DESTRUCTION OF BOOKS.

Evidence that books of account of the bankrupts' prior manufacturing business which they terminated in October, 1912, were lost, destroyed, or concealed was insufficient to sustain a specification of objection to an offer of composition that the bankrupts had concealed or destroyed the books of such business "with intent to conceal their true financial condition."

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 591; Dec. Dig. § 381.*]

3. EVIDENCE (§ 584*)—WEIGHT AND CONCLUSIVENESS—QUESTIONS OF FACT.

No trier of a question of fact is permitted to guess with the hope that his determination is correct, but facts must be found on evidence to support them, and suspicions, however strong, cannot be substituted therefor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2424, 2426, 2427; Dec. Dig. § 584.*]

4. BANKRUPTCY (§ 384*)—COMPOSITION—CONFIRMATION—OBJECTIONS—PREFERENTIAL PAYMENTS.

Preferential payments by the bankrupts to bona fide creditors, are not ground for refusing confirmation of a composition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 590-592; Dec. Dig. § 384.*]

5. BANKRUPTCY (§ 382*)—COMPOSITION—CONFIRMATION—PERJURY.

A finding by a special master that he was unable to report that he was satisfied that the bankrupt had not been guilty of knowingly and fraudulently making false oath in the bankruptcy proceedings, was insufficient to sustain objections to an offer of composition on the theory that the bankrupt had committed perjury when testifying concerning the loss of books of a prior manufacturing business in which they had engaged, since to sustain such objection it was essential that the master find that perjury had been in fact committed, and that the specification charging perjury should set out the testimony given, claimed to be false, together with the facts relied on to show its falsity, so as to present a specific issue.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 592; Dec. Dig. § 382.*]

6. BANKRUPTCY (§ 381*)—COMPOSITION—OBJECTIONS—PERJURY—WAIVER.

Where an objection to a composition offered by the bankrupt insufficiently charged perjury committed by the bankrupts in the proceedings, the fact that the bankrupts waived the legal insufficiency of the specification by not taking a timely objection thereto did not cure a failure of the objecting creditors to prove the specification by legally sufficient evidence.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 591; Dec. Dig. § 381.*]

7. BANKRUPTCY (§ 381*)—COMPOSITION—CONFIRMATION—OBJECTIONS.

Creditors, irrespective of the number or amount of their claims, may successfully oppose a confirmation of a composition, when they, under sufficient specifications, present adequate proof to establish a violation of one or more of the provisions of the bankruptcy act, which is made a sufficient reason to deny confirmation of a proposed composition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 591; Dec. Dig. § 381.*]

In Bankruptcy. In the matter of Maurice S. Rivkin and another, copartners as Rivkin Bros., bankrupts. On exceptions to a report of a special master denying the bankrupts' petition for confirmation of a composition. Exceptions sustained, report disapproved, and offer of composition confirmed.

Alvan Waldo Hyde, of Hartford, Conn., for Union Oil Co., creditor.

Henry H. Hunt, of Hartford, Conn., for C. W. Baker & Sons, creditor.

Benjamin Slade, of New Haven, Conn., for bankrupts.

THOMAS, District Judge. In this proceeding the bankrupts, by exceptions, challenge the legal sufficiency and force of an unfavorable report made by George A. Kellogg, Esq., as special master, to whom was referred bankrupts' petition for confirmation of a composition in bankruptcy. The record shows that the bankrupts' total obligations are approximately \$58,000, which aggregate amount is represented by a large number of creditors. Two only have filed specifications in opposition to a confirmation of the composition. The amount of these two

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

claims is \$2,470.80, leaving over \$55,500 of claims allowed, of which a very large majority in number and amount voted in favor of the composition offer, and the rest of the creditors made no opposition. The objecting creditors filed eight (8) specifications in opposition to the composition offer. The learned master struck out specifications 1, 3, 6, and 8 as insufficient, and received evidence pertaining to specifications 2, 4, 5, and 7.

Specification No. 2 alleged that the offer of composition was not for the best interest of creditors. As to this claim the master found as follows:

"Although much evidence was presented to me by the objecting creditors upon this issue in view of which it seems probable to me that the trustee may realize in the usual course of administration of this estate upwards of \$20,000, nevertheless they have not sustained the burden of proof by evidence so clear and convincing that I feel justified in overruling the business judgment of the great majority of creditors. I, therefore, decline to find that the confirmation of composition is not for the best interest of creditors."

This leaves for the court's consideration the allegations contained in the fourth, fifth, and seventh specifications, which are as follows:

"(4) Because said bankrupts, with intent to conceal their true financial condition and in contemplation of bankruptcy, concealed or destroyed certain books of account and records from which such financial condition could be ascertained, to wit, all books, papers, memoranda and records whatsoever pertaining to their business as conducted prior to October 1, 1912.

"(5) Because said bankrupts, at a time subsequent to the first day of the four months immediately preceding the filing of their petition in bankruptcy, transferred, removed, destroyed, and concealed or permitted to be removed, destroyed, and concealed, certain of their property, as per Schedule B, attached hereto, with intent to hinder, delay, and defraud their creditors."

Schedule B contains a list of claims "paid within four months prior to filing petition upon existing indebtedness" and amounting to \$24,128.86 and for "goods claimed to have been sold for less than the market price, within four months prior to filing petition," amounting to \$11,527.27.

"(7) Because the said Maurice S. Rivkin, during his examination before the referee in bankruptcy and before the United States District Court in his examination relative to the books and records mentioned and designated in paragraph 4, committed perjury in that he stated under oath that he had destroyed said books, and denied and disclaimed any knowledge of the existence or whereabouts of said books at any time subsequent to October 1, 1912, and whereas in truth and in fact the said Maurice S. Rivkin knew of said books and records, the persons concealing the same and all facts relating thereto."

Before taking up the legal questions involved the following facts taken from the master's report are of importance. He finds from the evidence before him as follows:

"The brothers, Maurice S. Rivkin and Nathan F. Rivkin, have been doing business as partners in the city of Hartford for many years. Prior to July, 1911, they were for some time engaged in the grocery business. About that date they began the manufacture of ladies' dry goods in a building on Market street in said city of Hartford, and gradually closed out the grocery line. The manufacturing enterprise was unsuccessful, and after heavy losses they closed it out in September, 1912, and about October 1, 1912, began a wholesale grocery business, comprising both American and foreign goods, in the building owned by them and known as Nos. 219-221 State street in said Hart-

ford. From October, 1912, this business steadily increased in volume for more than a year, amounting in gross sales to over \$100,000. They had, however, contracted large indebtedness which they could not meet, and on January 7, 1914, creditors attached their property and closed their store. Five days later the Italian Importing Company of New York and other creditors filed an involuntary petition against Rivkin Bros., and shortly thereafter W. K. Butler was appointed temporary receiver of their estate. On January 26th order of adjudication was entered, and January 27th the case was referred to me as referee for administration in the usual course. On the same day attorneys for bankrupts filed bankrupt's schedules, purporting to show complete lists of their assets and liabilities, which schedules showed unincumbered assets amounting on their face to about \$18,000, and unsecured debts aggregating about \$58,000."

Briefly, the master assigns three reasons in his report why he refused to act favorably on the bankrupts' offer of composition, viz.: (1) That bankrupts have concealed or destroyed or failed to keep books of their former manufacturing business, conducted prior to October, 1912, with intent to conceal their true financial condition. (2) That bankrupts made preferential payments to certain of their creditors. (3) That:

"I am therefore unable to report that I am satisfied that bankrupt has not been guilty of knowingly and fraudulently making false oath in the proceedings in this court."

[1] These three grounds will be discussed in their order. The burden of sustaining these specifications rested on the objecting creditors. As to the first claim the special master finds that the bankrupts either destroyed or concealed or failed to keep, books of their former manufacturing business, and that they did this with the intent of concealing their financial condition. I have very carefully examined the evidence taken by the referee and special master, and I fail to find that any proof exists justifying this finding. The creditors have not offered any evidence to substantiate this claim, except the testimony of one of the bankrupts, and that testimony does not, in my opinion, warrant the finding. In arriving at this conclusion I have applied the rule that the special master was privileged to draw all legitimate inferences from established facts, but the evidence fails to disclose the proved existence of facts from which a trier, by inference, could conclude that the bankrupts either failed to keep, or destroyed or concealed, the books of their former manufacturing business *with intent to conceal their true financial condition*, as alleged in the specifications.

[2] From the testimony of Maurice Rivkin the most that a trier could find was that the books were lost or destroyed or concealed, but from no part of the testimony, or from an examination of the whole record, am I able to find, as a fact, by testimony or by fair inference, that this was done with intent to conceal the true financial condition of Rivkin Bros. It must be remembered that whatever happened to the books, either by acts of omission or commission, occurred prior to October, 1912. Bankruptcy proceedings did not begin until early in January, 1914. Only by the merest guess can a trier find that such act was then done with intent to conceal their true financial condition.

My conclusion in this respect finds further support in the special master's uncertain finding that:

"They have destroyed or concealed, or failed to keep, books of their manufacturing business."

If from all the evidence such facts are found even in the alternative, there is nothing in the whole record from which a trier could reasonably or fairly draw the inference that such destruction or concealment of, or failure to keep, books was done with the intent to conceal the true financial condition of the bankrupts. Further, better and more satisfactory evidence, it seems to me, would be very necessary to fairly establish the fact that whatever was or was not done with reference to the books prior to October, 1912, was done to conceal the true financial conditions of these bankrupts in January, 1914.

[3] No trier of a question of fact is permitted to venture a guess with the hope that it is correct. Facts can only be found upon evidence, and suspicions, however strong, cannot be substituted therefor. This is the universal rule, and the only safe rule under which justice can fairly be administered. Hence I find that the objecting creditors have not sustained the burden of proof with reference to this specification, and that the offer of compromise should not be rejected on this ground.

[4] While it may be true that the special master's finding with reference to preferential payments shows a violation of the spirit of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), yet Congress did not provide that such preferential payments shall constitute sufficient ground to reject a composition offer. I am firmly of the opinion that the learned master misapprehended the doctrine laid down in *Van Iderstine v. National Discount Co.*, 174 Fed. 518, 98 C. C. A. 300, which he cites as his authority to sustain his conclusions that a preferential payment constitutes a sufficient ground in opposition, or that such preferential payment is a fraudulent conveyance to hinder, delay, or defraud creditors within the meaning of the Bankruptcy Act as a ground in opposition to confirm an offer of composition. Quoting more fully than the special master did from the opinion of Judge Noyes in the case above referred to, and from a careful reading of all of that part of the case pertinent to the present inquiry, one is thereby enabled to comprehend the full scope of that decision, and to more accurately apply the principle of law therein laid down. The court said, 174 Fed., page 521, 98 C. C. A., page 303:

"So far as Fellerman was concerned, the payments made with the money obtained from the defendant were undoubtedly preferences. The money might have been recovered if the creditors had had reasonable cause to believe that preferences were intended. But there is no evidence that the payments were fraudulent. *There is a marked distinction between a 'preferential payment' and a 'fraudulent conveyance.'* Every preferential payment must, to some extent, hinder and delay creditors, but it is not necessarily a fraudulent conveyance."

There is a distinction between a "preferential payment" and a "fraudulent conveyance" for the Circuit Court in the same case, on page 523 of 174 Fed., on page 305 of 98 C. C. A., said:

"The defendant undoubtedly took advantage of Fellerman's apparent necessities. But there was nothing in these necessities necessarily indicative of an

intention to defraud—certainly nothing showing an intent to make a 'fraudulent conveyance' as distinguished from a 'preference.'"

See, also, *Coder v. Arts*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008.

From Schedule B, above quoted, and as contained in the objecting creditors' specifications, it is admitted by counsel for the objecting creditors that these payments were made upon "existing indebtedness." This, I believe, negatives the claim that such a transfer was a "fraudulent conveyance," made with intent to hinder and delay creditors within the doctrine of *Van Iderstine v. National Discount Co.*, 174 Fed. 518, 98 C. C. A. 300, so that I am forced to the conclusion that the special master's finding in this respect should not be approved, and that the bankrupts' offer of composition should not be denied on this ground. See, also, *In re Brumbaugh* (D. C.) 128 Fed. 971; *In re Maher et al.* (D. C.) 144 Fed. 503, also cited by the Supreme Court in *Coder v. Arts*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, *supra*.

[5] Under the last reason assigned for rejecting the offer of composition and set out at length in specification (7) *supra*, the special master reports as follows:

"I am therefore unable to report that I am satisfied that bankrupt has not been guilty of knowingly and fraudulently making false oath in the proceedings in this court."

In other words, the master finds the allegations contained in the seventh specification established, and refuses to approve the offer of compromise on the ground that one of the bankrupts, Maurice Rivkin, committed perjury when testifying concerning the books of the manufacturing concern which suspended business about September, 1912.

The special master probably intended to find that one of the bankrupts testified falsely before him, but the record and evidence does not warrant the court in sustaining his finding. Perjury is an offense punishable by imprisonment, and when it is relied upon, as here, it should be charged with substantially the same particularity and exactness as would be required in an indictment. *In re Hirsch* (D. C.) 96 Fed. 468.

The specification charging perjury does not set forth the testimony given which is alleged to be false, together with the facts relied on to prove its falsity so as to present a specific issue, and under the law such allegations are necessary. *In re Goodale et al.* (D. C.) 109 Fed. 783.

The specification charging perjury should have alleged that the testimony of Maurice Rivkin was given, willfully, knowingly, and fraudulently, and with reference to a material question, in order that the person so testifying might have the benefit which the law gives him of compelling the objecting creditors to prove the essential legal elements necessary to constitute perjury. This was not done. Hence the specification is insufficient. *In re Eaton* (D. C.) 110 Fed. 731; *In re Beebe* (D. C.) 116 Fed. 48; *In re Cohen et al.* (D. C.) 149 Fed. 908.

[6] The special master, therefore, should have held the specification charging perjury upon the part of one of the bankrupts, Maurice S. Rivkin, as insufficient. No explanation or reason is given by the special master in his report why he properly passed upon the legal in-

sufficiency of specifications 1, 3, 6, and 8 and failed to pass upon the legal insufficiency of the one charging perjury; hence I conclude that it was because of his belief that the allegations were sufficient, but under the federal decisions, numerous and consistent, I am bound to overrule the special master and hold that the charge as set out in specification (7) is legally insufficient. The learned attorneys for the objecting creditors contend that the bankrupts waived the legal insufficiency of this specification by not making a timely objection. In this contention I cannot agree, for even so, it does not cure the evil disclosed that there was no legal proof warranting inferentially or directly the finding that perjury was committed. It is said in *Re Hendrick* (D. C.) 138 Fed. 473, 14 Am. Bankr. Rep. 796:

"The specifications of objections required proof, and, until a sufficient quantity of proof had been presented to the master, no valid objection to a discharge existed, and no testimony should have been heard, except such as had for a foundation a valid specification of objection. The creditors were acting at their own risk when they filed their objections. If they were not sufficiently specific, the master's only duty was to report back to me that nothing had been filed with him in the way of objections which he thought required him to take testimony."

The master's report does not disclose that his mind was satisfied by a sufficient degree of proof that perjury was committed. The report says:

"I am therefore unable to report that I am satisfied that bankrupt has not been guilty of knowingly and fraudulently making false oath in the proceedings in this court."

This is far from the requirements that the law exacts that the finding should show that the trier was reasonably certain that perjury was committed. Giving the quoted language employed by the special master its normal significance, he inferentially says that, "I suspect that the bankrupt did not testify truthfully." Again, I deem it proper to say that the law does not permit us to indulge in guesswork, or to find facts on suspicion. To charge a person with perjury, be he bankrupt or any other person, is charging a serious offense and should be charged in proper form, whether in an indictment or in specifications of objections, in order that the person so charged may have the full benefit of the law's protection. I am unwilling to sustain the master's finding in this respect, as I cannot find that the rules of law will permit me to do so.

Counsel for the objecting creditors argue that bankrupts' exceptions to the master's report are too general, and for that reason claim that the court should ignore them and sustain the master's report. The exceptions, when read in their entirety, point out the claimed errors committed by the master, and I have given them proper effect, and therefore must and do find them sufficient.

[7] The court is mindful of the rights of objecting creditors, irrespective of the number or amount of their claims, to successfully oppose a confirmation of a composition when such objecting creditors, under specifications sufficient in law, present adequate proof and meet the requirements of the rules of law and of evidence, and thus estab-

lish a violation of some one or more of the provisions of the Bankruptcy Act which is made a reason sufficient to deny a confirmation of any proposed composition.

From the admitted facts it appears that it is for the best interests of the creditors that the offer of composition of 22 per cent. be confirmed. I am not satisfied from the evidence that the objecting creditors have properly met the rules of law and of evidence and established the fact that the bankrupts have been guilty of any of the acts, or failed to perform any of the duties which would bar them from a discharge. I also find that the offer and acceptance are made in good faith and have not been procured by any means, promise, or acts prohibited by the Bankruptcy Act.

The special master's report is therefore disapproved and his finding is set aside.

Let an order be entered confirming the offer of composition of 22 per cent. and directing the custodian of the fund to distribute the same under the supervision of the referee according to law.

MERCANTILE TRUST CO. et al. v. TEXAS & P. RY. CO. et al.

(Circuit Court, E. D. Louisiana. December 15, 1908.)

No. 13,610.

1. COMMERCE (§ 3*)—ORGANIZATION—FEDERAL CORPORATION—ACT OF CONGRESS.

Under its power to regulate commerce, establish post roads, and provide such facilities as it may deem proper, and as military exigencies, when they arise, may require for the transportation of troops and munitions of war, Congress has power to charter a corporation to build and operate a railroad whereon interstate commerce may be conducted, and the mail, troops, and munitions of war may be transported, and for this purpose it is proper that such corporations be authorized to conduct the general business of a common carrier for its own purposes, in addition to serving the government.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 3; Dec. Dig. § 3.*]

2. COMMERCE (§ 46*)—FEDERAL CORPORATIONS—EXCLUSION FROM STATES.

Congress having incorporated an interstate railroad company to engage as a common carrier in interstate commerce, and also to serve the government by the transportation of mails, troops, and munitions of war, the states through which the railroad was located had no power to announce conditions for the noncompliance with which the corporation would be excluded from doing business in the state, and hence Const. La., as amended (see Act No. 10 of Ex. Sess. 1907), providing that any federal, foreign, or nonresident corporation which should institute any suit, or action in, or remove the same to, any federal court within the state should be prohibited and denied the right to operate, conduct, or do any business within the state, and that thereafter any contract, agreement, engagement, or undertaking with or by such corporations should be null and void, was invalid as to such railroad company.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 100, 113, 126; Dec. Dig. § 46.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
216 F.—15

3. CONSTITUTIONAL LAW (§ 303*)—DUE PROCESS OF LAW—DRASTIC AND INORDINATE PUNISHMENTS.

Const. La., as amended (see Act No. 10 of Ex. Sess. 1907), provides that any foreign, federal, or nonresident corporation doing business within the state which should institute any suit or action in any other court or courts than those created and organized under the Constitution and laws of the state, or which should remove any suit to any other court or courts than those created under such laws, should be barred of the right to conduct any business within the state, and thereafter all contracts by or with such corporations should be void; also that any person acting as agent, servant, or officer of such corporation, who should make, or attempt to make, any contract for, with, by, or for its benefit after it had violated such provision, should be guilty of a misdemeanor, and on conviction should be fined not less than \$100 nor more than \$1000, and might also be imprisoned with or without hard labor, for not more than 12 months, or both at the discretion of the court. *Held*, that the penalties for disobeying such provision were so extreme that foreign corporations would generally be deterred from litigating the question of the right of the state to enact such amendment, and, as to a federal railroad company operating within the state, it was violative of the fourteenth amendment of the federal Constitution, as depriving the company of its property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 863-866; Dec. Dig. § 303.*]

In Equity. Suit by the Mercantile Trust Company and others against the Texas & Pacific Railway Company and others. Bill dismissed.

Alexander & Green, of New York City, and Foster, Milling & Godchaux, of New Orleans, La., for complainants.

Howe, Fenner, Spencer & Cocke, of New Orleans, La., for defendants.

SAUNDERS, District Judge. I. On October 23, 1907, Hon. Newton C. Blanchard, then Governor of the state of Louisiana, issued his proclamation, convening the General Assembly of the state of Louisiana in extraordinary session, to be held from November 11, 1907, to December 10, 1907, in order to consider and take action on particular matters specified in the proclamation. Soon thereafter Gov. Blanchard went out of the state of Louisiana, and, during his absence, Hon. J. Y. Sanders, then Lieutenant Governor of the state, and, as such, exercising the powers and functions of the Governor during the absence of the latter, issued his proclamation, wherein he designated other and additional matters to be acted upon by the General Assembly in the extraordinary session convened by Gov. Blanchard. In his proclamation, Lieut. Gov. Sanders, after reciting the calling of the extraordinary session by Gov. Blanchard, the absence of the Governor from the state, and the fact that he, Lieut. Gov. Sanders, exercised the powers and duties of the Governor during his absence, went on to declare:

"Therefore, I, Jared Y. Sanders, Lieutenant Governor and Acting Governor of the State of Louisiana, do hereby, by virtue of the authority in me vested by the Constitution and laws of the state of Louisiana, issue this, my procla-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mation, designating the following as additional objects to be considered in said extraordinary session, as follows, to wit: * * *

"2. To provide that any foreign or federal corporation doing business in the state of Louisiana which shall institute any suit or any action at law or in equity against the state of Louisiana, or any of its political subdivisions, or against any citizen of this state, in any other than a court organized and constituted under the laws of this state; or who being sued by the state, or by any of its political subdivisions, or by any citizen of this state, shall remove or petition to remove such suit into a federal court, shall be debarred and prevented from doing or conducting any business in this state."

The General Assembly convened pursuant to the above proclamation of Gov. Blanchard, at its extraordinary session, on November 25, 1907, passed an act No. 10 proposing to amend the Constitution of Louisiana by adopting, as a portion of that instrument, the following amendment:

"Any foreign, federal or nonresident corporation, operating, conducting or doing business in this state which shall institute any suit or action at law or in equity against the state of Louisiana, or any of its political subdivisions, or any of its public officers, or against any corporation or citizen of this state, in any other court or courts than such as may be created and organized under the Constitution and laws of this state, or which when sued by the state or any of its political subdivisions, or any of its public officers, or any corporation or citizen of this state, shall remove, or petition, or move to remove said suit to any other court than a court created and organized under the laws of this state, shall by this fact alone be debarred, prohibited and denied the right to operate, conduct, or do any business within this state and thereafter any contract, or agreement, engagement or undertaking with, or by, or to said corporation shall be utterly null and void.

"Any foreign, federal or nonresident corporation, or any person acting as agent, servant or officer of such corporation who shall make or attempt to make any contract, agreement, undertaking or engagement for, with, by or in the name of, for the use and benefit of such corporation, after the said corporation shall have violated any of the provisions of the foregoing paragraph, shall be guilty of a misdemeanor, and on conviction shall be fined not less than one hundred dollars, nor more than one thousand dollars, and may also be imprisoned with or without hard labor for not more than twelve months, or both, at the discretion of the court; provided, that it is not intended hereby to interfere with or prohibit the transaction of interstate business authorized under the laws and Constitution of the United States."

The proposed amendment was voted on and adopted by the vote of the people, on April 21, 1908.

II. The Texas & Pacific Railway Company is a corporation created by and existing under and by virtue of the laws of the United States of America, to wit, an act of Congress, approved March 3, 1871 (Act March 3, 1871, c. 122, 16 Stat. 573) and acts of Congress amendatory thereof and supplemental thereto. It owns and operates a line of railroad extending from the city of New Orleans, in the state of Louisiana, through the states of Louisiana and Texas to El Paso, in the state of Texas, together with several branch lines connected therewith in the states of Louisiana and Texas and Arkansas. The Texas & Pacific Railway is declared, by the act of March 3, 1871, creating it, to be a military and post road and organized for the purpose of insuring the carrying of the mails, troops, munitions of war, supplies, and stores of the United States. It has either constructed or acquired, in the state of Louisiana, 347 miles of main line railroad, and about 363

miles of branch line railroads, at a cost of many millions of dollars, and this property has been continuously used since its construction or acquisition for the purposes of interstate, foreign, and intrastate commerce in the transportation of persons and merchandise between points in the state of Louisiana and points in other states of the United States, and foreign countries, and in the transportation of the military forces, supplies, and mails of the United States. Said railway company has been, for many years past, and is now, under contract with the United States government for the transportation of mails and postal matter of the United States between all points on its line, and is constantly engaged in the transportation, for the United States government, of supplies and munitions and men in the service of the United States between points wholly within the state of Louisiana.

III. On June 29, 1875, by act before J. G. Eustis, notary public, the New Orleans Pacific Railway Company was organized, under the general incorporation laws of the state of Louisiana, for the purpose of constructing a railroad from New Orleans, La., to Marshall, or Dallas, Tex. Under this charter, the New Orleans Pacific Railway Company did actually construct a part of the projected railroad from New Orleans to Marshall. On February, 19, 1876, the General Assembly of the state of Louisiana passed an act entitled "An act to confirm the notarial charter of the New Orleans Pacific Railway Company, with amendments thereto to extend the term of existence of said company, and to confer thereon certain powers and franchises." Act No. 14 of 1876. By this act the term of the charter was made perpetual instead of being limited to 25 years, and the right of way was given it over all public lands, and the right to expropriate a right of way not exceeding 100 feet on each side of the center line of its track. On February 5, 1878, the General Assembly passed an act granting still further privileges to the New Orleans Pacific Railway Company. On June 20, 1881, the Texas & Pacific Railway Company purchased all the property, franchises, rights, and privileges of the New Orleans Pacific Railway Company, and then completed the line begun by the latter company, from the point it had reached in Louisiana, to Marshall, Tex., all of which was done under the authority of the statutes of the state of Louisiana.

IV. After the adoption of the constitutional amendment above referred to, the executive committee of the board of directors of the Texas & Pacific Railway Company at a meeting held October 6, 1908, passed the following resolution:

"Resolved, that the officers of the legal department of this company in Louisiana be instructed and directed by the president to disregard and not observe the prohibition against the institution of suits in or removal of suits to the federal court brought by or against this company in the state of Louisiana, but on the contrary that they be directed to institute in, or remove to, the federal courts such suits and actions brought by or against this company as they may deem proper."

V. The Mercantile Trust Company, the complainant in this case, is trustee under an act of mortgage, or deed of trust, executed by the Texas & Pacific Railway Company on February 1, 1888, for the purpose of securing a certain issue of the bonds of the Texas & Pacific

Railway Company, known as its second mortgage bonds, to the amount in the aggregate of principal thereof, \$25,000,000, all of which have been duly issued, and are now outstanding in the hands of holders thereof for value. This deed of trust contains a stipulation, that:

"The Texas & Pacific Railway Company, in consideration of the premises, covenants, promises, and agrees: * * *

"III. That having possession, as aforesaid, it shall and will diligently preserve all the rights and franchises to it granted and upon it conferred by the acts of Congress appertaining to the railway property and premises subject to the lien hereof and otherwise, and whenever necessary or advisable comply with the laws of any state wherein the routes aforesaid, or any it may hereafter acquire the right to construct its road on or any part thereof, may now or shall at any time hereafter be situate, in such manner and form as counsel learned in the law shall advise, with a view to effectually preserve, obtain, or secure the corporate rights and franchises, enabling it to locate, construct, use, operate, and maintain the said railway line or lines whereon these presents shall constitute a lien throughout the whole extent thereof."

Under this stipulation, and by virtue of the powers vested in it, as trustee, the Mercantile Trust Company files this bill seeking to enjoin the Texas & Pacific Railway Company and its legal officers in Louisiana from obeying the said resolution of the executive committee of the board of directors passed on October 6, 1908, and hereinabove cited. The bill avers that as soon as the trustee heard of this resolution of the executive committee, it demanded that it be rescinded and annulled, but that the railway company and its executive committee have refused to rescind and annul the resolution, and will proceed to carry it out unless enjoined. The bill avers that it is the duty of the company to obey the constitutional amendment regarding the bringing of suits in, and the removal of suits to, the federal courts in Louisiana. The bill avers that the action of the railway company and its executive committee in adopting the above-mentioned resolution is a violation of the express covenants of the said above-mentioned mortgage, or deed of trust, which will injuriously affect the mortgage rights which it is complainant's duty to protect.

VI. The defendant has filed an answer in which the facts averred in the bill are admitted, but the defendant insists that the constitutional amendment was, and is, illegal and void: First, because it was not adopted in the way prescribed by the existing Constitution of Louisiana for the adoption of amendments to that Constitution; second, because even if legally adopted, it would be void as being in conflict with the Constitution of the United States (1) in attempting to exclude the defendant, a federal corporation, from Louisiana if defendant exercised its rights under the Constitution of the United States, and (2) because the provisions of the constitutional amendment would violate the fourteenth amendment by depriving defendant of its property without due process of law.

I shall first consider the objection to the Louisiana constitutional amendment on the ground of its alleged repugnancy to the federal Constitution.

i. Defendant's first contention is that the amendment is void because it undertakes, in effect, to exclude a federal corporation from

the state of Louisiana if that corporation shall attempt to exercise rights secured to it by the Constitution and laws of the United States.

[1] It is now settled, beyond controversy, that, under the powers to regulate interstate commerce, to establish post roads, and to provide such facilities as it may deem proper, and as military exigencies, when they arise, may require for the transportation of troops and munitions of war, Congress has the power to charter and organize a corporation for the purpose of building and operating a railroad whereon interstate commerce may be conducted, and the mail, and troops, and munitions of war may be transported. See *California v. Pacific R. R. Co.*, 127 U. S. at page 39, 8 Sup. Ct. 1073, 32 L. Ed. 150; *Cherokee Nation v. Kansas Ry. Co.*, 135 U. S. at page 658, 10 Sup. Ct. 965, 34 L. Ed. 295; and *Luxton v. North River Bridge Co.*, 153 U. S. at page 533, 14 Sup. Ct. 891, 38 L. Ed. 808.

In the exercise of this power, Congress incorporated the Texas & Pacific Railroad Company by an act approved March 3, 1871. 16 U. S. Stat. at Large, at page 573. Section 19 of this act declares:

"That the Texas Pacific Railroad Company shall be, and it is hereby, declared to be a military and post road; and for the purpose of insuring the carrying the mails, troops, munitions of war, supplies, and stores of the United States, no act of the company nor any law of any state or territory shall impede, delay, or prevent the said company from performing its obligations to the United States in that regard: Provided, that said road shall be subject to the use of the United States for postal, military, and all other governmental services, at fair and reasonable rates of compensation, not to exceed the price paid by private parties for the same kind of service, and the government shall at all times have the preference in the use of the same for the purpose aforesaid."

The act makes a land grant to aid in the construction of the railroad, and grants the company the right of way through public lands of the United States. And section 4 gives it the right to purchase any other railroad company, or to consolidate with it, whether chartered by Congress or under state law. And section 5 gives it the right to make running arrangements with any other railroad company.

Congress has therefore adopted the defendant company as an agency, or instrumentality, in carrying out the powers vested in Congress. The agency thus adopted by Congress is the agency of a common carrier, and it employs that agency as an entirety, and not merely to render those services, and those services only, which are directly and exclusively required in the execution of the powers vested in Congress. The services which Congress proposes to obtain, by means of the railroad, cannot be economically and efficiently obtained unless the railroad is vested with power, not only to perform the peculiar services required by the government, but also to engage in the general business of a common carrier. Congress has therefore made use, not merely of the railroad, but of the railroad as a common carrier, in all the branches of the business of a common carrier, for its own purposes.

The situation is exactly analogous to the case of the incorporation and employment of banks by Congress for more conveniently carrying on the financial operations of the government. It is possible to conceive that the government might have formed a corporation whose

operations would have been limited to the business of the government; but, while it is conceivable that this might have been done, it would have been done at great expense and great inconvenience. Congress, therefore, determined to employ the agency of a bank which was not only to aid the government in its financial operations, but also to carry on all the business of banking, and it was held that this could be validly done in the case of *Osborn v. Bank*, 9 Wheat. 740, 6 L. Ed. 204, and in *McCulloch v. Maryland*, 4 Wheat. 314, 4 L. Ed. 579.

[2] It is clear that when Congress has the power, under the federal Constitution, to adopt and use, for the convenience of the operations of the federal government, a corporation of any kind as its agency, in such case a state Legislature cannot, in any manner, interfere with the operations of such agency so employed by Congress for federal governmental purposes. The states cannot deny to these federal corporations the right to enter the states, or do business in the states. Neither can they announce conditions for noncompliance with which the federal corporations will be excluded from the states. And it is inconceivable that the state could exclude from their borders the federal corporations used as government agencies when those corporations decline to surrender their right to litigate in the federal courts.

I am clear, therefore, that the constitutional amendment is invalid and without effect as to the Texas & Pacific Railway Company.

[3] 2. It is further urged that the Louisiana constitutional amendment violates the provisions of the fourteenth amendment of the federal Constitution, in that it would, if enforced, deprive the railroad companies of their property without due process of law. The constitutional amendment provides that where any federal or foreign corporation brings a suit in the federal court, or removes a suit against it from the state court to the federal court, then—

“by this fact alone be debarred, prohibited and denied the right to operate, conduct, or do any business within this state and thereafter any contract, or agreement, engagement or undertaking with, or by, or to said corporation shall be utterly null and void.”

It is further provided that if any federal or foreign corporation violates the amendment by bringing, or removing, suits in or into the federal court, then any agent, servant, or officer of such corporation who shall thereafter—

“make or attempt to make any contract, agreement, undertaking or engagement for, with, by or in the name of, or for the use and benefit of such corporation, after the said corporation shall have violated any of the provisions of the foregoing paragraph, shall be guilty of a misdemeanor, and on conviction shall be fined not less than one hundred dollars, nor more than one thousand dollars, and may also be imprisoned with or without hard labor for not more than twelve months, or both, at the discretion of the court.”

The penalties thus denounced against corporations which violate the constitutional amendment are so drastic that they would involve the immediate and certain ruin of the corporation. The defendant in this case is a common carrier, and its very existence depends upon its power to make contracts from day to day. It sells thousands of railroad tickets to passengers every day that it exists and carries on busi-

ness. It issues every day thousands of bills of lading for freight received for transportation. Both the tickets and the bills of lading are contracts between the carrier and its customers. Under the constitutional amendment, not only are these contracts to be void, but the officers or agents of the company who make them are liable to be fined \$1,000 and to be imprisoned for 12 months for making them.

The penalties for disobeying the constitutional amendment are so extreme that the railroad companies and foreign corporations generally will probably be deterred from litigating the question of the right of the state to enact any such amendment. This, however, is a very serious question, and one which can and ought to be passed upon by the courts. The situation seems to be precisely that which the Supreme Court passed upon in *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764. The Supreme Court there dealt with a state statute which imposed penalties so excessive that the parties affected would naturally be deterred from testing the validity of the statute, and the court held:

"A state railroad rate statute which imposes such excessive penalties that parties affected are deterred from testing its validity in the courts denies the carrier the equal protection of the law without regard to the question of insufficiency of the rates prescribed."

They further held that:

"While there is no rule permitting a person to disobey a statute with impunity at least once for the purpose of testing its validity, where such validity can only be determined by judicial investigation and construction, a provision in the statute which imposes such severe penalties for disobedience of its provisions as to intimidate the parties affected thereby from resorting to the courts to test its validity practically prohibits those parties from seeking such judicial construction, and denies them the equal protection of the law."

I think this decision is conclusive of the contention that the constitutional amendment violates the fourteenth amendment, because it seeks to impose upon federal and foreign corporations that violate its provisions penalties so extreme and so ruinous that the only conclusion that a court can possibly draw is that it was the intention of the Legislature to deter federal and foreign corporations from instituting any proceeding to test the validity of the amendment. For it is obvious that if the penalties and consequences provided by the amendment could be inflicted, no corporation would ever dare to test the validity of this amendment. I am therefore bound to hold the constitutional amendment void because it violates the fourteenth amendment.

Having reached these conclusions I find it unnecessary to pass upon the alleged irregularity, under the state Constitution, in the steps whereby the constitutional amendment was adopted.

For the reasons assigned, the prayer of the petition must be denied and the bill dismissed at complainant's costs.

THE PRINZ OSKAR.

(District Court, E. D. Pennsylvania. July 16, 1914.)

No. 10.

1. COLLISION (§ 45*) — STEAMER AND SCHOONER CROSSING — FAULTS OF STEAMER.

A collision occurred at sea at night between the schooner City of Georgetown and the steamship Prinz Oskar, in which the former was sunk. The evidence showed that her lights were burning and she kept her course and speed. The night was clear, and, seeing that the steamer continued to approach some minutes before the collision, the mate took a torch and cast a light on the schooner's sails to attract attention. The steamer kept her speed of 12 knots until collision, and changed her course only when it was too late to avoid it. Her only lookout was stationed in the crow's nest, 98 feet from the stem and 81 feet above the water. The lookout saw the light cast on the schooner's sails, and twice reported the same, but the officers, who were busy laying the steamer's course for the voyage, paid no attention to it. When they finally saw the schooner's lights, no change of course was made for half a minute. *Held*, that the schooner was not in fault; that the steamship was in fault for failure to keep out of the way, as required by article 20 of the International Rules (Act Aug. 19, 1890, c. 802, 26 Stat. 320 [U. S. Comp. St. 1901, p. 2870]); for failure to have a lookout properly stationed; for failure of the officers to observe a proper degree of attention; and for failure to promptly reverse when the schooner was seen.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 51; Dec. Dig. § 45.*]

2. COLLISION (§ 108*)—STEAM AND SAILING VESSELS—ERROR IN EXTREMIS.

The failure of a sailing vessel to change her course when collision with a steam vessel seems inevitable, if an error, is one in extremis and does not impute fault.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 225–231; Dec. Dig. § 108.*]

In Admiralty. Suit for collision by Abram J. Slocum, master of the schooner City of Georgetown and as bailee of her cargo, and the International Salt Company, intervening libelant, against the steamship Prinz Oskar. Decree for libelant and intervening libelant.

Howard M. Long, of Philadelphia, Pa., and Blodgett, Jones & Burnham, of Boston, Mass., for libelant.

Henry R. Edmunds, of Philadelphia, Pa., and Haight, Sanford & Smith, of New York City, for respondent.

THOMPSON, District Judge. [1] The schooner City of Georgetown was a four-masted American sailing vessel 168 feet in length, of 506 tons net burden, and at the time of the collision was bound on a voyage from New York City to Savannah, Ga., loaded with a cargo of salt in bulk. The Steamer Prinz Oskar was a German steamer owned by the Hamburg-American Line, 403 feet in length, with a gross tonnage of 6,026 tons, and at the time of the collision was bound on a voyage from Philadelphia to Hamburg, with general cargo and passengers. The schooner had on board a crew of eight men all told, consisting of master, mate, engineer, steward, and four able seamen. On

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

February 1, 1913, from 8 p. m. to 12 midnight, she was in charge of her master, and was proceeding on her starboard tack, her course being southwest, with the wind blowing from northwest to west northwest. She had her three lower sails, consisting of foresail, mainsail, and mizzen-sail set, as well as her forestaysail and jib. Shortly after 12 midnight the watch was changed, the captain went below, and the mate took charge. An able seaman was stationed on the extreme forward part of the deck near the stem as lookout, and an able seaman was in the wheelhouse near the stern, at her wheel, steering her in accordance with the orders of the mate. The southwest course was continued upon the starboard tack with the wind blowing in the same direction. The weather was clear, the night dark, with starlight. When in the vicinity of Five Fathom Light ship those on board the schooner observed the masthead lights of a vessel, which afterwards proved to be the Prinz Oskar, proceeding on a course crossing the course of the schooner. Subsequently the red side light or port light of the Prinz Oskar was observed, bearing off the starboard bow of the schooner, and continued to be observed by the schooner and those in charge of her until just before the collision occurred. The schooner held her course, and when it was seen that the steamer continued to approach and was getting near the schooner, the mate of the schooner took an electric torch and cast the light upon the sails of the schooner, with the intention of attracting the steamer's attention to it. The schooner continued to hold her course and speed, the Prinz Oskar held her course without changing or checking her speed, and the vessels collided. The port bow of the steamer and the forward end of the schooner came into contact at right angles, whereby the forward end of the schooner was carried away and a hole made in the plating of the Prinz Oskar, leaving in the steamer both the schooner's anchors. Those on board the schooner took to the boats, and the schooner almost immediately sank.

The principal points of contention in the case are as to whether the schooner was carrying her proper lights, as to whether the steamship had a competent lookout properly placed, and as to whether she had competent officers in charge of the deck attending to their duties. It is claimed on the part of the steamship that the schooner was showing no side lights, although there was due diligence on the part of the steamship to observe lights of approaching vessels, and that the schooner contributed to the collision by her own negligence in that, finding the collision was inevitable, those in charge of her did not port her helm and throw her up to the wind, and did not exhibit a flare-up light. The evidence as to the lights upon the schooner is conflicting. The captain, mate, and lookout all testified that the lights were properly set and brightly burning. The captain testified from his knowledge of the facts when he went below about 12 midnight, the mate, from an examination made shortly prior to the collision, and the lookout, also from his observation just prior to that time. The Prinz Oskar was in charge of her second and third officers, and had a lookout in her crow's nest, and no other lookout, and the quartermaster was at the wheel. According to the testimony of the Prinz Oskar's second officer, the crow's nest was located from 16 to 20 meters (52 to 65 feet) from the bridge and about

30 meters (about 98 feet) from the stem. The crow's nest was 19 to 20 meters (61 to 65 feet) above the deck, and about 35 meters (81 feet) above the water. The captain was in the chartroom, and had instructed the officers upon the bridge to pass one-half mile distant from Five Fathom Light, and to report when the light was directly abeam the vessel. The Prinz Oskar had discharged her pilot shortly before midnight, and her voyage began with the Five Fathom Light. The collision occurred at 12:55. It appears from the evidence that the Five Fathom Light was passed at 12:49 p. m., and at that time the captain came out on the bridge and at the same time the lookout reported a steamer's lights about four points on the starboard bow and these lights were seen by all of the officers in charge. After the light ship came abeam, the captain ordered the course changed two points. This order was communicated through the third officer to the second officer and by him to the engineer whose log shows the beginning of the voyage and the new course at 12:52, just three minutes before the collision. Meanwhile the captain had returned to the chartroom. The duty of the third officer was to put the course on the log for which purpose he would have to go on top of the wheelhouse. About the time of passing the light ship, the lookout saw the flare of the white light on the port bow and reported it to the officers on the bridge. To this report he received no reply. The white light continued for a period, then disappeared for an interval and was again seen by the lookout, who again reported it to the officers, but received no reply. The lookout then saw a green light on the port bow and reported "light on the port bow," and had barely reported the light when the collision occurred. The second officer testifies that he was looking out for lights or vessels and saw nothing until about a minute before the collision, when he saw a dark object ahead, which proved to be the schooner. The third officer was on top of the wheelhouse observing the standard compass. He first saw the dark object about 2 or $2\frac{1}{2}$ points on the port bow of the steamer at a time, which appears to have been about a minute before the collision. He did not make any report of this to the second officer until within 10 seconds of the collision. He then called out that they would not go clear. At the time he saw the vessel he says she was less than a quarter of a mile from the steamer. Just before the collision the captain came up on the bridge, and at that time he and the second and third officers all saw a green light on the schooner. According to the second officer, this did not differ from the green lights ordinarily shown on schooners, and that seemed to be the opinion of the third officer, while to the captain, whose eyes were momentarily blinded by the darkness after the light of the chartroom, the light seemed to be faint. After the third officer called that they would not go clear, the second officer ordered the quartermaster to "hard astarboard," which, according to the method of giving orders upon German vessels, would put the vessel to starboard. The second officer telephoned to the engineer, and both engines were reversed at practically the same time. Up to 12:55, the time of the collision, the steamer's engines were running full speed ahead, and at that time, as appears by the engine room log, both engines were put full speed astern.

It is urged by the respondent that the testimony of the officers of the Prinz Oskar, by reason of their superior position, education, and training should have greater weight than that of the master, mate, and lookout upon the schooner, who not only by reason of their belonging to a different walk in life, but also because of their interest in the outcome of the suit, were less likely to tell the truth. The circumstances are such that there need be no issue of veracity upon the question of the lights upon the schooner. The lookout upon the Prinz Oskar, the captain, and the second and third officers all saw the green light of the schooner immediately before the collision. That the second and third officers of the vessel did not see it before I think is abundantly explained by the fact that their attention for the few minutes prior to the collision was not directed to scanning the water for lights of approaching vessels, but was entirely directed to the, at that time, important subject of laying the course of the vessel for her voyage across the Atlantic. As has been shown, the course was to be laid from a point where the light ship was within one-half mile and abeam of the vessel. This occurred at 12:49, and the course was altered at 12:52, three minutes prior to the collision. The third officer was busy in reporting to the captain, carrying the captain's orders to the second officer and entering the course upon the log and in examining the compass upon the top of the wheelhouse, and the second officer was busy in laying the course, and communicating the captain's orders to the helmsman and engineer. Both of these officers were evidently depending upon the lookout to discern and report any objects affecting the vessel's course, but were so engaged in other duties that they did not hear or did not heed the lookout's report of the white lights a few minutes before the accident. There can be no doubt that the light the lookout saw and reported on two occasions within a few minutes was the light of the electric torch used by the mate to apprise the steamer of the schooner's presence. It appears that the green light of the schooner, when it was seen, was approximately 14 or 15 feet above the water, very considerably below the position of the officers upon the bridge and upon the wheelhouse, while the lookout was stationed over 80 feet above the water. While in this position the lights on steamships, which are high above the water, might be readily seen, but the smaller lights of the schooner, being below the line of vision of the lookout, would not be readily observed by him from his station 98 feet from the stem. It seems to have been settled as a matter of nautical practice recognized by the courts that the proper place for a lookout is as far forward and as near the water as possible, and the importance of having a competent lookout properly stationed has been repeatedly maintained. The evidence seems to be conclusive that the schooner did carry proper lights, and that, if the lookout had been in a position at the forecandle head, he could have seen the lights or observed the approach of the schooner in time to avoid the collision. The truthfulness of the officers of the Prinz Oskar is not impugned, but it is apparent that, on account of their being engrossed in laying the course by the position of the Five Fathom Light at that immediate time, they did not give sufficient attention to approaching objects, and, relying entirely upon the lookout to warn them, they either

did not hear or did not heed his report of the white light, owing to diversion of their attention. When the schooner was seen by the two officers in charge, taking into consideration her speed of 12 knots an hour, there was a remarkable lack of promptness in stopping the course of the vessel. The third officer did not directly report the sail to the second officer at all, but, after a full half minute had elapsed, expressed a doubt that they would go clear, thus indicating that he was willing to take a risk before taking action. Meanwhile the Prinz Oskar was proceeding at full speed.

[2] In the failure of the Prinz Oskar to keep out of the way of the City of Georgetown, article 20 of the International Sailing Rules was clearly disobeyed, and there are no circumstances to hold the schooner in fault for keeping her course and speed. The mate of the schooner was justified in relying upon the steamer to alter her course and pass under the stern of the schooner. While putting the schooner to starboard at the last moment might have avoided the collision, yet if at the same time the Prinz Oskar had attempted to port, the schooner would have been struck amidships. While some of the cases hold that obstinacy in keeping the course of a sailing vessel, where it is appreciated that a collision is inevitable, is evidence of fault on her part, yet the majority of the cases cited by counsel for the steamship merely hold that a failure to keep her course and speed when, in the sound judgment of the master of the sailing vessel, a collision is inevitable, is an error in extremis which does not impute fault.

Under the circumstances, as developed by the evidence, the steamship is clearly in fault for failure to observe Sailing Rule 20 by keeping out of the way of the schooner; for failure to have a competent lookout properly stationed; for failure on the part of the officers in charge of the Prinz Oskar to observe that degree of attention which would have apprised them of the presence of the schooner, and for failure to act promptly in reversing the engines when the collision might have been avoided.

A decree will be entered in favor of the libellant, and intervening libellant.

MERCHANTS' & MINERS' TRANSP. CO. v. SEVEN HUNDRED AND ONE
BALES OF COTTON.

(District Court, E. D. Pennsylvania. July 24, 1914.)

No. 42 of 1912.

1. SHIPPING (§ 146*)—CARRIAGE OF GOODS—FREIGHT—WHEN EARNED—CONTRACT FOR THROUGH CARRIAGE.

Where an initial carrier, for itself and connecting carriers, contracts with a shipper for the transportation of goods from the point of loading to the port of final destination for a stipulated freight, the contract is a single one, and the right to freight is dependent on delivery at destination. In such case pro rata freight is not recoverable for a portion of the carriage, unless there is a voluntary acceptance of the goods at an inter-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mediate port in such a mode as to raise a fair inference that their further carriage was intentionally dispensed with.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 508; Dec. Dig. § 146.*]

2. SHIPPING (§ 146*)—CARRIAGE OF GOODS—FREIGHT—WHEN EARNED—CONTRACT FOR THROUGH CARRIAGE.

Libelant was an intermediate carrier of a shipment of cotton from Augusta, Ga., to Liverpool, under through bills of lading; its part of the transportation being from Savannah to Philadelphia. On the voyage a fire occurred, and the cotton was damaged by fire and water. On arrival at Philadelphia the underwriters, as agents for the owners, refused to consent to the sale of the damaged cotton, but demanded that it be forwarded to destination, and, the connecting carrier having refused to receive it, libelant libeled it for its ratable share of the freight. There was no provision in the bills of lading for freight pro rata itineris to be earned by an intermediate carrier, except in case the cotton was sold short of its destination. *Held* that, the contract not having been performed, no freight was earned, and libelant could not recover.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 508; Dec. Dig. § 146.*]

In Admiralty. Suit by the Merchants' & Miners' Transportation Company against 701 bales of cotton. Decree for respondent.

Lewis, Adler & Laws, of Philadelphia, Pa., for libelant.

Conlen, Brinton & Acker, of Philadelphia, Pa., for claimant.

THOMPSON, District Judge. This is a libel for freight against 701 bales of cotton carried by the libelant from Savannah, Ga., to Philadelphia, Pa., as intermediate carrier under through bills of lading from Augusta, Ga., to Liverpool, Eng. Watson, Moody & Co. shipped from interior points in the south by rail to Savannah 856 bales of cotton under through bills of lading issued by the Southern Railway Company and the Georgia & Florida Railway Company, by which the cotton was to be carried by the Merchants' & Miners' Transportation Company from Savannah to Philadelphia, and there delivered to the American Line to be carried to Liverpool, Eng. The inland freight was prepaid. The freight from Savannah to Liverpool was 22½ pence, of which, by agreement between the libelant and the American Line (not set out in the bills of lading), the Merchants' & Miners' Transportation Company were to receive 15 cents per hundred pounds and the American Line 30 cents per hundred pounds. While being carried on the steamship Berkshire of the Merchants' & Miners' Transportation Company, a fire broke out in the cotton, in consequence of which the ship was sunk off Cape Hatteras to extinguish the fire, but was ultimately raised and brought the cotton to Philadelphia, where it was discharged in a burnt, charred, and wet condition. After discharge, notice was given to Watson, Moody & Co., the owners, and to the British & Foreign Marine Insurance Company, their underwriters, of the condition of the cotton. A marine adjuster was employed by all parties in interest to examine and recommend the disposition of the cotton, and it was recommended by him that it be sold at Philadelphia. The British & Foreign Marine Insurance Company, underwriters and agent for Watson, Moody & Co., declined to agree to this recommenda-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion or to accept the 701 bales which could be identified; the balance (155 bales) being so badly charred as to render identification impossible. As to the 701 bales, the British & Foreign Marine Insurance Company demanded that the cotton be sent forward, and it was accordingly tendered by the Merchants' & Miners' Transportation Company to the American Line, the succeeding carrier, who declined to receive it upon the ground that it was dangerous to carry on account of the probability that fire would break out in it again. Notice of the refusal of the American Line to receive and transport the cotton was given to Watson, Moody & Co., and to the underwriters, who still demanded that it be sent forward. This the Merchants' & Miners' Transportation Company declined to do, for the reason that other lines besides the American Line would not receive it, except at increased rates and at the sole risk of the shippers. The underwriters offered to accept the cotton, provided no claim for freight pro rata itineris was made by the libellant. The offer was refused, and the libellant thereupon demanded its freight of \$525.75 before the cotton would be released to the underwriters or owners. This being declined, a libel was filed herein for the freight, security entered, and the cotton delivered to the claimant, Watson, Moody & Co., the owners. The cotton was subsequently carried forward at the instance of the underwriters at a freight in excess of that called for by the bills of lading. When sold in Liverpool, it brought \$4.45 per bale less than other cotton damaged in the same manner brought in Philadelphia free of any charge.

The claimants contend that, under the bills of lading, the libellant is not entitled to recovery of freight as an intermediate carrier pro rata itineris, because the contract of affreightment was an entire one for transportation from Augusta, Ga., to Liverpool, Eng., and the freight was not earned because of the failure of carriage to and delivery at Liverpool. The bills of lading, so far as material to the present controversy, provide as follows:

"To be carried to the port (A) Savannah, Ga., and thence by M. & M. T. Co. (October 15th) to Philadelphia, Pa., American Line (October 26th) to port (B) Liverpool (or so near thereto as steamer may safely get, with liberty to call at any port or ports in or out of the customary route), and to be there delivered in like good order and condition as above consigned, or to consignee's assigns, or to another carrier on the route to destination, if consigned beyond the said port (B) upon payment immediately on discharge of the property of the freight thereon, at the rate from Augusta to Savannah of 21 cents prepaid, and Savannah to Liverpool, England, of 22½ pence collect United States gold currency per 100 lbs. gross weight and advance charges, with all other charges and average, without any allowance or credit or discount, etc. It is agreed that if any goods are sold short of destination each carrier that has completed its part of the transportation shall have earned its agreed-upon proportion of the through freight, and the same with charges advanced shall be due and payable out of the proceeds thereof; for any distance carried each carrier shall on same basis have earned and be entitled to freight with charges advanced for such part of the transportation as has been accomplished. That the carrier shall have a lien on all goods for freight, primage and charges," etc.

It will be seen by the bills of lading that there was no provision for freight pro rata itineris to be earned by any intermediate carrier, except where the goods were sold short of their destination.

[1] The law in admiralty upon the subject of contracts for through transportation is well stated in the opinion of Judge Lacombe, in the case of *British & Foreign Marine Insurance Co. v. Southern Pacific Co.*, 72 Fed. 285, 18 C. C. A. 561 (C. C. A. Second Circuit). In that case cotton was shipped from southern points to Liverpool, Eng., under through bills of lading providing for transportation by the various railways to southern ports; thence by Morgan Line Steamships to New York; and thence by Trans-Atlantic Lines to Liverpool. While the cotton was at the wharf in New York, fire broke out, destroying part, and so badly damaging the rest that it was sold for the common benefit. The court held that the carrier was not entitled to any freight on the cotton destroyed, but was entitled to freight pro rata itineris on the damaged cotton, solely on the ground that the underwriters had voluntarily accepted the cotton at an intermediate port. Judge Lacombe said:

"It is urged that since the bills of lading provide for successive transportations by successive carriers, with a provision that the liability of each carrier for loss or damage of the goods shall cease on his delivery of the cotton to the next carrier, each separate transportation should be treated as a separate voyage. But the contract is a single one for the entire transportation from the port of original loading to the port of ultimate destination. The carrier who received the goods agreed with the shipper, directly for himself and as agent for the two other carriers, that they would transport the cotton the entire distance for a stipulated freight, to be paid upon delivery at destination. The shipper sought carriage for his goods, not to New Orleans, nor to New York, but to Europe; and when three carriers, having formed a combination for the entire carriage, take his goods under a contract, by the terms of which compensation for that carriage is made dependent upon delivery at final destination, there is no reason why a court should alter those terms. Had the carriers chosen to apportion the freight in advance, and to require the shipper to pay separately for each successive stage of the voyage, it was competent for them to insert such provisions in the contract. Not having done so, their contract must be interpreted as such contracts of affreightment always have been, and their right to demand freight be held dependent upon delivery at destination."

To the same effect is the decision in *Mitsui v. St. Paul Fire & Marine Insurance Co.*, 202 Fed. 26, 120 C. C. A. 280. See, also, the *Anna D. Richardson*, Fed. Cas. No. 410; *Burn Line, Ltd., v. U. S. & A. S. S. Co.*, 162 Fed. 298, 89 C. C. A. 278; *Brittain v. Barnaby*, 21 How. 527, 16 L. Ed. 177.

And to use the language of Judge Lacombe in *British & Foreign Marine Insurance Co. v. Southern Pacific*, supra:

"The only exceptions to this rule are where the completion of the voyage has been prevented by the freighters, or where the cargo owner takes delivery of the goods or their proceeds at a different place from that originally agreed, under circumstances which show that that was intended to be treated as a substituted performance of the contract."

To justify a claim for pro rata freight, there must be voluntary acceptance of the goods at an intermediate port, in such a mode as to raise a fair inference that the further carriage of the goods was intentionally dispensed with. *Vlierboom v. Chapman*, 12 M. & W. 229.

This is not an exception to the general rule, based upon the entirety of contracts, that freight is only due when the voyage is completed. It is merely tantamount to saying that the parties, by mutual agreement,

may rescind the contract at an intermediate port. Hughes on Admiralty, p. 148.

[2] The libelant, however, claims that an exception to the general rule should be made in the present case because of (1) the danger of shipment and (2) its commercial inexpediency. Counsel for the libelant have not been able to point to any authorities to sustain their position. The case of *British & Foreign Marine Insurance Co. v. Southern Pacific Co.* (D. C.) 55 Fed. 82, which was affirmed in 72 Fed. 285, 18 C. A. 561, cited above, is relied upon by reason of the language of the District Court, where it was said:

"From the earliest times the rule of the maritime law has been different from that of the common law in respect to payment of pro rata freight; the rule being that where the ship, through accident or major force, has been prevented from completing her voyage, the owner, on receiving his goods, must pay ratable freight. *Macl. Shipp.* 478; *Roccus*, 81; *Consolato*, 151. And see other authorities cited in *The Spartan* [D. C.] 25 Fed. 44, 57. Upon this ground I must allow to the carrier in the present case a pro rata freight upon the damaged cotton, the proceeds of which were received by the libelant as the owners' representative. The present is a stronger case for a pro rata freight from the fact that the bills of lading contemplated in several respects the divisibility of the contract; and because the contract contained in the bills of lading was for the most part completely performed."

The decision in that case, however, was not based upon an exception to the rule but upon the ground that with the knowledge and acquiescence of the insurers, who represented the owners, the cotton was sold at the intermediate port for the benefit of all concerned, which amounted to a substituted performance for that stipulated in the contract.

The case of *Scow No. 190 and Four Hundred and Fifty Bales of Cotton*, 88 Fed. 320, in the District Court of Maryland, is cited by the libelant as instancing an exception to the rule. In that case the suit originated in a libel for salvage, and, the agent of the owners having filed a claim for the cotton, it was by agreement delivered to him in order that he might deal with it for the benefit of all concerned. It was by him put into condition for immediate sale and sold at auction as wet and damaged cotton. That case is therefore not an instance of an exception to the rule, but, as in the case of *British & Foreign Marine Insurance Co. v. Southern Pacific Co.*, upon which the decision was based, the sale at an intermediate port was by the consent of all parties, and there was therefore a rescission of the contract by acceptance of part performance of the agreement for through transportation.

In the present case there is nothing in the contract of affreightment under which pro rata freight may be recovered, and there are no circumstances in the case which can be construed as an acceptance by the claimant of anything short of full performance of through transportation. To the contrary, the claimants consistently refused to accept the cotton short of its destination, and the contract must therefore be construed in accordance with its terms and with the well-settled rules of admiralty.

The libel will be dismissed at libelant's costs.

WALL et al. v. ANACONDA COPPER MINING CO. et al.

(District Court, D. Montana. July 31, 1914.)

No. 464.

1. CORPORATIONS (§§ 182, 189*)—ELECTION OF REMEDIES (§ 7*)—MINING CORPORATIONS—SALE OF ASSETS—DISSENTING STOCKHOLDERS—REMEDIES.

Rev. Codes Mont. §§ 4409-4412, provide that any Montana mining corporation, when directed by a vote of the holders of two-thirds of the outstanding stock authorizing a sale or accepting a proposition from any one to buy all the corporate property for cash, property, or capital stock of any other corporation, may sell or convey in accordance therewith as though all stockholders had consented thereto, and that thereupon the vendor is dissolved and any dissenting stockholder may proceed in court to secure an appraisal of the value of the stock and have judgment therefor, including expenses and costs, which shall be entered against both vendor and vendee and shall be a lien on all the real property sold. *Held* that, where a dissenting stockholder claims a fraudulent sale of the property of a mining corporation, he has a choice of remedies, to wit, appraisal or avoidance of the sale; but he cannot have both, and if he elects an appraisal he is estopped to sue.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 686-690, 706-722; Dec. Dig. §§ 182, 189;* Election of Remedies, Cent. Dig. § 12; Dec. Dig. § 7.*]

2. CORPORATIONS (§ 189*)—SELLING OF ASSETS—CONSOLIDATION—FRAUD—EVIDENCE.

In a suit by a minority stockholder to set aside an alleged sale of a mining corporation's assets to another company for alleged fraud, evidence *held* insufficient to establish either fraud or that the sale was effected without complainant's knowledge and consent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 706-722; Dec. Dig. § 189.*]

In Equity. Suit by William E. Wall and another against the Anaconda Copper Mining Company and the Parrot Silver & Copper Company to avoid an executed sale of the property of the Parrot Company to the Anaconda Company. Decree for defendants.

Harrison Dunham, of Boston, Mass., R. L. Clinton, of Butte, Mont., and Asa P. French, of Boston, Mass., for complainants.

C. F. Kelley, L. O. Evans, and D'Gay Stivers, all of Butte, Mont., and W. B. Rodgers, of Anaconda, Mont., for defendants.

BOURQUIN, District Judge. This is a suit to avoid an executed sale of all the property of the defendant Parrot Company to the defendant Anaconda Company, both defendants Montana mining corporations.

Plaintiffs own 1,210 shares of 230,000 shares, 229,850 issued, the capital stock of the Parrot Company.

The complaint alleges that in 1899 A. C. Burrage, William Rockefeller, H. H. Rogers, and more than 15 named "other persons," purchased the majority of Parrot stock and at all times thereafter controlled the corporation pursuant to a conspiracy by them entered into to dissipate the company assets and to acquire them at less than real

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

value; the sale being the successful termination of the conspiracy. The methods thereto employed are detailed at great length. In substance, they are abandoning, closing, and dismantling the company's refinery and smelters, excess costs in mining, smelting and refining its products, unauthorized and concealed transfer of its personal and real property without consideration or for inadequate consideration and in part in trust for the "other persons" and to the Anaconda company and other corporations controlled by them, mismanagement of the Parrot company's mines so that mining was and is at a loss, concealment of company assets, duplicate, private, concealed, false, and fraudulent reports, accounts, and books, and denial to plaintiffs of access thereto, change of the company from a profitable to an unprofitable concern, infliction of losses upon it aggregating \$100,000,000, and the sale involved at a valuation of \$2,300,000, in consideration of 90,000 shares of Anaconda stock of the par value of \$25, whereas the actual value of Parrot tangible assets was \$100,000,000, and of its rights of action arising out of the acts aforesaid \$100,000,000, or a total value of Parrot property so sold of \$200,000,000. Plaintiffs also allege that they protested against the sale and thereafter proceeded in the proper state court of Montana to secure appraisal of their stock and payment of its value, but that therein they cannot secure appraisal of the company's rights of action arising from the conspiracy and so cannot secure the actual value of their stock. There are also allegations that the sale is obnoxious to the Sherman Anti-Trust Act, but this was abandoned at final hearing. The complaint does not directly allege that all or any of the wrongful acts aforesaid were not known to the stockholders either when they were committed or when the sale involved was by them directed.

The prayer is avoidance of the sale, a receiver to take an account between defendants, payment of any excess due from Anaconda to Parrot, and sale of all assets of Parrot with distribution of the proceeds to stockholders.

The answers are denials and explanations of specific transactions attacked in the complaint.

A great volume of testimony and other evidence has been submitted, entirely by deposition and master's report.

[1] It appears the sale involved was made in April, 1910, by virtue of statutes of Montana which in substance provide that any Montana mining corporation at any time so directed by the vote of holders of two-thirds of its outstanding stock authorizing a sale or accepting a proposition from any one to buy all the corporate property for cash, property, or capital stock of any other corporation, shall sell and convey in accordance therewith even as though all stockholders had consented thereto; and thereupon the vendor is dissolved and to be wound up as in other cases, that any dissenting stockholder may proceed in court to secure appraisal of the value of his stock and judgment therefor, including expenses and costs, shall be entered against both vendor and vendee, a lien upon all real property sold. Sections 4409-4412, R. C.

These statutes vest power, unknown at common law, in holders of two-thirds of the issued stock of any Montana mining corporation, for

any reason at any time to any one at any price for any consideration to sell all corporate property inclusive of choses in action and to dissolve the corporation. Motive, vendee, price, consideration are all immaterial, provided the transaction be free from fraud. Every stockholder consents thereto when he becomes a stockholder, and it is part of his contract with all other stockholders and the corporation. In a fair sale a dissenting stockholder has but the remedy of appraisal wherein he secures the value of his shares; that is, the value of his equitable interest in all corporate property inclusive of corporate choses of action arising from fraudulent management or otherwise.

In a fraudulent sale he has a choice of remedies—appraisal or avoidance of the sale. He cannot have both, and the choice of either estops to thereafter claim the other or at least a choice of appraisal with knowledge of all material facts is in its nature condonation of the fraud and acquiescence in the sale, and he cannot thereafter inconsistently maintain suit to avoid the sale. All this is of the general law of sales, as applicable to corporate sales by virtue of these statutes as to any sale. Defendants contend plaintiffs, having elected appraisal, are estopped from this suit.

The complaint sets out that plaintiffs proceeded to appraisal and does not allege lack of knowledge of acts and facts which might relieve them from their election. Having elected, *prima facie* they are estopped from the right and remedy of this suit, and the burden is on them to plead and prove otherwise. Regardless of the pleadings and burden of proof, consideration of the evidence discloses that when plaintiffs begun their appraisal action they had knowledge of all facts and fraudulent acts alleged in this suit, in so far as they are sustained by proof, to the extent any stockholder has or may have of corporate transactions openly accomplished.

It follows they so far acquiesced in the sale as to elect appraisal and so cannot recede therefrom and secure the inconsistent remedy of avoidance of the sale.

At the same time it is considered the court's findings on all issues should appear. In addition to the insufficiency of the complaint to excuse election, it is doubtful if the complaint can be maintained in any event. It is upon the theory of rescission or avoidance of a fraudulent sale, yet for all expressly alleged therein plaintiffs and all stockholders may have had at the time they directed the sale knowledge of all the acts alleged to constitute the fraud.

[2] If they had, their consent was free and the sale valid. If, however, it be assumed that from the allegations of control, secrecy, and concealments this lack of knowledge be inferred, the evidence fails to prove either fraud or lack of knowledge. When the sale was made, the Amalgamated Copper Company owned a majority of the stock of both Parrot and Anaconda. Burrage and some of the "other persons" had organized the Amalgamated and were interested in all three corporations, likely controlled them by majority ownership of shares and interlocking directorates. This is of less significance than ordinarily, in that, not the directors, but holders of two-thirds of Parrot shares, ordered the sale, and neither Amalgamated nor the "other persons" named

nor all united held the requisite two-thirds. If because thereof the sale should be more closely scrutinized, yet in view of the statutes aforesaid the burden to satisfy the court that it is fraudulent and voidable is upon plaintiffs who allege it. If unfair on its face, ambiguous, or suspicious, the burden of explanation may shift to those defending the sale's integrity. At the outset it is noted that, in so far as losses might accrue to Parrot from the acts complained of, the holders of the majority of Parrot stock would proportionately suffer. Their other interests would not relieve therefrom.

So far as the evidence goes, it is that in 1899 some few of the "other persons," including Burrage, Rockefeller, and Rogers, purchased a little more than half of Parrot stock. About two years thereafter this stock was sold to Amalgamated, and it thereafter controlled, as it lawfully might, Parrot operations. Therein, methods and instrumentalities changed. A refinery, an operating smelter, and an unfinished smelter were dismantled and sold. Some thereof, particularly salvage, were sold to Anaconda, but for fair prices.

The developed Parrot mine was of the earliest in the Butte, Mont., mining district. Its productive operations covered some 25 years. Several million dollars in dividends were paid. But several years before this sale its commercial ore bodies were practically exhausted, dividends ceased, operations were at a loss, and much exploration developed no new and valuable ore deposits. Complex geological conditions involved Parrot in "apex" controversies with neighbors, and these were settled in the main to Parrot's advantage. True and correct reports, accounts, and books were made and kept, accessible to all stockholders and inspected, experted and copied so far as desired by plaintiffs before this suit. At the time of this sale, Parrot was but a shadow of its former self. But its main mining property was well located, and it owned outlying mining property of no developed worth, so that taken as a whole it had probabilities and possibilities and was of actual and speculative value. All this and all acts of management were open and known at the time of occurrence and before and at the time of the sale. As an illustration the complaint alleges a loss to Parrot of \$50,000,000, in that it was constrained to convey without consideration to another corporation in which the "other persons" were interested the "Blue vein" ore bodies to which Parrot's title had been finally determined by litigation, the truth being that there were "apex" controversies over the "Blue vein," said ore bodies were neither large nor of great value, there was no litigation, the adverse claims passed to a corporation in which Amalgamated had no interest though some of the "other persons" had, and a compromise was authorized by a meeting of Parrot stockholders in September, 1906, which compromise was effected and wherein Parrot received more than it yielded. The complaint is replete with allegations of fraudulent acts so variant from what the evidence shows to be true, from what plaintiffs knew to be true, or could have so known, that it appears reckless and in part to the point of willful falsehood.

To this another illustration is the allegation of conveyance of Parrot property in trust for the "other persons"; no such property ever having existed. All this appearing, any suit is discredited. It is argued

that since Parrot, while controlled by the "other persons," declined to unprofitableness, in large measure fraud is thereby proven. Not necessarily, or at all. Parrot, like all mines, lessened in value with every ton of ore extracted and came to the end of its visible resources. Its ore bodies were exhausted. Further development may revive it, but that is for the management's judgment to direct, and that development done disclosed no valuable ore bodies does not support the allegation and argument that the "other persons" have not discovered and so have concealed valuable ore bodies. Corporate management not ultra vires is of unlimited discretion, and free from fraud only stockholders and not courts can control it. But the court is admonished it must bear in mind that "the term Rockefeller" is a synonym for "secretiveness," "successful manipulation," "sly and subtle machinations," "sphinx-like mystery," only known by results. However that may be, however effective on the stump and curb, it is of no impressiveness in court.

Herein the fraud charged must be proven and by legal evidence, and not merely alleged in pleadings and for proof rested upon argument and oratorical endeavor. Finding no fraud in the sale, finding the stockholders' consent was free, it is unnecessary to inquire into the purchase price. That was determined by the holders of two-thirds of Parrot stock; Amalgamated holding a little more than half said stock. They satisfied, none can complain. They could direct a corporate sale for any consideration, even as they individually could make personal sales. Doubtless gross inadequacy might be a circumstance in a fraudulent sale. Aside from that, the dissenting stockholder has a plain, speedy, and adequate remedy at law in the appraisal proceedings provided by the statutes, wherein he secures the value of his shares though the others receive from the sale but a tithe thereof. It appears, however, that when this sale was made Anaconda stock had a market value ranging from \$35 to \$45 per share. Conditions were such that Parrot was not worth to itself or to any other independent concern the amount Anaconda in view of its resources and facilities could afford to and did pay.

The value of any mining property is a problem, and here it seems to have been solved fairly to Parrot. The purchase price was fair value and adequate, the sale was valid, plaintiffs elected the remedy of appraisal, they have no right, and there is no reason to rescind or avoid the sale, and decree accordingly will be entered.

CRESCENT MFG. CO. v. MICKLE.

(District Court, D. Oregon. August 3, 1914.)

No. 6375.

1. Food (§ 5*) — ADULTERATION — BAKING POWDER — PRESENCE OF EGG ALBUMEN.

The presence of egg albumen in baking powder, which neither adds to, nor subtracts from, its leavening qualities, but only serves to demonstrate, in a simple way, the presence of carbon-dioxide, and whether the product has become stale and unfit for use, and does not make the pow-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

der appear better or of greater value than it really is, did not render the same violative of the Oregon Food Law (L. O. L. §§ 4830, 4831), declaring that an article should be deemed adulterated if it is so treated that a damaged or inferior article is sold or made to appear better or of greater value than it really is.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 5.*]

2. Food (§ 15*)—BAKING POWDER—LABELING.

Where baking powder was composed of bicarbonate of soda, calcium acid phosphate, sodium aluminium sulphate, egg albumen, and corn starch, a legend on the label, reciting, "This Baking Powder contains the following ingredients and none other: Starch, Egg, Phosphate, Bicarb. Soda, Sodium Aluminium Sulphate," constituted a substantial compliance with the Oregon Food Law (L. O. L. § 2231), making it unlawful for any person to sell baking powder in Oregon which does not have printed on the label, in plain English, free from all technical or chemical phrases, the names of all the ingredients composing it.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 14; Dec. Dig. § 15.*]

In Equity. Suit by the Crescent Manufacturing Company, a corporation, against J. D. Mickle. Decree for complainant.

C. A. Riddle, of Seattle, Wash., for complainant.

A. M. Crawford, Atty. Gen., of Salem, Or., and Walter H. Evans, Dist. Atty., of Portland, Or., for defendant.

WOLVERTON, District Judge. This is a suit to enjoin J. D. Mickle, who is the State Dairy and Food Commissioner, from interfering with the sale in Oregon of Crescent Baking Powder, which is a product manufactured by complainant in Seattle, Wash., and sold in many states. The questions presented for determination arise upon motion of the complainant for judgment on the bill and answer.

Reduced to their ultimate analysis, the pleadings, as to all material issues, show about this state of facts: The Crescent Manufacturing Company is a Seattle, state of Washington, corporation, engaged, among other things, in the manufacture and sale of a food product known as Crescent Baking Powder, which is a mixture or compound consisting of five ingredients, namely: Bicarbonate of soda, calcium acid phosphate, sodium aluminium sulphate, egg albumen, and corn starch. The egg albumen used in the powder is clean, wholesome, and nutritious, and enters into and becomes a part of the product to the same extent as all other ingredients therein.

Complainant is engaged also in selling its product to wholesale and retail dealers in Oregon, and has heretofore sold and transported large quantities from Seattle, in the state of Washington, into the state of Oregon, and has established a large business and trade therefor within the latter state.

The defendant J. D. Mickle is the Dairy and Food Commissioner for the state of Oregon, and intends and threatens to, and will, make and issue a ruling to bar and prevent the sale of such product within the state, because the same is declared to be adulterated, and the packages containing it are not labeled as required by the food laws of Oregon.

The complainant avers that Crescent Baking Powder is not adulterated nor misbranded within the meaning of the food laws of Oregon,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and that it is labeled and branded in full compliance with the labeling requirements of all such laws, a copy of the label being set forth; that said baking powder as an article of food does not contain any added poisons or deleterious substances of any kind whatsoever; that it is a mixture and compound under its own distinctive name, and is not an imitation of, or offered for sale under, a distinctive name of any other article whatsoever; and that the name "Crescent Baking Powder" is plainly printed on all tins or receptacles in which said mixture or compound is packed or shipped or offered for sale, accompanied on the same label with a statement of the place where said article has been and is manufactured or produced.

It is denied that said baking powder is not adulterated nor misbranded, or that it is labeled or branded in compliance with the labeling requirements of said laws, and it is alleged that said baking powder is adulterated by reason of an infinitesimal amount of egg albumen therein, which, while not of itself harmful, is used for the purpose of deceiving and defrauding the public into believing that said baking powder is better and of greater value than it really is, and that said compound is misbranded in that the ingredients are not properly designated on the label. It is further denied that said baking powder is a mixture or compound under its own distinctive name, or that the compound is an article of food, or other than a compound used in preparing articles of food. All other matters herein set out stand admitted by the answer.

The bill of complaint further expressly negatives, with reference to Crescent Baking Powder, every clause of the statute, section 4831, Lord's Oregon Laws, declaring when any article of food shall be deemed adulterated within the meaning thereof.

Full compliance with the statute is admitted, except it is denied that no substance has been mixed with petitioner's product to lower or depreciate, or injuriously affect its quality, strength, or purity, and affirmatively alleged that its value is depreciated to the extent of the amount of egg albumen contained therein, for the reason that egg albumen has no leavening power in itself. And it is further denied that complainant's product is not a damaged or inferior article of food, or is not made to appear better or of greater value than it really is.

There can be no question that under the allegations of the bill the complainant is engaged in interstate commerce, in the shipment from Seattle, Wash., into the state of Oregon, and the sale of its baking powder to wholesale and retail dealers therein; the said commodity coming to dealers within this state in the original packages. *McDermott v. Wisconsin*, 228 U. S. 115, 33 Sup. Ct. 431, 57 L. Ed. 754, 47 L. R. A. (N. S.) 984.

Further, the suit is in legal effect against Mickle as an individual, and not against him as an officer of the state, or against the state. Mickle avows his purpose and intention of excluding and barring complainant's product from the markets of the state, assigning as his reason therefor that said product has been declared (the declaration being his) to be adulterated and misbranded within the meaning of the Oregon food laws. Besides, he threatens, and is threatening, according to the complaint, to issue a warning addressed to the various wholesale

and retail merchants in the state to the effect that said baking powder is adulterated, and thus intimidating the dealers against buying and selling the product, whereby the business of complainant is seriously injured and impaired. *Scully v. Bird*, 209 U. S. 481, 28 Sup. Ct. 597, 52 L. Ed. 899; *Pratt Food Co. v. Bird*, 148 Mich. 631, 112 N. W. 701, 118 Am. St. Rep. 601; *State ex rel. Ladd v. District Court*, 17 N. D. 285, 115 N. W. 675, 15 L. R. A. (N. S.) 331.

The food laws of Oregon, so far as they are pertinent here, provide:

Sec. 4830, L. O. L. "The term 'food,' as used herein, shall include all articles used for food or drink, or intended to be eaten or drunk by men, whether simple, mixed, or compound."

Sec. 4831. "Any article shall be deemed to be adulterated within the meaning of this act: (1) If any substance has been mixed with it so as to lower or depreciate, or injuriously affect its quality, strength, or purity. (2) If any inferior or depreciating substance has been substituted wholly or in part for it. (3) If any valuable or necessary consistent or ingredient has been wholly or in part abstracted from it. (4) If it is in imitation of or sold under the name of another article. (5) If it contains wholly or any part of the diseased, decomposed, putrid, tainted, or rotten animal or vegetable substance or article, whether manufactured or not. Or in case of milk, if it is the product of a diseased animal. (6) If it is colored, coated, polished, or powdered, whereby a damaged or inferior article is sold, or if made to appear better or of greater value than it really is. (7) If it contains any added substance or ingredients which is poisonous or injurious to health. * * * Provided further, that the provisions of this act shall not apply to a mixture or compound recognized as ordinary articles or ingredients of food in which every package sold or offered for sale has the name and address of the manufacturer and be distinctly labeled under its own distinctive name and in a manner to plainly and correctly show that it is a mixture or compound."

This latter proviso is perhaps superseded by a later statute, which conforms more nearly with the federal statute on the subject. *Sess. Laws 1913*, pp. 213, 214.

These provisions are the same in effect as are contained in the National Food and Drugs Act of June 30, 1906 (34 Stat. 768, 770, c. 3915 [U. S. Comp. St. Supp. 1911, p. 1354]), with the exception that in the sixth subdivision of the state act the words "or if made to appear better or of greater value than it really is" are added.

In addition to the foregoing, the Oregon statutes contain a regulation for the labeling of baking powder before the same is sold within the state, as follows:

Sec. 2231. "It shall be unlawful for any person or persons, firm, or corporation, or their agents, to sell or offer for sale in the state of Oregon, any baking powder whether made within the state or without the state which does not have printed on the label in plain English, free from all technical or chemical phrases (unless accompanied by its English equivalents of the same import or meaning), the names of all the ingredients composing said baking powder."

The entire controversy under the pleadings hinges about the added clause, the proviso, and provision respecting the labeling of baking powder.

It is urged that Congress has by its legislation fully occupied and covered the field relative to the protection of the public against the adulteration or misbranding of articles of food, and therefore that the state

legislation, as it may affect foods dealt in in interstate commerce, is void and inoperative. This it is unnecessary to decide, for, in the view I take of the local act and the admitted facts, the complainant's product is not subject to the denunciation thereof.

It will be noted by a survey of the pleadings that it is denied by the answer that said baking powder is not adulterated, or is not misbranded, within the meaning of the Oregon food laws. The denial as to the adulteration, however, is accompanied by an affirmative allegation on the part of the defendant, which qualifies it, that the powder is adulterated by reason of its containing an infinitesimal portion of egg albumen. So in connection with the denial that the product is not misbranded, there is found in the complaint a reproduction of the label which constitutes the branding of the packages containing the product, and it is admitted that such is the label used.

Also, the denial of the allegation that said product is not made to appear better or of greater value than it really is must be construed with the qualification that it is so made to appear better and of greater value than it really is by the use in small proportions of the one ingredient of egg albumen.

[1] It is the cardinal purpose of these pure food statutes to protect the public against the imposition upon it of adulterated food products, and to prevent deception through misrepresentation by misbranding. The added clause under the Oregon statute is intended, no doubt, as a further safeguard against adulteration, and deception as to purity and quality.

Now, as it respects the adulteration of the complainant's baking powder, everything is conceded as to its genuineness and wholesomeness as an ingredient or article of food, as measured by the requirements of the pure food laws of Oregon. But it is urged that the presence of the egg albumen makes the compound appear better or of greater value than it really is. The question is: Does it do that? I think this is a question that may be determined on the record, without resort to testimony of experts or other persons. Admittedly, egg albumen is clean, wholesome, and nutritious, and its presence in the baking powder does not render the product any less wholesome, nor detract in any degree, even the slightest, from its quality as an ingredient or article of food; consequently, absolutely no harm can come therefrom to any person using the compound.

Referring to an affidavit of Dr. Harvey W. Wiley, which is contained in one of the briefs of counsel for defendant, we find this statement:

"Ordinary baking powders not containing albumen, when placed in a glass and treated with water, permit the reaction to take place between the acid element, whatever it may be, and the basic element, which is in all cases bicarbonate of soda. Carbon-dioxide which is liberated in this reaction escapes freely from the baking powder containing no egg albumen. On the other hand, in baking powders containing egg albumen a film of the albumen holds the bubbles of the carbon-dioxide, causing it to foam and fill the glass with a more or less permanent bubble.

"To the unscientific observer, this would indicate that the carbon-dioxide in the baking powder containing the egg albumen is more abundant and more serviceable than that in the powders not containing the albumen."

The test referred to in the statement is the water-glass test which was alluded to in argument. But note the statement relative to the indication by an application of the test to an unscientific observer. It is only in comparison with other baking powder not containing the egg albumen that the carbon-dioxide would appear more abundant and more serviceable. If all baking powder contained the egg albumen, could it be said that its effect was to make it appear better or of greater value than it really is? The carbon-dioxide is in the compound in any event, and the egg albumen affords a demonstration that it is there, while in other baking powders the demonstration is in the baking of the bread in which it is used. As said in the argument, the water-glass test is one that any one can make prior to using the baking powder, and thus determine at once its purity or staleness for use. The presence of the egg albumen becomes, therefore, a trade difference or distinction between Crescent Baking Powder and other baking powders in use, but it does not render the powder better or of greater value, nor does it make the same appear better or of greater value than it really is. The powder has the same leavening quality without the egg albumen as with it, and has the same quality with it as without it. The egg albumen only serves to demonstrate, in a ready, simple, inexpensive, and practical way, that the leavening quality is there, and the product has not become stale and unfit for use. The presence of the egg albumen, affording as it does a simple and practical test, may constitute a trade advantage, such as a trade-mark or trade-name may afford to those who acquire it, yet it is an advantage that legitimately belongs to the proprietor. Let it be emphasized that it is only in comparison with other baking powders that the presence of the albumen with the test makes the carbon-dioxide appear more abundant or more serviceable in the Crescent. It does not change in the least the inherent quality of the article, or its leavening power, for better or for worse, and hence it cannot be regarded as a deception or a fraud in any degree.

I hold, therefore, that, within the intentment of the statute, the presence of the egg albumen does not make the Crescent Baking Powder appear better or of greater value than it really is.

This renders it unnecessary to consider whether Crescent Baking Powder is a compound under its own distinctive name, and subject to exemption contained in the latter clause of section 4831 quoted above, or its amendment.

As to the labeling, there may be a question whether, as applied to interstate commerce, the Oregon statute pertaining to baking powder is not inimical to the federal Constitution. *McDermott v. Wisconsin*, supra. I waive this also without deciding.

[2] But the label adopted is not subject to the denunciation of the Oregon statute. The ingredients of the compound are bicarbonate of soda, calcium acid phosphate, sodium aluminium sulphate, egg albumen and corn starch. The label contains this legend:

"This Baking Powder contains the following ingredients and none other: Starch, Egg, Phosphate, Bicarb. Soda, Sodium Aluminium Sulphate."

It would be sticking in the bark to hold that this is not a substantial compliance with the statute. Any one who is acquainted with the English language will readily be apprised of the ingredients composing the article offered for sale.

Complainant is entitled to a decree permanently enjoining the defendant from issuing his proposed ruling or order inhibiting the sale by complainant of Crescent Baking Powder in Oregon, and it is so ordered.

DELAWARE, L. & W. R. CO. v. VAN SANTWOOD et al., Public Service Commission of Second District of New York.

(District Court, N. D. New York. July 14, 1914.)

1. RAILROADS (§ 218*)—SERVICE—PUBLIC SERVICE COMMISSION—ORDERS.

Where a railroad company discontinued two trains a day each way, and was ordered by the public service commission to restore them, and it appeared that the people residing in the terminal cities were amply served without them, the question of the right of the commission to order the trains restored depended on whether the convenience and necessities of the residents of certain small intervening towns demanded the restoration and operation of the trains in question.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 715; Dec. Dig. § 218.*]

2. RAILROADS (§ 218*)—SERVICE—NECESSITY OF ADDITIONAL SERVICE.

Where a railroad operated a line between two cities, and sufficient steam trains were run to accommodate the necessities of the people of those cities and an intervening city, and two steam trains a day each way were run which reasonably served the convenience and supplied the reasonable necessities of four small intervening points, the residents of which also had the convenience of a through interurban trolley line, complainant would be considered as having performed its whole duty to the public, and could not be compelled by the public service commission to operate two additional trains over the road each way per day at a net loss of over \$3,000 per annum.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 715; Dec. Dig. § 218.*]

In Equity. Suit by the Delaware, Lackawanna & Western Railroad Company to restrain Seymour Van Santwood and others, constituting the Public Service Commission of the Second District of New York, from enforcing an order requiring complainant to restore, run, and operate two trains each way, in addition to the service existing at the date of the order between Oswego and Syracuse. Decree for complainant.

F. W. Thompson, of New York City, for complainant.

L. P. Hale, of Albany, N. Y., for defendants.

RAY, District Judge. The complainant is a corporation of the state of Pennsylvania and engaged principally in interstate commerce and transportation of both freight and passengers. It does considerable intrastate business.

The city of Oswego, with a population, in 1910, of 23,368, is situated on Lake Ontario, at the mouth of the Oswego river, and is distant

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from the city of Syracuse some 35 miles, which has a population of some 180,000 and is situated on the main lines of the New York Central & Hudson River Railroad Company. In 1865, the city of Oswego had a population of 19,288. The intervening towns are Fulton, 24 miles from Syracuse and 11 miles from Oswego, with a population of 10,480; Baldwinsville, 12 miles from Syracuse, with a population of 3,099; South Granby, 19 miles from Syracuse, with a population of 84; Lamson, 16 miles from Syracuse, with a population of 750. In addition, there is Little Utica off the line and west of Lamson 3 miles, with a population of 100, and Lysander with a population of 305 situated five miles west of Lamson. There is considerable manufacturing at Oswego, Fulton, and Baldwinsville, substantially none at the other points, except Syracuse, and the surrounding country is made up of farms of ordinary fertility. Each of the places named has a post office.

The two trains in question had been run by the complainant some years prior to their discontinuance. At the time of such discontinuance and also at the time of the making of the order complained of, there was the following service by steam operated roads between Oswego and Syracuse, viz.: By the Delaware, Lackawanna & Western Railroad running through Fulton, Baldwinsville, Lamson, and South Granby, four trains each way daily; by the New York Central & Hudson River Railroad by way of Fulton and Phoenix, four trains each way daily; by New York, Ontario & Western, through Fulton to Oneida, there connecting with the New York Central & Hudson River, two trains each way daily; and by the Empire Railways Company, a trolley line, running cars through Fulton and Baldwinsville at least every half hour for the day and part of the night. It is evident that, considering the population to be served, eight steam operated trains each way with a trolley car every half hour in addition was more than what was necessary for Syracuse, Baldwinsville, and Fulton. Lamson and South Granby had the four D. and L. steam trains and were within three miles from the trolley line. Lysander and Little Utica are off the line entirely from 3 to 6 miles. By discontinuing the two trains in question Lamson and South Granby and passengers coming from Lysander and Little Utica were deprived of the two steam trains each way, but could be served by the trolley line in cases of necessity by some travel by ordinary road.

This line of road from Syracuse to Oswego while leased and operated by the Delaware, Lackawanna & Western is a separate corporation. It is seen that Oswego and Fulton are each a competitive point for the four roads named, and South Granby, Lamson, and Little Utica and Lysander for the Delaware, Lackawanna & Western and the trolley line.

In 1884, the gross revenues of the Delaware, Lackawanna & Western for operating these four trains each way between Syracuse and Oswego were \$103,660.37. The trolley line was not then in operation. This revenue has steadily decreased until in 1912 it was for the same service only \$36,111.36, a decrease of \$67,549.01, for 1912, comparing 1884 with 1912. This was not due to any change of schedule. In

1890, the complainant carried 340,648 passengers on this line between Syracuse and Oswego, an average haul of 12 miles and of 20 cents per mile revenue per passenger, while in 1912 the average haul per passenger was 11 miles and 21 cents revenue. For some years the complainant has been operating and running these four trains at a large loss. It cannot be denied that the running and operation of these two trains in question (ordered restored) and which are discontinued is wholly unnecessary for all the points and the principal points mentioned. For Lamson, South Granby, Little Utica and Lysander, their running would be convenient for the people residing at those points and those residing elsewhere and desiring to visit those points.

The main line of the Delaware, Lackawanna & Western runs from New York to Buffalo with this branch to Syracuse and Oswego. This branch is made up of two roads owned by other companies but leased by the Delaware, Lackawanna & Western. It is evident that if the line from Oswego to Syracuse, the Oswego & Syracuse Railroad, was being run by the company owning it, itself, it could not maintain the service demanded by the order of the commission. A prolonged effort so to do would bankrupt the owner. However, the convenience, etc., of the public who desire to use the line to Syracuse and Binghamton and to Oswego and the main line and other connecting lines is to be considered.

[1] The true inquiry is whether or not the convenience and necessities of the people at South Granby, Lamson, Little Utica, and Lysander demand the restoration, running, and operation of the two trains in question (those discontinued and ordered restored). South Granby and Lamson are on the line, and the combined population is, in round numbers, 850. Lysander and Little Utica have a population combined of 400, and to serve the necessities and convenience of these 1,250 people, residing in an agricultural community, should the complainant, the Delaware, Lackawanna & Western Railroad Company, be compelled to operate four trains per day each way between Oswego and Syracuse at a large pecuniary loss to the company? Are not two trains each way on complainant's road sufficient for the convenience and necessities of the public? It is not contended by the complainant that taken as a whole the road is run and operated (exclusive of freight trains) at a loss, or that the branch, made up of two leased roads, from Oswego to Binghamton, fails to pay expenses, etc., when these trains in question are operated. In *Minneapolis & St. Louis R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151, in reference to rates fixed by the commission, it was held:

"The presumption is that the rates fixed by the commission are reasonable, and the burden of proof is upon the railroad company to show the contrary. A tariff fixed by the commission for coal in car load lots is not proved to be unreasonable, by showing that if such tariff were applied to all freight the road would not pay its operating expenses, since it might well be that the existing rates upon other merchandise, which were not disturbed by the commission, might be sufficient to earn a large profit to the company, though it might earn little or nothing upon coal in car load lots."

St. Louis & San Francisco R. Co. v. Gill, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567, is another rate case, and it is recognized that,

when a state regulation establishes rates so unreasonable as to practically destroy the value of the property of companies engaged in the carrying business, such legislation is in conflict with the Constitution of the United States as depriving the company of its property without due process of law, etc.; but, when railroads in one state become consolidated with others in another state, it was held that the proper test of the reasonableness of the rates is as to their effect upon the consolidated line as a whole.

[2] If in the case of the Delaware, Lackawanna & Western Railroad, extending as it does through New Jersey, the eastern half of Pennsylvania, and the western half and central portion of the state of New York, railroad commissioners created by the several states named may prescribe that sufficient trains from point to point, as from Water Gap to Scranton, Scranton to Binghamton, Binghamton to Norwich, Norwich to Utica, Binghamton to Elmira, and Syracuse to Oswego, and so on covering the entire road, must be run to accommodate the necessities and convenience of all the people in each of the small intervening towns, even though operated at a loss, the profits of the road and all its accumulations would soon be eaten up, and in a few years this road, so operated, would become worthless. If numerous nonpaying trains may be compelled in order to serve the convenience of a very few residing in small towns situated between two larger places on the line of the road, it may be done at all points on the line, and the profits, if any, of the paying trains, including freight, will be eaten up; and, if there is to be a curtailment of service, where shall it be, and on what principal based? What is reasonable and what is reasonably necessary is not to be determined by the occasional wants and wishes and convenience of a very few people living at points along the line. It seems to me that when steam trains enough are run between the city of Oswego and the city of Syracuse to accommodate and serve the necessities of the people of those cities and the intervening city of Fulton, and two steam trains per day each way are run which reasonably serve the convenience and supply the reasonable necessities of the four small intervening points, and these people also have the convenience of the trolley line as described, the complainant has performed its whole duty to the public, and that to compel the running of the two additional trains between these points at a net loss of over \$3,000 per annum is unjust and unreasonable and in violation of the constitutional rights of the complainant.

In 33 Cyc. 639, 640, we find the following:

"Train Service and Accommodations.—A railroad company authorized to condemn land and act as a common carrier must provide such train service and accommodations as will meet the necessities of the general public, and not merely serve private interests; but the extent of its duty in this regard varies as the exigencies of the traffic and its remunerative character demand and justify, and the manner in which it shall conduct its business, including the number and frequency of trains, rests largely in the discretion of the company. While this discretion must be exercised in good faith and with a due regard to the interests of the public, it seems that in the absence of express statutory authority the courts have no power to interfere with it or to require more trains or additional accommodations so long as the railroad company does not suspend or cease its duties as a common carrier, and certainly

such an order is unwarranted where the road as operated is unable to pay expenses, or where it is not shown that the facilities furnished are not reasonably adequate and the increase demanded would impose an undue hardship upon the company. A railroad company is bound on common-law principles to stop a sufficient number of its trains at stations to meet the demands of public convenience and business necessity; but it is a reasonable regulation on the part of the railroad company that certain trains shall not stop at all stations provided there are enough to serve the purpose of local travel, except as to places where it is expressly required by statute that all trains shall stop. Separate trains for freight and passengers should be run if there is a demand for each class of traffic and the business of the road is sufficiently large and profitable to warrant it, but otherwise this will not be required and mixed trains may be operated. A board of railroad commissioners has no authority to interpret and enforce a contract between a railroad company and private individuals as to the maintenance of a station, but where in the consideration of the granting of a right of way the railroad company agrees with a landowner to build a station upon his land and stop all regular trains at it, he may maintain an action for the specific performance of the contract."

See, also, what is said in *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398.

The injunction *pendente lite* is granted.

Ex parte LA PAGE.

In re LA PAGE et al.

(District Court, N. D. New York. August 17, 1914.)

1. EXTRADITION (§ 14*) — PROCEEDINGS FOR EXTRADITION — SUFFICIENCY OF EVIDENCE.

In extradition proceedings instituted for the purpose of taking a citizen and resident of the United States to Canada or Great Britain for trial for a crime there committed, evidence must be produced that a crime was committed and that there is reasonable ground to believe accused guilty of the offense.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 15, 16; Dec. Dig. § 14.*]

2. EXTRADITION (§ 14*) — PROCEEDINGS FOR EXTRADITION — SUFFICIENCY OF EVIDENCE.

In a habeas corpus proceeding by a citizen of the United States sought to be extradited to Canada for trial for the larceny of a calf, a turkey gobbler, and a number of hens, evidence as to accused's guilt *held* insufficient to justify his extradition.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 15, 16; Dec. Dig. § 14.*]

3. LARCENY (§ 64*) — EVIDENCE — POSSESSION OF STOLEN PROPERTY.

While the possession of recently stolen personal property is some evidence that the possessor is the thief, such possession must be a conscious possession, and, where the evidence makes it at least just as probable that the stolen property was placed on the premises of the suspected party by some one else, the presence of the property on his premises has no probative force.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 170-178; Dec. Dig. § 64.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Application for the extradition of Joseph La Page and others under the treaties between the United States of America and the Kingdom of Great Britain, and petition by Joseph La Page for writ of habeas corpus. Writ sustained, and petitioner discharged.

On examination before a United States commissioner, the defendant Joseph La Page having been held for action by the State Department in deportation proceedings to answer in the Dominion of Canada for an alleged crime, alleged to have been there committed by him, said La Page sues out this writ on the claim that the evidence is wholly insufficient to justify his being held and subjected to imprisonment, etc.

John P. Kellas and Le Roy M. Kellas, both of Malone, N. Y., for petitioner.

Charles Fox, of New York City, for Consul General.

RAY, District Judge. [1] It is fundamental in extradition proceedings instituted for the purpose of taking a citizen of the United States, residing here, to Canada, or any part of Great Britain, for trial there on the claim that such citizen has committed a crime there (one within the treaty and laws), that such evidence must be produced as shows, first, that a crime was committed there, and, second, that there is at least reasonable ground to believe that the person sought to be deported is guilty of the offense charged.

[2] One James Arnold, a resident of Godmanchester in the Dominion of Canada, asserts that on the 27th and 28th days of May, 1914, he was the owner of some 70 Plymouth Rock hens, a grade Ayshire heifer calf, and a large turkey gobbler, and that the gobbler and hens were locked up for the night in his henhouse. Also, that on the morning of May 28th, between 3 and 4 o'clock he discovered that the calf (one of five) had been stolen, and then or a little later that the gobbler and a number of his hens had been stolen. The evidence is sufficient to establish that this property was missing.

This witness also states that on the morning of May 28, 1914, between 3 and 4 o'clock a. m., he arose and went to the barn and discovered that the calf was missing; went to the highway some distance away where the bars were partly down, and found the footprints of men, those of more than one, those of a pair of horses, and also wheel tracks, and these showed the team had been standing there some time; and that he then called his wife. She corroborates this part of his evidence, and also the allegation that the henhouse had been broken into. He also says the wheel and other tracks indicated the wagon came from the north and went south. The defendants arrested resided southerly from Arnold some five miles distant. He says that in his wagon he followed these tracks to the home of La Page; that there was a heavy dew, and he followed the track around the La Page house and to his barn. Whether there was any track leading away from the barn and further out does not appear, and he did not note and could not tell whether or not the horses that drew the wagon were shod all round. It does not appear whether or not any road turns off from the one in which for miles he says he followed this track driving as fast as he could. To corroborate this the sheriff, who got there

later, says that when he reached La Page's he (La Page) was putting thills on his milk wagon and that the pole looked as though recently used. How recently did not appear. Also, that one of the horses in the barn was wet with sweat and one witness said "panting." This horse was shod in front only, and if its tracks had been followed some four miles this fact would have been observed. The evidence was uncontradicted that that particular horse had been out the night before (the 27th) for drawing potatoes and not cleaned. Also, that this morning of the 28th and just before the arrival of the sheriff at least for 1½ to 2 hours after La Page drove over the road, if he did, this horse "wet with sweat and panting" had been driven (unaltered) with another from the pasture into the barn; that they were loose and for some 10 or 15 minutes ran up and down the highway for some distance; also, that this one had been rolling in the wet grass. All this was shown by members of the family and by a neighbor.

If one of the horses was wet with sweat and panting from being driven some miles drawing a wagon, the other would have showed some signs of having been driven. But the evidence and circumstances show clearly that the "wet with sweat" and "panting" of the horse could not have been caused by being driven on the road attached to a wagon that morning or night. The interval of time between being so driven, if so driven, and when seen by these witnesses, was such that the "sweat" must have dried off and the "panting" must have ceased. But the running up and down the road when being driven in from the pasture fully accounts for this condition. The marks of the saddle of a harness on the back of a horse used will remain a long time unless the horse is curried or brushed so as to remove them. The evidence altogether, instead of showing that La Page's horses, or either of them, had been driven on the road that night of May 27-28, or in the early morning of the 28th, drawing the wagon making wheel tracks claimed to have been followed by Arnold by means of the tracks, shows the contrary. There was no evidence that the highway was wet with rain or dusty, or that there were not other wagon tracks on it, or that the tracks followed to the barn of La Page did not then pass on. But a neighbor of La Page saw Arnold on his way driving towards La Page's residence, and when Arnold asked where La Page lived or whose house it was on ahead, and on La Page's house being pointed out Arnold said that was where he was going. This evidence of the wagon tracks and sweating and panting horse, in view of the other known, proved, and conceded facts, is worthless as tending to fix this larceny on La Page.

The sheriff and others came almost immediately on the arrival of Arnold at La Page's residence, and a strict and thorough search of the entire premises of La Page was made, including woods, lots, barns, and home, and well in the barn, both inside and out, and no objection was made to such search and no obstacle interposed. Nothing was found. No stolen property was there discovered; no suspicious circumstance, aside from the alleged sweating horse, then existed. The La Page family went about its business. But Arnold and several others were on the watch on the premises all day and all the evening

and night of the 28th. There was a well in La Page's pasture some six rods from the house and three rods from the pig pen. This was in plain sight and was not, so far as appears, investigated on the 28th but may have been. During the night of the 28th and 29th the attention of two sons of La Page was attracted to the squawking of a goose near the pig pen indicating a movement of these people who were lingering about the premises, or of other persons. These young men went in that direction and found a person in the immediate vicinity of the well who could not be identified on account of the darkness, and on being approached this person ran rapidly away, and the sons were unable to catch him. It cannot be successfully contended that this was a made-up story. Arnold with his crowd was about, and no one of them was called by the prosecutor to deny. Indeed, it was not shown who these night visitants remaining about the premises that night were. It is evident they were hostile. They were not placed there by the sheriff.

The next day at the instigation of some one there was a research. A body of men was arranged in line and advanced, and when this well was reached a pole with a hook was produced and the turkey gobbler pulled from the water in the bottom of the well. It is strange indeed that this well was not searched or probed the day before when the other was. Feeling out wells was in the mind of the searching crowd that day and all this ground was gone over. The well beyond the pig pen was not concealed. As the La Page family had been under constant surveillance from daylight in the early morning of the 28th, no one of the family had had time or opportunity to place the gobbler in the well. If La Page stole the gobbler, he stole the calf and hens, and the query is what has become of them? A slight attempt was made by Arnold to state that he identified about 11 p. m. by the light of a lantern a hen at roost in La Page's henhouse as one of his by the color of the feathers around its neck. As this hen was shown to have had at the time a brood of chickens, this identification of the one hen is too uncertain to demand any consideration. There was no evidence to show any addition in number to La Page's hens. He was and is a farmer, and that he owned hens of his own of this breed or variety was not questioned. It is more than probable that during the night of May 28-29, the actual possessor of calf, hens, and gobbler placed the latter in La Page's well to divert suspicion from himself or themselves.

[3] The possession of recently stolen personal property is some evidence that the possessor was the thief, and its probative force depends on the attending circumstances. But such possession must be a conscious possession, or possession under such circumstances as to show that the possessor knew it was on his premises, and when the proof shows that it was just as probable, or, as here, more probable, that the stolen property was placed on the premises of the suspected party by another or others, the mere presence of the property on the premises has no significance. George La Page, a married son of Joseph La Page, lived with his family a mile away across the lots, but more than that by the road. While Arnold was at La Page's in the

early morning of the 28th, he saw George come around the barn from the direction of his home with a lantern. He was arrested. The evidence shows he was at his father's the evening before; that at 11 p. m. he went home across the lots, much the nearer way, and, it being very dark, that he borrowed this lantern; that he was home all the remainder of the night, and the morning of the 28th was on his way to a neighbor where he was working and stopped to leave the lantern. He was discharged. La Page has two other grown-up sons who reside with their father, and all were at home the night of May 27th and 28th. The evidence of Arnold and his wife was that there were tracks of men, not of a man, at the barn where the horses stood. If La Page was at Arnold's the night and morning of the 27th and 28th of May, it must be his sons, or one of them, was with him; but both were discharged. The defendant Joseph La Page was evidently held and his deportation sought for the reason he owned the farm on which is situated the well in which the gobbler was found the second day after the theft and after a posse of unfriendly people had been in possession practically of the farm and well for a day and a night and after a day's unavailing search had been made.

This was not the possession of stolen property such as alone will justify either conviction or deportation to Canada for trial. See 1 Wigmore on Evidence, p. 211, §§ 152 and 154; Commonwealth v. Harry Bell et al., 102 Mass. 163, 165. Neither actual personal possession nor possession with knowledge of such possession by the defendant is shown, nor did he have the actual possession of the place where the gobbler was found for the preceding 24 hours during which time it was in the possession of those seeking to fix on him the crime of the larceny of the gobbler and through that the stealing of the calf and hens and the breaking into the henhouse. When taken from the well, the gobbler was in a bag or sack used by merchants in selling a certain kind of merchandise. The defendant had such bags, but substantially any farm and all farmers might have them. These people around the defendant's premises could have taken one or could easily have procured it elsewhere. It was not shown to have been defendant's bag or sack. It may have been and it may not have been. The evidence against the two sons residing at home was just as strong as that against Joseph La Page, and yet they were discharged.

The writ is sustained, and defendant discharged.

DOCTOR JACK POT MINING CO. v. MARSH et al.

SAME v. HUMPHREYS.

(District Court, D. Colorado. April 6, 1914.)

Nos. 5865, 6100.

JUDGMENT (§ 684*)—CONCLUSIVENESS—PERSONS BOUND.

A judgment adjudging that plaintiff was the owner and entitled to the possession of a vein or lode of ore was not conclusive as to its ownership as against lessees of the defendant, who entered as such long prior to the rendition of such judgment, and prior to the institution of the suit, in actions against them for trespass.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1207; Dec. Dig. § 684.*]

At Law. Two actions by the Doctor Jack Pot Mining Company against Frank R. Marsh and others and against A. E. Humphreys, respectively. On motions to strike, and demurrers to the complaint. Motions sustained, and demurrers overruled.

Wm. V. Hodges, Mason A. Lewis, and James B. Grant, all of Denver, Colo., for plaintiff.

Chinn & Strickler, of Colorado Springs, Colo., and Thomas, Bryant, Nye & Malburn and C. F. Clay, all of Denver, Colo., for defendants.

LEWIS, District Judge. In each of these actions the plaintiff asks for damages on account of trespasses quare clausum fregit. The premises charged to have been entered is a vein or lode of precious ore. There are two counts in each complaint, but for the purposes presently to be considered they are identical. The defendants have moved to strike certain allegations found in each count, which are to the effect that in 1909 plaintiff filed in this court an action against the Work Mining and Milling Company, the defendants' lessor, wherein the plaintiff claimed to be the owner of said vein or lode, and that on the trial of said action in 1910 plaintiff recovered judgment against said Work Mining and Milling Company wherein the issues were found in favor of the plaintiff, and that it is the owner and entitled to the possession of the vein or lode on which the trespasses are alleged to have been committed, that this judgment was on appeal affirmed, and that the defendants here in each of these cases, having entered as the lessees of said Work Mining and Milling Company, are bound by said judgment against that company. Each count in each complaint discloses that the defendants entered as lessees of the Work M. & M. Company long prior to the rendition of the judgment against it and prior to the institution of that suit. The term of the lease, given to the defendants in the first case above, had expired when the suit against the Work Company was begun, and they were out. In the second case the defendant was still in when that suit was brought.

The only authority presented by the plaintiff in resisting the motion to strike the allegations in each count, the substance of which is set

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

forth above, is an opinion by the Supreme Court of Minnesota, found in the case of *Blew v. Ritz*, 82 Minn. 530, 85 N. W. 548. In that case it appeared that the plaintiff, Mrs. Blew, owned an eighty-acre tract of land. In September, 1877, she executed a mortgage on this land to J. I. Case & Co. She was at that time a married woman and her husband did not join in the execution of the mortgage. For that reason it was void, but Mrs. Blew did not know it. The mortgage was foreclosed, and thereafter, through mesne conveyances, Burnham and Derby acquired whatever title passed by the foreclosure. They leased the land to the defendant Ritz, and he cropped the same for three successive seasons. When Mrs. Blew was informed that the mortgage she had given was void, for the reason that her husband had not joined in its execution, she commenced an action against all parties holding conveyances to the land subsequent to her mortgage, including as party defendants Burnham and Derby, the defendant's lessors, for the purpose of determining validity of claims adverse to hers in the land. Judgment was rendered in that action in her favor. The defendant Ritz had entered as the tenant of Burnham and Derby before the determination of that suit and also before it was instituted, as I gather the facts. When she was informed that the mortgage was void she notified the defendant that she claimed the premises and demanded then the possession of him. Ritz was not a party to the suit against Burnham and Derby et al. After the determination of that suit and it had been adjudged therein that she had right to the title and possession of the property, she then brought this action against Ritz to recover damages for the unlawful entry, use and occupation of the land by him. Upon the trial of the case against Ritz the judgment roll in the suit against Burnham and Derby and others was offered in evidence by the plaintiff to disprove any right in the defendant Ritz under his lease. The court, in considering the effect of that judgment against the tenant Ritz, says:

"It is now insisted that defendant, not being a party to that suit, is not concluded by the judgment against Burnham and Derby as lessors, although he specifically places his right to occupy the land upon the lease derived from them in his answer. Under these circumstances he must be treated in his right to occupy the land as the privy of, and identified in interest with, his lessors, who gave him possession, and upon whom he expressly relies; consequently he is bound by the judgment against them, and there was no error in admitting it in evidence."

Much can be said in commendation of the rule there announced by the Minnesota court. If it be true, as alleged, that the only claim, under which the defendants entered and extracted the ore, was as lessees of the Work Company, it would appear to be an idle proceeding to litigate over again the question of title between the plaintiff and said lessor, the Work Company; which necessarily follows if the lessees of that company are not bound by the judgment as to title determined in that case. And thus suits against successive lessees may bring contradictory results as to them, as well as to the judgment obtained against the lessor; and the absurdity of this from the every-day viewpoint is pointed out in *Spencer v. Dearth*, 43 Vt. 106, though a case quite different in character from the one in hand.

All of this is met by the watchful principle, sometimes strained, which gives every man his day in court before anything affecting his rights is adjudicated, unless the proceeding be in rem.

But whatever we may think of *Blew v. Ritz*, the law seems settled to the contrary. It is not necessary to review the authorities at length. They are well-nigh unbroken in both text and case law. There are, however, exceptions to this rule in other classes of cases, but with which we are not now concerned.

In *Black on Judgments*, vol. 2, § 549, the author, after considering the plea of *res adjudicata* and announcing the general rule that it can be availed of only by parties or those in privity with them, says:

"In the second place, privies, in such sense that they are bound by the judgment, are those who acquired an interest in the subject-matter after the rendition of the judgment; if their title or interest attached before that fact, they are not bound unless made parties."

In *Freeman on Judgments*, vol. 1, § 162, it is said:

"It is well understood, though not usually stated in express terms in works upon the subject, that no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit. A tenant in possession prior to the commencement of an action of ejectment cannot therefore be lawfully dispossessed by the judgment, unless made a party to the suit. The assignee of a note is not affected by any litigation in reference to it beginning after the assignment. No grantee can be bound by any judgment in an action commenced against his grantor subsequent to the grant; otherwise a man having no interest in property could defeat the estate of the true owner."

The principle thus announced is applied in *Dull v. Blackman*, 169 U. S. 243, 18 Sup. Ct. 333, 42 L. Ed. 733.

The rule is stated again in *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 122, 33 Sup. Ct. 967, 57 L. Ed. 1410. The lessees were strangers to the judgment against the Work Company.

There is slight comfort on the other side in *Key v. Wood's Adm'r* 14 Md. 86; *Johnson v. Richmond Co. (C. C.)* 63 Fed. 494; *Lichty et ux. v. Lewis et ux. (C. C.)* 63 Fed. 535; *Id.*, 77 Fed. 111, 23 C. C. A. 59; *Bank at Hamburg v. Flynn (C. C.)* 38 Fed. 798; *Railroad Equipment Co. v. Blair*, 145 N. Y. 607, 39 N. E. 962; *Kolb v. Swann*, 68 Md. 516, 13 Atl. 379; *Baylor's Lessee v. Dejarnette*, 13 Grat. (Va.) 163; and general expressions in *Town of Canaan v. Turnpike Co.*, 1 Conn. 1.

It results that the motion to strike must be sustained.

II. The defendants' motion also embodies a demurrer to each cause of action in each complaint. But I have no doubt that each count in each complaint states a good cause of action. The demurrers will therefore be overruled.

COCA-COLA CO. v. BRANHAM et al.

(District Court, E. D. Oklahoma. July 15, 1914.)

1. TRADE-MARKS AND TRADE-NAMES (§ 70*) — UNFAIR COMPETITION — ACTS CONSTITUTING.

Plaintiff prepared and sold a beverage called "Coca-Cola," and defendants one called "Koke," both of which were made from syrups mixed with carbonated water, put up in bottles, and also served by the glass. Defendants' bottles were slightly taller than plaintiff's. The bottles of each party had a tin cap over the stopper, with the name of the beverage in script thereon, but it was the custom of dealers in serving the two beverages to remove the tin caps so that the purchaser did not see the name. Defendants sold exclusively to dealers. The color of the two beverages was similar, but it appeared that there were 181 beverages having practically the same color as Coca-Cola. Defendants neither sold Koke for Coca-Cola nor advised their customers to do so. *Held*, that defendants were guilty of no unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 73*)—ORIGIN OR ADOPTION OF MARK OR NAME.

That certain purchasers of "Coca-Cola," prepared and sold by plaintiff, referred to it as "Koke" did not entitle plaintiff to enjoin defendants from selling a somewhat similar beverage under the name "Koke," on the theory that by adoption or user the name "Koke" had become a secondary trade-name of plaintiff's product, where plaintiff had neither adopted nor used such name in connection with its beverage.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. § 73.*]

In Equity. Suit by the Coca-Cola Company against Joseph D. Branham and another, partners doing business as the Sand Springs Bottling Works. Temporary restraining order dissolved, and bill dismissed.

Dillard & Blake, of Tulsa, Okl., for plaintiff.

Randolph, Haver & Shirk, of Tulsa, Okl., for defendants.

YOUMANS, District Judge. [1] This is a suit in equity to enjoin the defendants from an infringement of the trade-name of plaintiff, and to prevent unfair competition. There is no evidence tending to show that defendants have been guilty of infringement of plaintiff's trade-name. The facts with regard to the allegation of unfair competition are as follows: The trade-name of plaintiff's product is "Coca-Cola." The defendants prepared and sold a beverage which is called "Koke." Both beverages are made from syrups mixed with carbonated water. Both are put up in bottles, and are also served by the glass at cold drink stands. The bottles containing Koke are a little taller than those containing Coca-Cola. The bottles containing each beverage have a tin cap over the stoppers. The words "Coca-Cola" and "Koke" appear in script on these tin caps. Coca-Cola and Koke are similar in color. Defendants sold to dealers exclusively. It appears in testimony that in some instances persons wanting Coca-Cola would say, "Give me a dope," or "Give me a Koke." There is also proof to the effect that two or three dealers in Tulsa gave Koke to their customers when they

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

had called for Coca-Cola. There is no proof that the defendants sold Koke for Cola-Cola, or advised their customers to do so. In that respect this case differs from the case of Coca-Cola Co. v. Gay-Ola Co., 200 Fed. 720, 119 C. C. A. 164. In that case the facts are set out as follows:

"Defendant claimed to have discovered complainant's formula, and to be in fact making the same thing. It adopted for its product * * * the word 'Gay-Ola.' It proceeded to bring this product into public notice by some advertising under its own name and by some other methods not criticized by complainant, all to an extent not distinctly shown by this record. It also wrote a series of letters to bottling companies which were engaged in bottling Coca-Cola, which letters were to the effect that it would sell the bottler Gay-Ola for a less price than he was paying for Coca-Cola; that the two articles were just alike, and no one could tell the difference; that the bottler could, if he wished, substitute Gay-Ola for Coca-Cola and his patrons would never know it; that several bottlers, who had been handling Coca-Cola, were doing this successfully and without discovery; and that, if the bottler desired, defendant would ship him Gay-Ola in plain, unmarked packages, so that his dealings with defendant would not be observed. Several of the letters in the record are of this substantial effect, though they use different forms of expression, and some only by hint and innuendo convey the invitation to substitute and so to deceive the final purchasers. Defendant also sent letters to soda fountain proprietors, setting out the cheap price and the merits of Gay-Ola and its identity with Coca-Cola, and quoting from a testimonial of a soda fountain proprietor: 'No one can tell it from Coca-Cola, and I sell it for Coca-Cola, and every one says I have the best Coca-Cola in the city.' On these letters, the defendant added the postscript: 'For your information, beg to state that we are shipping twenty-one Coca-Cola bottlers. "Nuff said."'"

Upon those facts it was held by the Court of Appeals for the Sixth Circuit that a case of unfair competition had been made out in that defendant sold its product "as and for Coca-Cola." Nothing appears in the testimony in this case connecting defendants with any effort to sell their product for Coca-Cola. There is nothing to show that they had such intention.

In the case of Coats v. Merrick Thread Co., 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847, the court said:

"Rival manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their inclosing packages, in the extent of their advertising, and in the employment of agents, but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals."

That was a suit charging unfair competition in the manufacture and sale of thread. It appeared in evidence that dealers had delivered to purchasers the thread of the defendants when they had been asked for that of plaintiff. On that point the court said:

"We think the defendants have clearly disproved any intention on their part to mislead the dealers who purchase of them. Indeed, such dealers could not possibly fail to know what they were buying, and the fraud, if any, was practiced on the buyer of a single or a small number of spools, who might be induced to purchase the thread of the defendants for that of the plaintiffs."

Further in the opinion the court said:

"If the purchaser of such thread desires a particular make, he should either call for such, in which case the dealer, if he put off on him a different

make, would be guilty of fraud, for which the defendants would not be responsible, or should examine himself the lettering upon the spoons."

It is true that it appears in testimony that it is the custom of dealers, in serving the two beverages, to remove the tin caps from the bottles, so that the purchaser does not see the name thereon, but that would be true as to any beverage of like or similar color to Coca-Cola. According to the testimony of plaintiff's agent, there are 181 beverages having practically the same color as Coca-Cola. Defendants cannot be held responsible for what their customers did without aid, suggestion, or inducement from them.

[2] Plaintiff also argues that "Koke" has become the "secondary name" of its product, because it appears from the proof that some persons desiring that product say to the dealer, "Give me a Koke." A trade-name may be acquired by adoption or user. In their brief, counsel for plaintiff quote the following from 38 Cyc. 765:

"Trade-names are acquired by adoption and user and belong to the one who first used them and gave them a value."

But plaintiff has never used the word "Koke" in connection with its product. It has taken and used the name Coca-Cola. The use of the word "Koke," as applied to the product of plaintiff, has been, so far as the testimony shows, by persons upon their volition without being moved thereto by defendants. If the use of the name had been observed by defendants, and it was afterwards adopted by them with the purpose and intention of taking advantage of that fact and to engage in the manufacture and sale of a beverage and call it "Koke," and sell it "as and for Coca-Cola," then a case of unfair competition would undoubtedly be made out.

Assuming that there is such a thing as a secondary trade-name, the right to its exclusive use must depend upon adoption and use, just as in the case of a primary name. There is such a thing as a name having acquired a secondary meaning. *Elgin National Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; *Bates Mfg. Co. v. Bates Numbering Machine Co.* (C. C.) 172 Fed. 892. But the facts in this case do not call for an application of that rule. The relief sought here is the prohibition of the use of a name that the defendants have neither adopted nor used. There is nothing to show that the defendants were using the name for the purpose of selling the beverage manufactured by them for Coca-Cola.

The temporary restraining order will be dissolved, and the plaintiff's bill dismissed.

KRYPTOK CO. v. HAUSSMANN & CO.

(District Court, E. D. Pennsylvania. August 12, 1914.)

No. 587.

1. DISMISSAL AND NONSUIT (§ 60*)—GROUNDS—WANT OF PROSECUTION.

Pending a suit for infringement of a patent against a manufacturer, plaintiff brought suit against a dealer, who was a customer of the manufacturer, on November 17, 1910. On February 27, 1911, he was restrained from proceeding against any of the manufacturer's customers. This restraining order was reversed on October 16, 1911, but the suit was not finally determined in plaintiff's favor until May 4, 1914. *Held*, that a motion made on June 18, 1914, to dismiss the suit against the dealer for want of prosecution, should be denied.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140-152; Dec. Dig. § 60.*]

2. EQUITY (§§ 272, 296*) — SUPPLEMENTAL PLEADING — MATTERS OCCURRING SUBSEQUENT TO FILING OF BILL.

Where matters, sought to be brought into the pleadings, have occurred since the filing of the original bill, they must be brought in by supplemental bill and not by amendment.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 564, 584-586, 599; Dec. Dig. §§ 272, 296.*]

3. EQUITY (§ 296*)—SUPPLEMENTAL PLEADING—MATTERS OCCURRING SUBSEQUENT TO FILING OF BILL.

Where plaintiff has no cause of action when his bill is filed, he cannot cure the defect by bringing in subsequent matters constituting a good cause of action by a supplemental bill, but may bring in matters not going to the existence of an original cause of action, but to a confirmation of it from which certain incidental rights flow.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 584-586, 599; Dec. Dig. § 296.*]

Suit by the Kryptok Company against Haussmann & Co. On motion by defendant to dismiss bill for want of prosecution and petition by plaintiff for leave to file a supplemental bill. Motion to dismiss disallowed, and permission to file and serve supplemental bill granted.

See, also, 216 Fed. 196.

Horace Pettit, of Philadelphia, Pa., and Victor D. Borst and Wm. H. Kenyon, both of New York City, for plaintiff.

Wm. C. Schwebel and I. S. Prenner, both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. Before the actual awarding of the writ of injunction preliminary until hearing in the above case, the attention of the court has been called to the fact that no formal disposition has been made of either the motion to dismiss the bill or the application to file a supplemental bill which were discussed and considered with the motions for the preliminary injunction in the above case and a similar motion in the case of the same plaintiff against another defendant.

Preliminary injunctions were awarded because the prima facie right thereto of the plaintiff could not be denied without nullifying the rulings made in its favor by the courts of both this and the Second Circuit.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This disposed of the question here involved except the formal disposition of the motion to dismiss and the petition for leave to file a supplemental bill.

[1] The special facts bearing upon this phase of the case are these:

The plaintiff filed its original bill November 17, 1910. The defendant in this case is a dealer. There was pending at the time a proceeding against another defendant in another jurisdiction for a like infringement. This latter defendant was a manufacturer and was charged with making lenses, the sole right to manufacture which was claimed by the plaintiff. An interlocutory order was applied for and granted in this last-mentioned suit on February 27, 1911, restraining the plaintiff from proceeding against any of the customers of the said manufacturer of lenses, of whom the defendant in the case before us was one. This order was reversed by the Circuit Court of Appeals for the Eighth Circuit on October 16, 1911; but the said case against the manufacturer was not finally determined in favor of the plaintiff until May 4, 1914. Another case against another manufacturer had also been instituted by the plaintiff in still another jurisdiction in which the same defenses here set up were introduced. A preliminary injunction was finally granted to the plaintiff on May 25, 1914.

[2, 3] On June 18, 1914, the plaintiff gave notice of the application now before us, and this was followed on June 27, 1914, by the pending motion to dismiss. It is evident that leave to file the supplemental bill should be given, and the motion to dismiss be disallowed, unless there is some technical obstacle in the way calling for a different ruling. As the matters sought to be brought into the pleadings have occurred since the filing of the original bill, they cannot be brought in by amendment, but must be by supplemental bill. If a plaintiff be without a cause of action at the time of the filing of his bill, he is not helped, in the sense of having his action continued, by bringing in subsequent matters which constitute a good cause of action but which are sought to be brought in after answer filed. A fortiori he would not be entitled to a preliminary injunction in the same suit. The legal effect, however, of the matters sought to be introduced here does not go to the existence of an original cause of action but to a confirmation of it, out of or from which, as a matter of practice, the allowance of certain incidental rights flow.

Rule 34 was adopted to meet just such a contingency, and is directly applicable in the present case.

The motion of defendant to dismiss plaintiff's bill is disallowed. Permission to file and serve its supplemental bill as applied for is granted to plaintiff; the notice of such application being found to be reasonable. Orders to this effect and a decree allowing the writ of preliminary injunction are filed herewith.

CINCINNATI EXHIBITION CO. v. MARSANS.

(District Court, E. D. Missouri, E. D. July 1, 1914.)

No. 4314.

1. INJUNCTION (§ 60*)—SUBJECTS OF PROTECTION—RESTRAINING BREACH OF CONTRACT.

A written contract, by which complainant employed defendant as a ball player for certain specified periods at a fixed compensation, on condition that it should have the right to discharge him on ten days' notice, followed by part performance by defendant and payment therefor, is based on a valuable consideration and valid, and a term of the contract by which defendant covenanted not to render such service to others during its continuance is also valid and binding and may be enforced by injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 117–119; Dec. Dig. § 60.*]

2. INJUNCTION (§ 14*)—GROUNDS OF RELIEF—IRREPARABLE INJURY.

Where the refusal of an injunction may, and probably will, inflict great damage upon the complainant, which is likely to be irreparable, while by a bond or otherwise defendant may be saved from loss or injury if it is granted, the injunction should be granted.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 14; Dec. Dig. § 14.*]

In Equity. Suit by the Cincinnati Exhibition Company against Armando Marsans. On motion for preliminary injunction. Motion granted.

John Galvin and Ellis G. Kinkead, both of Cincinnati, Ohio, and George H. Williams, of St. Louis, Mo., for plaintiff.

Dwight D. Currie, of St. Louis, Mo., for defendant.

SANBORN, Circuit Judge. [1] The plaintiff offered the defendant a contract to employ him for certain specified periods at a fixed compensation on condition that it should have the right to discharge him upon ten days' notice, and the defendant accepted that offer in writing. This made a valid and binding contract, especially after the defendant entered upon the performance of the contract and received the compensation there specified during a part of the term. The plaintiff's contract and the payment of the wages for this part of the term constitute a valuable consideration for the agreement. It is a settled rule of law that where a person agrees to render services that are unique and extraordinary, and which may not be rendered by another, and has made a negative covenant in his agreement whereby he promises not to render such service to others, the court may issue an injunction to prevent him from violating the negative covenant in order to induce him to perform his contract. The facts of this case seem to me to bring it under this rule.

[2] Another established rule of equity is that, where the refusal of an injunction may, and probably will, inflict great damage upon the plaintiff which is likely to be irreparable if the injunction is refused, while by a bond or otherwise the defendant may be saved from loss

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or injury if it is granted, an injunction may be and ought to be granted to hold the parties and the situation in the same condition in which it was at the time of the attempted breach of the contract until there may be a trial of the issues the suit presents. This case falls under this rule of law, and the order of the court will be that an injunction issue against the defendant forbidding him from rendering his services as a ball player to any one other than the complainant until the final decision

that the plaintiff gives a bond in the sum of \$13,000 with ample security to pay any damages that may result to the defendant from the issue of this injunction.

Let the order for the injunction and the injunction also provide that they shall cease to have effect and become dissolved whenever the complainant
and pay the defendant according to its terms.

THE TOWANDA.

(District Court, E. D. New York. July 18, 1914.)

MARITIME LIENS (§ 37*)—HARBOR TUGS AND LIGHTERS—PRIORITY OF LIENS.

Instead of the rule which gave priority of lien against harbor tugs or lighters to claims accruing within 40 days prior to attachment of the vessel, a fairer rule is to consider each case from the standpoint of due diligence, and to prorate such claims as arose within a reasonable period before the levy, viz., 90 days, then, such claims as were filed within 90 days before that and back of the second period, all claims of that season.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 58-70; Dec. Dig. § 37.*]

In Admiralty. Suit by the Burns Bros. against the steam lighter Towanda. On determination of priority of liens.

Alexander & Ash, of New York City (Mark Ash, of New York City, of counsel), for plaintiff.

Carter & Carter, of New York City (Peter S. Carter and William H. Carter, both of New York City, of counsel), for Henry Endner and Edgar F. Luckenbach.

De Lagnel Berier, of New York City, for Hudson Oil & Supply Co.

Henry W. Runyon, of Jersey City, N. J., for Alex. Miller & Bros., Inc.

Hyland & Zabriskie, of New York City (Nelson Zabriskie, of New York City, of counsel), for National Hoisting Engine Co.

Ralph J. M. Bullowa, of New York City, for Edward A. Hall and another.

Foley & Martin, of New York City, for James Shewan and another.

J. A. Martin and Burlingham, Montgomery & Beecher, all of New York City (Chauncey I. Clark, of New York City, of counsel), for Edward M. Timmins and another.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CHATFIELD, District Judge. The present application by one libellant asks the enforcement of the 40-day rule referred to in the case of *The Gratitude* (D. C.) 42 Fed. 299, so as to allow the payment in inverse order of the claims accruing within 40 days before the attachment, then in the same order, the claims accruing during the next period of 40 days before that time, and so on until the fund is exhausted. This rule has been recently discussed in the opinion filed in *The Towanda*, 215 Fed. 232, on the 22d day of May, 1914, by this court. The 40-day rule was a recognition of the fact that seamen's wages and ordinary claims on boats around New York Harbor were usually settled and paid on a 30-day basis. Ten days were added as a reasonable time for adjustment thereof.

It is urged that no materialman would wish, as a matter of business, to file a libel and attach a vessel which was continuing to obtain supplies, unless some other claimant found it necessary to begin action. It would also appear that great discrepancies would result in case the 40 days did not correspond to the exact 30 days and 10 days' grace with respect to each of the claims affected. No two claims would become due at the end of the same 40 days. The rule seems to have been disregarded and considered a dead letter for a long time. The principle has rather been applied of considering each case from the standpoint of due diligence; but in no case has more than one voyage or one season been considered a "reasonable period." In most cases, claims of the same rank and of approximately the same period have been prorated, and this would seem to be fairer than to establish a fixed period within which to order payment in inverse order. Each case, where agreement cannot be reached, must be considered by itself.

In the present case, some of the claimants have been trying to libel the boat for over 90 days; and this is the period fixed by the state statute as well. It would seem that in this case, all claims accruing within 90 days before the attachment should be paid pro rata after payment of costs of the action, in which the boat was sold.

If the fund is sufficient, then the claims accruing within 90 days before the first libel was filed should be paid pro rata, and back of that, any claims during the season of 1913.

E. I. DU PONT DE NEMOURS POWDER CO. et al. v. MASLAND et al.

(District Court, E. D. Pennsylvania. August 5, 1914.)

No. 1279.

INJUNCTION (§ 146*)—PRELIMINARY INJUNCTION—TRADE SECRETS—DISCLOSURE.

Where complainant sued to restrain an ex-employé from disclosing, and persons with whom he had since associated himself from using, complainant's secret processes in a competing business, but the answer denied the salient averments of the bill, and that defendants intended to do complainant the injury sought to be prevented, a preliminary injunction would be denied, with leave to renew the application at any time.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 319; Dec. Dig. § 146.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the E. I. Du Pont de Nemours Powder Company and the Du Pont Fabrikoid Company against Walter E. Masland and others. On application for a preliminary injunction. Denied.

Charles N. Butler, of Philadelphia, Pa., and Prindle, Wright & Small, of New York City, for plaintiffs.

George Quintard Horwitz, of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. We follow the usual practice in not discussing the merits of the bill on this motion further than is necessary to make clear the reason for the conclusion we have reached.

The bill alleges knowledge of secret processes of manufacture necessary to the successful prosecution of the business of plaintiff, gained by one of the defendants while in the employ of the plaintiff and maintaining confidential relations with it. The further averment is that these processes will be disclosed, unless such disclosure is prohibited by the court. The other defendants are alleged to be associated with the plaintiffs' former employé in a contemplated business which will involve the use of plaintiffs' processes and a disclosure of the secrets of its business.

The answer denies all the salient averments of the bill. The line which terminates the limits where the rights of the plaintiffs end and those of the defendants begin is a difficult one to draw. The iniquity of an employé who takes away with him the property of his employer, existing in the form of valuable processes, is as clear as if he asported any other form of property. The right of the employé to use his abilities, developed through his experiences, to the utmost of his capacity, is equally clear. This right of the employé and his obligation to preserve to the full the property rights of the employer are shaded into each other by lines so fine that it is doubtful whether anything but a nice sense of honor can keep them distinguished.

To award an injunction pendente lite is to in some measure at least prejudice the case, and involves a finding that the defendants are disposed to act contra bonos mores. At the same time it is within at least the theoretic possibilities that to refuse the writ is to permit a great injustice to be done the plaintiffs. There are considerations to be taken into the account, however, which promise a more satisfying judgment of the respective rights of the parties after a full hearing than now.

The defendant especially concerned has denied all intention to do the plaintiffs the injury which the latter think to be threatened. It is to be expected that the defendants will continue to see the wisdom and prudence, as well as the righteousness, of abiding in this position and awaiting a determination of their rights and those of the plaintiffs on final hearing.

The preliminary injunction is now refused, with leave to renew the application at any time, and costs to await final decree.

CITY OF DETROIT v. GRUMMOND.

(Circuit Court of Appeals, Sixth Circuit. July 25, 1914.)

No. 2478.

1. MUNICIPAL CORPORATIONS (§ 1035*) — CONTRACTS — RENTAL OF VESSEL — EXECUTION—CITY'S LIABILITY.

In an action on a contract executed by defendant city, it was not sufficient to sustain the city's claim of nonliability thereon to show that the contract had been executed without authority, but it must be shown also that such execution had not been ratified.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2206; Dec. Dig. § 1035.*]

2. MUNICIPAL CORPORATIONS (§ 1036*)—CONTRACTS—RATIFICATION—QUESTION FOR JURY.

In an action against a city on a contract for the hiring of a vessel as a quarantine station, whether the contract had been executed without authority, and whether, if so, it had subsequently been ratified, *held* for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2207; Dec. Dig. § 1036.*]

3. APPEAL AND ERROR (§ 719*)—ASSIGNMENTS OF ERROR—NECESSITY.

Denial of a requested charge cannot be reviewed, unless error is assigned thereon.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2968-2982, 3490; Dec. Dig. § 719.*]

4. HEALTH (§ 16*) — BOARD OF HEALTH — CONTRACTS — RENTING VESSEL AS QUARANTINE STATION—CALLING FOR BIDS—COMPROMISE BY CITY COUNCIL.

Detroit City Charter, § 178, confers power on the city council to provide for the general health of the inhabitants, to make regulations to secure the same, to prevent the introduction or spread of contagious or infectious disease, and to suppress disease generally, and, if deemed necessary, to establish a board of health and prescribe and regulate its powers and duties. *Held* that, where it was deemed necessary to protect the city from a cholera epidemic, and for this purpose the city's board of health leased a steamboat to be used as an isolation hospital, the contract therefor was not void because it was not duly approved and confirmed by the city council, and there had been no previous calling for bids, as required with reference to ordinary contracts by sections 240 and 241; such sections not being applicable to contracts made under section 178.

[Ed. Note.—For other cases, see *Health*, Cent. Dig. §§ 13, 14; Dec. Dig. § 16.*]

5. COURTS (§ 352*)—FEDERAL COURTS—FOLLOWING STATE PRACTICE.

Where a motion is made to set aside a general verdict in a federal court, and to render judgment for defendant on special findings, the matter is to be determined by the common law, and not by the state statute.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 926-932; Dec. Dig. § 352.*]

Conformity of practice in common-law actions to that of state court, see notes to *O'Connell v. Reed*, 5 C. C. A. 594; *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 392.]

In Error to the District Court of the United States for the Eastern District of Michigan; Alexis C. Angell, Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 216 F.—18

Action by U. Grant Grummond against the City of Detroit. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 121 Fed. 963, 58 C. C. A. 301.

R. I. Lawson, of Detroit, Mich., for plaintiff in error.

H. H. Smith, of Detroit, Mich., for defendant in error.

Before DENISON, Circuit Judge, and COCHRAN and TUTTLE, District Judges.

COCHRAN, District Judge. This case is here, after the lapse of ten years, for the second time. At the former hearing a judgment in favor of defendant in error, plaintiff below, against the plaintiff in error, defendant below, for the sum of \$16,366.66, entered upon a verdict of a jury, was reversed, with direction to award a new trial. The opinion was by Judge Severens, and is reported in 121 Fed. 963, 58 C. C. A. 301. It is assumed that the reader hereof has read that opinion and the recital of facts which precedes it. The new trial resulted in a verdict for plaintiff for the sum of \$7,500, and it is from the judgment thereon that this writ was taken.

The first judgment was reversed on three grounds, to wit: The exclusion from evidence of the entry of September 8, 1892, in the record of the board of health; the direction to the jury to find for the plaintiff, which was based on the ground that the execution of the contract in suit, of date November 30, 1892, had been ratified by the city; and the charge as to the measure of damages. The admissibility of the entry was put upon the ground that it could reasonably be claimed that it evidenced another contract of letting of the boat than that one, to wit, a contract with Capt. Grummond, of the date of the entry, to which plaintiff succeeded as lessor upon the sale thereof to him, September 14th, which contract was void because of Capt. Grummond's membership in the board of health, under which, rather than it, the possession of the boat may have been taken and kept and the hire paid, in which case such action on the part of the city would not have been a ratification of the contract in suit. It was held that the uncertainty as to which contract that action was referable made the question of ratification thereof one for the jury and not for the court. It was assumed that the contract was executed without authority of the board of health, upon whom and the health officer power to act in the matter had been conferred by the resolution of the common council of September 2d, and that therefore the liability of the city thereon depended on whether it had ratified its execution on its behalf.

No such errors were committed on the new trial. The entry was admitted in evidence, the question of ratification was submitted to the jury, and the measure of damages given accorded with the ruling of this court. The assignments of error now relied on mainly complain of certain rulings, each of which negated the position taken by the defendant at and maintained by it all through the trial that, as a matter of law, plaintiff was not entitled to recover. They were the overruling of its objection to the admission in evidence of the contract in suit, the overruling of its motion at the close of all the evidence to direct a ver-

dict for it, and the refusal to give to the jury certain requests, in each of which they were charged that the plaintiff was not entitled to recover, to each of which rulings defendant duly excepted. The objection, motion, and special requests were each expressly based on the position that, as a matter of law, the execution of the contract was without authority; the several special requests differing only in the way in which the want of authority was put. The court submitted to the jury the questions of authority and ratification both, and charged them that the plaintiff was entitled to recover, if the execution of the contract had been either authorized or ratified by the city.

[1] It was not sufficient to sustain defendant in this position that the contract had been executed without authority. It was necessary also that its execution had not been ratified. Though unauthorized, it was binding if ratified. Such was the presupposition and concession of the decision on the former hearing, and see *Hill v. Indianapolis* (C. C.) 92 Fed. 467. And possibly it was not open to the lower court and is not now open to this court to hold that, as a matter of law, the contract had not been ratified. The ground of this is that on the former hearing it was held that the lower court had erred in holding that, as a matter of law, the contract had been ratified, and that the question of ratification was for the jury. But, apart from the question of the conclusiveness of the former decision that the question was for the jury, we see no reason for receding therefrom.

[2] The facts on the new trial differed in two particulars from those on the first and in other particulars were more definite. The more important of the two particulars in which they differed was as to the date of payment of the hire of the boat. Judge Severens had it that it was paid November 22d; i. e., eight days before the execution of the contract. It was in fact not paid until December 7th; i. e., seven days after its execution. The bill therefor was presented to the common council by the controller November 22d, and it was then referred to the committee on claims and accounts. It does not appear when it was allowed, but it was not paid until December 7th. The other particular of difference is this: Judge Severens had it that in the report of September 13th to the common council by the health officer it was stated that, "at another meeting held in the mayor's office, Controller Black stated that a boat could be procured for \$5,000 for two years; the board to pay insurance on \$12,000." In the record before us no reference is made in the report to the matter of insurance. The particulars in which the case was more definite are these. The report of the committee on ways and means of the common council on the report of the health board of September 13th was made to that body and adopted by it September 20th. The possession of the boat was given to the city not "as early as September 14th"—probably not until after September 20th. The city, when it took possession, equipped it with disinfecting apparatus, new linen, and mattresses, and added some staterooms to her. The contract was executed in the city clerk's office, and the corporation counsel was consulted and advised as to how the contract was to be signed on behalf of the city, and wrote the words "City of Detroit by," "President of Board of Health," and "Health Officers" in the signature. Simultaneously with

the execution of the bill of sale of the boat by Capt. Grummond to the plaintiff (i. e., on September 14th), the former transferred certain insurance policies on the boat by indorsement on the policies, and these policies were delivered to the controller in October, before the 10th. The official who thus received notice of the transfer took a most active part in the transaction. He presented Capt. Grummond's proposition to the board of health; together with the health officer he was appointed by the board to look after the expenditures, the matter of which appointment was referred to in the report to the common council September 13th; he presented to the common council plaintiff's bill for the hire of the boat, and on December 7th paid it to plaintiff. On the assumption that the contract in suit was executed without authority, these particulars, in which the case at the new trial differed from and was more definite than that at the first trial, favored the position that the contract had been ratified.

But it cannot be said, as a matter of law, that the contract in suit was executed without authority. At the least that was a question for the jury, and the lower court was right in submitting it to them. By virtue of the resolution of the common council of September 2d and its adoption of the report of the committee on ways and means September 20th, the board of health, acting through its president, and the health officer had full authority to execute the contract in suit on behalf of the city. And, so far as the health officer was concerned, he needed no other authority than this. The only extent to which it can be said that it was executed without authority is in so far as it was executed on behalf of the city by the president of the board of health. In order for his act to have been with authority, it is essential that the board had theretofore authorized it. As heretofore stated on the former hearing in this court, it was assumed that the contract was executed without authority. The basis of this assumption was what it was taken that the entry of September 8th in the record of the board of health evidenced. It was taken that it evidenced a contract between Capt. Grummond and the board of health, between which and the contract in suit there was no connection. And, as there was no other direct evidence of action on the part of the board, that contract was unauthorized, so far as it was concerned. But this is not the only possible view to take of what that entry evidences. Construing it in the light of what subsequently happened, as may properly be done, it is possible to say that it evidenced an authorization of the execution of the contract in suit. The entry was not itself a contract between Capt. Grummond and the board. It was a minute of what took place at its meeting September 8th, and is quite informal in character. According to it, though Capt. Grummond was present as a member of the board, he did not then and there make any proposition. Seemingly he had theretofore made one, possibly to the controller, and this proposition was reported to the board by that officer.

The statement in the entry that it was moved and carried that the proposition be accepted need not mean more than an authorization to enter into a contract embodying the terms of the proposition. The board alone had no power under the resolution of the common council

of September 2d to make a contract. Joint action on its part and the part of the health officer was essential to that end, and, though the latter was secretary of the board and present at the meeting, it is not stated, nor is there any other direct evidence, that he then took any action. But, though the board alone had no power to make a contract, it was for it alone to determine whether, so far as it was concerned, it would make one. That it was regarded that a contract had not then been entered into and the matter was still open is indicated by the report of the action then taken to the common council September 13th, and the report thereon by the committee on ways and means, to whom it was referred, and the adoption of the latter report by the common council September 20th. Seemingly it was thought that further power than that theretofore granted was necessary in order to close a contract, or at least the approval of the common council was desired before one was closed.

If, however, the action of September 8th was not merely the authorization of a contract, as far as the board was concerned, but was the entering into an agreement with Capt. Grummond in relation to the boat, this does not exclude the fact that it was then understood that the agreement should be reduced to writing and a formal written contract entered into, and that the execution of such a contract was then authorized. It is most likely that there was such an understanding. In a matter of such consequence, the terms of the agreement would hardly be left to the witness of an informal entry and the recollection of those present. There is nothing in the entry negating such an understanding. In either contingency, therefore, the action of September 8th called for the execution of a formal written contract. And it is open to claim that it called for the execution of the contract in suit. It is no stretch of the historical imagination to surmise that all concerned then knew that Capt. Grummond could not, by reason of his membership in the board, legally make a contract with the city; that this feature of the case was the subject of consideration at the meeting of September 8th; and that it was then understood that Capt. Grummond would sell the boat to the plaintiff, as he did within a week thereafter, and that the contract contemplated would thereafter be made with plaintiff and not with him. Beyond doubt, no formal written contract was made with Capt. Grummond; he sold his boat to plaintiff; and thereafter such a contract was made with the latter because of this legal difficulty, and for the purpose of obviating it. What more reasonable than to infer that all this was in pursuance of what was understood should be done at the meeting of September 8th? Not otherwise can the execution of the contract in suit be accounted for. It was executed on behalf of the city by the president of the board of health and the health officer. It was executed in the city clerk's office. The city clerk attested it and affixed the seal of the city to it. The corporation counsel was consulted as to the manner of execution on behalf of the city and wrote the words in the signature heretofore stated.

Now how did all this come about? It calls for explanation. So far as the contract was executed on behalf of the city by the health officer, it needs no other explanation than the resolution of the common coun-

cil of September 2d. His action was within the authority then conferred upon him, and he needed no authorization on the part of the board of health, though seemingly according to his testimony, given many years after the event, he did not so understand the matter. But how as to the execution by the president of the board of health? To justify it, authorization on the part of that body was essential, and such authorization is not to be found elsewhere than at the meeting of September 8th. And, according to the testimony of the health officer, it was under that authority that the contract was executed both by the president of the board and himself. The silence of the entry on this subject and an inability to account therefor is not conclusive against this position. Possibly it was thought that the real nature of things would not be changed by this procedure, and it was naïvely supposed that the legal difficulty could thus readily be obviated. It may be urged that even on this view of the matter the contract in suit was not within the authorization of the board at the meeting of September 8th, because it is stated in the entry that the city was to "pay insurance on \$12,000," whereas in the contract it was provided that the city should keep the boat insured. But it does not follow necessarily that such is the effect of this difference. It may be that the entry is incomplete in not showing that the city was to keep the boat insured. Its so doing would not be inconsistent with its paying the insurance. If it was to keep the boat insured, it had to pay the insurance. In the report of September 13th, no reference is made to the matter of insurance. On the other hand, immediately preceding the statement of the proposition as to the boat in question, which had been accepted, it is stated that an option had been obtained on another boat by which it was to be "returned in good condition," from which possibly the inference might have been drawn that such was a term of that proposition. The contract in suit provided that the city was to return the boat "in like condition as when taken, reasonable use and wear and tear excepted." This, of itself, made the city responsible for the loss without respect to the clause as to insurance. These considerations made it a question for the jury at least whether or not the execution of the contract had not been duly authorized. If the fact that the contract provided that the city should keep the boat insured rather than that it should pay for insurance on \$12,000 removed the question of authority from the case, still it was for the jury to say whether the city, by taking and keeping possession of the boat and paying the \$5,000, had not waived this departure from authority and thereby ratified the execution of the contract.

It may be thought that this view of things affects the legality of the contract in that it leaves it open to be claimed that the contract in reality was with Capt. Grummond and only in form with the plaintiff. We are not disposed to say that it does not, though there was evidence tending to show that the plaintiff gave full value for the boat, and that the sale was genuine and not a sham. But no such question is before us.

[3] The defendant made a request that the jury be charged that if Capt. Grummond "was interested in this contract, either directly or indirectly, there can be no recovery, because the statute would make such

a contract void," and the request was refused and an exception taken. But this ruling has not been assigned as error.

[4] Yet another ground is urged to support the contention that defendant was entitled to a directed verdict than want of authority on the part of those who executed the contract on behalf of the city to so do. It is want of authority in the common council to confer authority on the board of health and health officer to act as they did on behalf of the city. Reliance is had on sections 240 and 241 of the charter of the city, which provide as follows, to wit:

Section 240:

"No contract shall be let or entered into for the construction of any public work to be done, or for the purchase or furnishing of supplies for said city not hereinafter provided for, and no such public work, performance, purchasing or supplying shall be commenced until approved by the common council and until the contract therefor has been duly approved and confirmed by the council."

Section 241:

"No contract * * * for the purchase or furnishing of any material, printing or supplies for said corporation, if the purchase of said * * * materials or supplies shall exceed \$200 shall be let or entered into except to and with the lowest bidder with adequate security."

It is claimed that the contract in suit is void because it was not duly approved and confirmed by the council, and there was no previous calling for bids. This question was in the case at the former hearing, but no mention is made of it in Judge Severens' opinion. It is stated by counsel for defendant in error that it was then urged on behalf of the city. If so, no mention was made of it, no doubt, because it was thought that there was nothing in it. By section 178 of the charter of the city power is conferred on the common council to "provide for the preservation of the general health of the inhabitants of said city; to make regulations to secure the same; to prevent the introduction or spread of contagious disease or infectious disease and suppress disease generally; and, if deemed necessary, to establish a board of health and prescribe and regulate its powers and duties." This provision is sweeping in its character. The following cases coming from the Supreme Court of Michigan have been cited by counsel for defendant in error as showing that a liberal construction has been put by that court on statutory provisions relating to the public health, to wit: *Rae v. City of Flint*, 51 Mich. 527, 16 N. W. 887; *Elliott v. Supervisors*, 58 Mich. 452, 25 N. W. 461, 55 Am. Rep. 706; *Wilkinson v. Long Rapids*, 74 Mich. 64, 41 N. W. 861; *Cedar Creek Twp. v. Supervisors*, 135 Mich. 124, 97 N. W. 409; *Bishop v. Supervisors*, 140 Mich. 177, 103 N. W. 585; *Thomas v. Supervisors*, 142 Mich. 319, 105 N. W. 771. In view of them we are of the opinion that sections 240 and 241 are not limitations upon section 178, and under the latter section the common council had full power to take the action it did. Judge Campbell in *Elliott v. Supervisors*, said:

"The exigency of a pestilence will not wait for the convenience of parties, and measures must be prompt and effectual."

For these reasons we hold that the assignments of error under consideration are not well taken. The fact is that, so far as the question of the contract being the city's contract is concerned, the case bordered very closely on being one where it would have been proper to decide as a matter of law that it was.

[5] Of the other assignments of error the only one urged in oral argument was one complaining of the action of the lower court in overruling its motion to set aside the general verdict and enter judgment for defendant upon certain findings. The matter is to be determined by the common law and not by the state statute. *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302, 319, 16 C. C. A. 232. The result, however, would not be different if it were determined by the state statute. The basis of the motion was that the special findings were inconsistent with the general verdict. The special findings were as follows, to wit:

"Q. Did the board of health authorize its president and secretary to make a contract with U. Grant Grummond for the hiring of the boat Milton D. Ward? Ans. We think so, because it was afterwards ratified by the controller of the city of Detroit.

"Q. Was an agreement on behalf of the city for the hiring of the boat made with Capt. Grummond on the 8th day of September, 1892? Ans. Yes."

It is only claimed that the second special finding is inconsistent with the general verdict. But we can see no inconsistency between the two. Even if it be assumed that the meaning of the finding is that a contract was made with Capt. Grummond on September 8th, between which and the contract in suit there was no connection, there is no inconsistency. The jury could have so found, and yet found that the plaintiff was entitled to recover on the ground that the taking and keeping possession of the boat and payment of the hire were referable to the contract in suit and not to the earlier contract, and that thereby the city had ratified that contract. On the former hearing in this court it was held that on this assumption the city was liable if it had thus ratified the contract in suit, and that the question whether it had so done was for the jury. But such is not necessarily the meaning of the finding. As heretofore shown, it was open to the jury to find that there was an agreement then made with Capt. Grummond, and that it was a part of the agreement that it should be embodied in a formal written contract, and that such as the contract in suit, in which case there would have been a direct connection between that agreement and that contract. This assignment is not well taken.

The other assignments of error have been carefully considered and the conclusion reached that they are not well taken. It is not deemed important to make further reference to them.

Finding no error in the proceedings in the lower court, the judgment is affirmed.

HICKMAN v. SAWYER et al.

(Circuit Court of Appeals, Fourth Circuit. May 26, 1914.)

No. 1190.

1. CONTRACTS (§ 93*)—CONSENT—MISTAKE.

One who in the full possession of all his faculties signs a written or printed contract without reading the same, although having full opportunity to do so, cannot impeach it by parol on the ground that he intended to sign something different.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 415-419; Dec. Dig. § 93.*]

2. CONTRACTS (§ 321*)—CONSTRUCTION AND OPERATION—REMEDY FOR BREACH.

When the parties agree upon the remedy which one of them is to have in case of a breach of the contract by the other, that remedy is exclusive.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1508-1527; Dec. Dig. § 321.*]

3. SALES (§ 38*)—VALIDITY OF CONTRACT—FRAUD.

Defendants and one C. formed a partnership for the purpose of purchasing a stallion; defendants being induced to do so by the joinder of C., who was a horse dealer. Defendants gave joint notes for their share of the purchase money, while C. paid his share in cash, which, through a fraudulent agreement with the agent of the sellers, was returned to him. *Held*, that the fraud rendered the contract voidable by defendants.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 65-77, 85; Dec. Dig. § 38.*]

4. BILLS AND NOTES (§ 525*)—ACTION—BONA FIDE PURCHASER.

Evidence *held* to sustain the finding of a jury that plaintiff was not a bona fide purchaser of notes sued on from a bank which purchased the same from the payees, but to warrant a finding that he purchased as agent of the payees, who were indorsers, which rendered the action subject to the defense of fraud in the inception of the notes.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832-1839; Dec. Dig. § 525.*]

5. SALES (§ 360*)—ACTIONS FOR PRICE—DEFENSE OF FRAUD.

In an action on notes given for the purchase price of a stallion which was retained and sold by defendants, although a successful defense was made against the notes on the ground that the sale was induced by fraud, plaintiff was entitled to recover the value of the horse.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1060-1062; Dec. Dig. § 360.*]

Pritchard, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of North Carolina, at Raleigh; Henry G. Conner, Judge.

Action at law by Charles W. Hickman against D. C. Sawyer, John E. Parrisher, J. W. Cahoon, Charles Roughton, H. T. Davenport, L. S. Spruill, and others. Judgment for defendants, and plaintiff brings error. Reversed.

De Witt C. Wilson, of La Fayette, Ind., and I. M. Meekins, of Elizabeth City, N. C. (Wilson & Quinn, of La Fayette, Ind., on the brief), for plaintiff in error.

W. M. Bond, of Edenton, N. C., and E. F. Aydlett, of Elizabeth City, N. C., for defendants in error.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

WOODS, Circuit Judge. The controversy arises out of a contract made April 14, 1908, for the sale of a stallion by J. Crouch & Son, an Indiana partnership, to the defendants, citizens of North Carolina, under the name of the Columbia German Coach Horse Company. The contract of sale contained a guaranty on the part of the sellers that the stallion would be a "satisfactory sure breeder" provided he should be kept in sound and healthy condition and should have proper care and exercise; and it was stipulated by the sellers:

"If the said stallion should fail to be a satisfactory sure breeder with the above treatment, then same shall be returned to us at La Fayette, Indiana, in as sound and healthy condition as he now is and in as good flesh by June 1, 1909, and we agree thereupon to take the said stallion back and to give the said company another stallion in his place."

The contract on the part of the buyers recited the necessity of improving the stock of the country, and contained an agreement by the defendants as subscribers to the association to take shares aggregating \$3,000, each of the par value of \$300, and when all the shares were sold to give their three joint notes to J. Crouch & Son for \$1,000 each, payable November 1, 1909, November 1, 1910, and November 1, 1911, with interest at the rate of 6 per cent. The notes were given April 13, 1908; and after they fell due this action on them was brought December 12, 1911, by the plaintiff, Hickman, claiming to be an indorsee and holder for value without notice. After the testimony was taken the District Judge submitted to the jury the following issues, to which the jury responded as indicated:

"1. Was the execution by D. C. Sawyer, L. S. Spruill, J. G. Brickhouse, W. M. Brickhouse, Charles Roughton, H. H. Phelps, W. R. Spruill, H. T. Davenport, and J. W. Cahoon of the notes sued upon procured by fraud and misrepresentation as alleged? Ans. Yes.

"2. Was the execution by defendants J. R. Parrisher, Benjamin Spruill, W. F. Owens, W. C. Alexander, and E. P. Cahoon of the notes sued upon procured by fraud and misrepresentation as alleged? Ans. Yes.

"3. Was the Merchants' National Bank an innocent purchaser before maturity for value and without notice of Exhibits A and B? Ans. Yes.

"4. Is the plaintiff, Hickman, a purchaser for value of the notes marked Exhibits A and B? Ans. No.

"5. Was plaintiff, Hickman, an innocent purchaser for value and without notice of the note marked Exhibit C? Ans. No.

"6. What amount, if anything, is due the plaintiff by defendants on the notes sued on? Ans. ———"

Upon these findings the District Judge entered judgment for the defendants. It is unnecessary to set out the assignments of error in detail, as the case turns on the question whether the District Judge should have directed a verdict for the plaintiff instead of submitting issues to the jury, and whether he should have given judgment for the plaintiff on the findings of the jury, or should have granted a new trial.

[1] 1. Laying aside for the moment the claim of the plaintiff that he is a purchaser for value without notice, we consider whether there was any evidence of fraud upon the part of J. Crouch & Son in the

contract of sale and the taking of the notes. Some of the defendants testified that McLean, who was the agent of Crouch & Son in the transaction, read the notes to them as if each maker would be liable only to the extent of the par value of the stock subscribed by him, and also indicated in the reading that Combs, who was a horse dealer in Columbia, had signed the notes and become liable along with the others; and Spruill, one of the defendants, testified that he could not write nor read writing, though he signed the notes with his own hand. There was no evidence that McLean knew that Spruill could not read writing, nor does it appear that the notes and contract were written and not printed. The defendants had abundant opportunity to examine the papers, and it was their duty to do so. A court cannot grant relief to one who in the full possession of all his faculties signs a written or printed contract, on the ground that he carelessly failed to even read the paper or make any examination of it, depending upon the statements of someone else as to its contents.

It is true that relief has been granted when persons exercising reasonable diligence have been misled into signing a paper which had been cunningly substituted for the contract they intended to sign. But this is not a case of that sort. Having every opportunity of seeing and reading the papers, the defendants signed without reading them, and they cannot now be allowed to say by parol that they intended to sign something different, and thus impeach their written contract. *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Dellinger v. Gillespie*, 118 N. C. 737, 24 S. E. 538; *Boyden v. Clarke*, 109 N. C. 669, 14 S. E. 52.

[2] 2. If the proof of the failure of the horse to come up to the guaranty as a satisfactory and sure breeder stood alone, it would not be sufficient to protect the defendants against their contract of purchase, because they specially agreed that if the guaranty should fail they would take another stallion from the sellers in place of the one purchased. And it appears that after discovery of the failure of the guaranty they elected to keep the horse without claiming another, and finally sold him for their own benefit. It is well established that, when the parties agree upon the remedy which one of them is to have in case of a breach of the contract by the other, that remedy is exclusive. This rule was applied in the following cases similar to this: *Walters v. Akers* (Ky.) 101 S. W. 1179; *Oltmanns v. Poland* (Tex. Civ. App.) 142 S. W. 653; *Nave v. Powell*, 52 Ind. App. 496, 96 N. E. 395; *Crouch v. Leake* (Ark.) 157 S. W. 390; *Sturtevant Mill Co. v. Kingland Brick Co.*, 74 N. J. Law, 492, 70 Atl. 732; *Bomberger, Wright & Co. v. Griener*, 18 Iowa, 477; *Chas. Hackley Co. v. Kennedy*, 152 N. C. 196, 67 S. E. 488; *Ancrum v. Camden Water, etc., Co.*, 82 S. C. 284, 64 S. E. 151, 21 L. R. A. (N. S.) 1029.

It is true that the remedy in this case is inadequate almost to the point of absurdity, since there was no stipulation whatever as to the quality of the other stallion that was to be given in exchange. But a court cannot on the ground of improvidence substitute other remedies for that which the party himself has contracted to accept.

[3] 3. But the failure of consideration does not stand alone. The deception in the procurement of the contract which we now point out,

and which was relied on by defendants, not only vitiates the contract in its inception, but projects itself into the entire transaction, attaching itself to the failure of consideration and magnifying it into evidence of fraud. The evidence is clear and undisputed that the defendants went into the purchase because of their faith in Combs as a dealer in horses and their reliance on the representation of McLean, the agent of the seller, and of Combs himself that he was joining in the purchase and incurring a common pecuniary risk. In order to deceive the defendants into the belief that Combs had faith in the enterprise and had joined in the venture, and that he would be stimulated to make the business a success, McLean and Combs not only led the defendants into that belief by false oral statements, but, to make sure of the deception, resorted to this artful trick: Combs gave his check for \$300 as if in payment of his share of the purchase money of the horse; McLean had the check cashed and then paid the money back to Combs after entering a credit of \$100 on each note as if Combs had made that payment on it. Fraud has assumed no more odious form than this. The bargain between McLean and Combs was not only corrupt, but was a breach of trust on the part of Combs participated in by the sellers of the horse. Combs had entered into a partnership with the defendants, thus assuming to them a trust relation which required on his part the utmost good faith and disinterested effort for the common good; and he was corrupted by the agent proposing to sell to the association to act in the sellers' interest by inducing the association to make the purchase. For such a nefarious bargain between the seller and one pretending to act in association with the buyers, the buyers may avoid the entire contract. The authorities on this subject are so numerous that only a few are cited. *Empire State Ins. Co. v. American Central Ins. Co.*, 138 N. Y. 446, 34 N. E. 200; *Truslow v. Parkersburg, etc.*, R. Co., 61 W. Va. 628, 57 S. E. 51; *De Buesche v. Alt*, L. R. 8 Chan. Div. 315; *Emmons v. Alvord*, 177 Mass. 466, 59 N. E. 126; 31 Cyc. 1572.

It is true that if the buyer would rescind he must return the article purchased as soon as the fraud is discovered, but if the article has been disposed of, or for any other reason the return has become impossible before discovery of the fraud, the buyer may sue for damages for the imposition or may set them up as a counterclaim in an action brought by the seller for the purchase money. The usual measure of damages in such case would be the difference between the real value of the article purchased and the purchase price. *May v. Loomis*, 140 N. C. 350, 52 S. E. 728; 35 Cyc. 149.

In this case there was no proof whatever that the defendants knew of the corrupt bargain between Combs and McLean until after they had disposed of the horse, and hence had this been a suit on the notes brought by Crouch & Son the recovery could not exceed the real value of the horse sold.

This conclusion as to the rights of the defendants as against Crouch & Son is not affected by the terms of the guaranty providing that in case the horse should not turn out as represented the purchasers should return him and take another in its place. For this stipulation for the

acceptance of another horse related only to the failure of consideration; it had no relation to fraud in the inception of the contract and provided no remedy for it. Indeed, as between the parties the written guaranty along with every other incident of the contract of sale was vitiated by the fraud.

[4] 4. We consider next whether there was such a preponderance of evidence that the plaintiff was a bona fide purchaser for value without notice before maturity of the third note indorsed by Crouch & Son to him, that the District Judge should have so held without submitting the issue to a jury. In North Carolina when a negotiable instrument has been obtained by fraud, the law lays the burden on the holder to prove by a preponderance of the evidence that it was indorsed to him for value, in good faith, before maturity. *Third National Bank v. Exum*, 163 N. C. 199, 79 S. E. 498; *American National Bank v. Fountain*, 148 N. C. 590, 62 S. E. 738. In this instance, the plaintiff testified that the last note maturing on November 1, 1911, was so indorsed to him. But this is utterly inconsistent with the fact that, a year and a half before he acquired this note, he had sued on the note which matured November 1, 1909, which had been transferred to him by the bank, and the defense of fraud in procuring its execution had been set up. As both notes related to the same transaction, it is obvious that the defense of fraud set up to the first note furnished good reason to submit to the jury the issue of notice to the plaintiff of fraud in procuring the execution of the third note, and that their finding on that issue is well supported.

5. There is more difficulty as to the issue submitted whether the plaintiff, Hickman, was a "purchaser for value" of the two notes which had been previously indorsed to the American National Bank; the fact being, as found by the jury, that the bank was an innocent purchaser of the notes before maturity. If after maturity Hickman purchased from the bank, the innocent holder, he would be entitled to recover, although at the time of his purchase he had notice of the vice in the original transaction. This is on the principle that want of notice to the first indorsee confers upon him the right to collect or transfer the instrument, and with the transfer goes the first indorsee's own right of action. If this were not so, the value of negotiable instruments in the hands of bona fide indorsees before maturity would be impaired. *Montclair v. Ramsdell*, 107 U. S. 159, 2 Sup. Ct. 391, 27 L. Ed. 431; *Aragon Coffee Co. v. Rogers*, 105 Va. 51, 52 S. E. 843, 8 Ann. Cas. 623; *Kost v. Bender*, 25 Mich. 515; *Glenn v. Farmers' Bank of N. C.*, 70 N. C. 191; 7 Cyc. 938. Nor would it make any difference if the innocent purchaser chose to transfer the instrument for a nominal consideration, all his rights would nevertheless go to his assignees. If therefore Hickman himself was really the purchaser from the bank, the inquiry whether he paid value was entirely immaterial.

The real question made by the evidence was not whether there was a formal transfer by the bank to the plaintiff for value received from him therefor, but whether in that transaction the plaintiff was representing himself or Crouch & Son. The testimony of the officers of

the bank supports that of the plaintiff that he paid the money, and that the bank transferred the notes in consideration of the payment. As the bank had paid full value for the notes, it is inconceivable that it would have assigned them without value. There is no doubt that, if the plaintiff was the assignee at all, he was an assignee for value. The evidence leaves no room for controversy on that point. Hence it could make no difference that the fourth issue submitted presented the inquiry whether Hickman was a purchaser for value, for the real question was not as to the payment of value but whether he was himself a purchaser at all. The form of the inquiry might have been more definite in asking directly whether Hickman purchased and paid the money for himself or as the representative of Crouch & Son; but the inquiry whether Hickman was a purchaser opened and included the issue whether he represented himself or Crouch & Son, and that is the crucial question which the jury answered against the plaintiff in their response to the fourth issue.

Hickman testified that he had never been in North Carolina, and knew nothing of the responsibility of the makers of the note; that he could not remember how he found out that the bank had these overdue papers; and that under these circumstances he bought the notes as an investment, intending to incur the expense of suit, although the notes made no provision for attorney's fees. But what is still more significant, he testified that he had never made any demand on Crouch & Son, and that the law of Indiana required him to exhaust the makers before making demand on the indorsers; that he had never mentioned the notes to Crouch & Son, and had never notified them of nonpayment; and that he had no understanding with Crouch & Son to reimburse him for expenses. It is significant, too, that no witness, not even a member of the firm of Crouch & Son, testified in support of this extraordinary story.

The extreme improbability of this statement is strong evidence against it. The inference that Hickman was acting for Crouch & Son was, under the circumstances, a fair and reasonable inference for the jury to draw. Looking backward to the beginning of the transaction, the inference of duplicity and false pretense as to the ownership of the notes is greatly strengthened by the undisputed duplicity of Crouch & Son when they corrupted Combs, the pretended associate of the defendants. Crouch & Son were bound to take up the notes when they were dishonored, and it would be disregarding the obvious to say the evidence does not warrant the conclusion that the plaintiff paid the bank at their instance and as their agent. It is incredible that the plaintiff or any other reasonable man with no inducement but investment would have taken up the notes for himself or any one else but Crouch & Son, the indorsers. If Hickman did purchase the notes for Crouch & Son, as is implied by the finding of the jury, then they are the beneficial owners of the notes and against them and Hickman, their representative, the defense of fraud must prevail. We conclude that there was no error in refusing to direct a verdict and that the answers to all the issues submitted to the jury were well supported by the evidence.

[5] Nevertheless, the judgment of the District Court in favor of the defendants cannot stand, because under the evidence offered the plaintiff was without doubt entitled to recover the value of the horse. It is true that the answer sets up the expense of maintaining the horse as a loss to the defendants because of the seller's fraud; and mention is made of this claim in the argument; but no evidence was offered at the trial in support of it. It may be if there had been evidence on the point that it would have been the duty of the District Judge to submit an issue of the amount of this expense, and whether the seller's fraud caused the useless expense, under the principle laid down by the United States Supreme Court in *Sigafus v. Porter*, 179 U. S. 116, 21 Sup. Ct. 34, 45 L. Ed. 113. But as that question is not before us, we express no opinion upon it.

As against Crouch & Son, the plaintiff is the legal owner and holder of the notes; as against the defendants, he stands in the shoes of Crouch & Son and is entitled to recover just what they would be entitled to recover had they sued on the notes. 2 Daniel on Neg. Ins. § 1192; note to *Stewart v. Price*, 64 L. R. A. 599; 30 Cyc. 78.

For this reason the judgment must be reversed and the cause remanded to the District Court for a new trial of an issue as to the real value of the horse, and of any other relevant issue made by the pleadings upon which evidence may be offered and which has not already been determined by the findings on the first trial.

Reversed.

PRITCHARD, Circuit Judge (dissenting). It is with reluctance that I dissent from some of the conclusions of the court in this instance.

The principal allegation in the plaintiff's complaint is to the effect that these defendants were induced to sign the notes in question by the false and fraudulent representations of Combs and McLean, as to the extent of liability they would incur by signing the same. In other words, this appears to have been the main defense relied upon by the defendants in the court below; the two first issues being as to whether the execution by the defendants of the notes sued upon was procured by fraud and misrepresentation, both of which were found in favor of the defendants. However, I heartily concur in the conclusion reached in the leading opinion as to this contention, which is to the effect that:

"Having every opportunity of seeing and reading the papers, the defendants signed without reading them, and they cannot now be allowed to say by parol that they intended to sign something different, and thus impeach their written contract."

Such being the case, can the defendants, in view of the facts, avail themselves of the further plea that they were induced to execute the notes in question by reason of the false and fraudulent representations of McLean acting as the agent of J. Crouch & Son in the sale of the horse? In other words, inasmuch as the defendants retained the horse and did not rescind the contract, are they not estopped thereby

from setting up the alleged fraudulent conduct of Crouch & Son's agent as a defense to this action?

Crouch & Son delivered the horse in pursuance of their agreement, and the purchasers received, retained possession of, and sold the same for a valuable consideration which they retained, and now seek to repudiate the liability which they assumed when they signed the notes. They could have rescinded the contract when they discovered that the horse was not as represented, but this they failed to do.

It is well settled that, where one seeks to avoid liability under a contract on account of fraud, he must do so by rescinding the same at the earliest possible moment after the fraud is discovered. In this instance the defendants in their answer admit that they did not return the horse as required by the express provisions of the warranty.

As said by the Supreme Court in *Shapiro v. Goldberg*, 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419:

"It is well settled by repeated decisions of this court that, where a party desires to rescind upon the ground of misrepresentation or fraud, he must, upon the discovery of the fraud, announce his purpose and adhere to it. If he continues to treat the property as his own, the right of rescission is gone, and the party will be held bound by the contract. * * * If he choose the latter remedy (to rescind), he must act promptly—'announce his purpose and adhere to it,' and not by acts of ownership continue to assert right and title over the property as though it belonged to him."

The same rule is announced in the following cases: *Hill v. Railroad Co.*, 143 N. C. 539, 55 S. E. 854, 9 L. R. A. (N. S.) 606; *Clements v. Insurance Co.*, 155 N. C. 57, 70 S. E. 1076; *Masson v. Bovet*, 1 Denio (N. Y.) 69, 43 Am. Dec. 653; *Richardson v. Lowe*, 149 Fed. 625, 79 C. C. A. 317.

It should be borne in mind that at the time the notes in question were signed J. Crouch & Son executed a guaranty in the following language:

"Nashville, Tenn., April 14, 1908.

"Guaranty on the German Imported Coach Stallion, Stepper No. 4327.

"We have this day sold the imported German Coach Stallion named Stepper, No. 4327, to the Columbia German Coach Horse Company, Columbia, N. C., and we guarantee the said stallion to be a satisfactory sure breeder, provided the said stallion keeps in as sound and healthy condition as he now is and has proper care and exercise. If the said stallion should fail to be a satisfactory sure breeder with the above treatment, then same shall be returned to us at Lafayette, Indiana, in as sound and healthy condition as he now is and in as good flesh by June 1st, 1909, and we agree thereupon to take the said stallion back and to give the said company another in his place.

"J. Crouch & Son,

"Columbia German Coach Horse Co.

"Accepted: S. M. Combs, Sect.

"Duplicate."

This warranty or agreement was as much a part of the contract between the parties as the notes, and must be construed in connection therewith in order to determine what relief the defendants were to have in the event the horse should prove to be worthless. This agreement clearly expressed the terms of the contract in which there is provided a remedy in case there should be a breach of the same.

There being no other provision contained therein by which the defendants could be compensated should the horse prove to be unfit for the purpose for which he was purchased, the remedy thus afforded was exclusive.

A warranty somewhat similar to the one in this case was passed upon in the case of *Walters v. Akers* (Ky.) 101 S. W. 1179. The court in that case, among other things, said:

"There was no mistake or fraud in the written contract of warranty entered into between Vannort and Crouch & Son, and this writing contained the entire contract between them, and by its terms each of the parties to it must abide. * * *

"Contracts containing provisions similar to this have been before this court in a number of cases, and it has uniformly been ruled that, when the parties to a contract agree upon the remedies that accrue for a breach of it, these remedies constitute the only relief in this particular that the purchaser has, and he must look to his contract and be governed by its stipulations."

Also in the case of *Oltmanns Bros. v. Poland*, 142 S. W. 653, the Texas Court of Appeals in discussing this phase of the question said:

"2. The gist of this case is the proper construction of the warranty given by Oltmanns Bros., and appellee's rights thereunder, as shown by the undisputed facts of this case. It is a rule of the common law in the sale of chattels that a sound price warrants a sound article; and where a purchase is made without any special warranty, if the article proves unfit for the purpose for which it was sold, the purchaser may return the same and demand a return of the purchase money, or he may keep the article and recover as damages the difference between the value of the article as represented by the implied warranty and its real value. If he seeks a rescission of the contract, he must return the article purchased. *Stewart v. R. R. Co.*, 62 Tex. 248, 249; *Milligan v. Ewing*, 64 Tex. 260; *Coddington v. Wells*, 59 Tex. 50. But in the sale of personal property, as in all other transactions, the seller has a right to define his liability by a special warranty, and provide for the measure of damages or the manner of fulfilling his warranty. This was done in this case by Oltmanns Bros. The guaranty provides that, 'if the said stallion fails to be a satisfactory and sure breeder, with the above treatment, we agree to take the said stallion back and give to said company another * * * at our barns in as sound and healthy condition as he now is, by April 1. 1908.'"

Also in the case of *Crouch & Son v. Leake et al.*, 157 S. W. page 390, the Supreme Court of Arkansas, in passing upon a warranty almost identical with the one now under consideration, among other things, said:

"The written contract expressed the terms of the warranty and provided the remedy that should accrue from a breach of it, which was exclusive of any other mode of compensation and afforded the only relief to which they were entitled. Not having complied with the said condition on their part, nor shown a waiver thereof on the part of appellants, they will be held to have accepted the stallion as in all respects complying with the warranty and are bound to the payment of the balance due on the note for the purchase money. *Hightsmith v. Hammonds*, 99 Ark. 400 [138 S. W. 635]. See, also, *Walters v. Akers* (Ky.) 101 S. W. 1179; *Wilson v. Nichols & Shepperd Co.* [139 Ky. 506] 97 S. W. 18."

It is held by a majority of the court in this instance that the deception practiced by Combs in the procurement of the contract projects itself into the entire transaction, "attaching itself to the failure of consideration, and magnifying it into evidence of fraud; that the

evidence is clear and undisputed; that the defendants went into the purchase because of their faith in Combs as a dealer in horses, and their reliance on the representations of McLean, the agent of the sellers, and of Combs himself that he was joining in the purchase and incurring a common pecuniary risk."

While the conduct of Combs in entering into a secret agreement with McLean was not in the least commendable, we think that when all the circumstances of this case are considered it cannot be reasonably contended that he said or did anything calculated in the slightest degree to mislead the defendants as to the character of the horse they were about to purchase. The injury these defendants sustained was due to the fact that the horse did not prove to be "a satisfactory sure breeder," as represented by J. Crouch & Son in the written guaranty that was delivered to the defendants at the time the notes in question were signed.

The fact that Combs was willing to take a one-tenth interest in the horse in consideration of any services he might render is in itself sufficient to repel the presumption that he had any knowledge of the fact that the horse was not in all respects as represented by J. Crouch & Son.

There is nothing in the record to show that these defendants were, by the false and fraudulent representations of Combs, precluded from making such inquiries as may have been necessary to ascertain the truth as to the qualities of the horse.

The court below submitted an issue as to whether the Merchants' National Bank was an innocent purchaser before maturity for value and without notice of the two notes referred to as Exhibits A and B, and in response to this issue the jury answered in the affirmative. The court also submitted an issue as to whether the plaintiff was a purchaser for value of these notes, and to this issue the jury responded in the negative. Then there was an issue submitted as to whether the plaintiff was an innocent purchaser for value and without notice of the note referred to as Exhibit C (this note having been purchased from J. Crouch & Son according to the testimony of the plaintiff before maturity for value and without notice), and the jury responded in the negative as to this issue.

Even if the defendants were not estopped from interposing the plea of fraud to plaintiff's right of recovery, and were able to establish such plea, nevertheless the court below should have instructed the jury that the plaintiff was entitled to recover on the first two notes in question, inasmuch as the jury found that the Merchants' National Bank was an innocent purchaser before maturity for value and without notice of these notes. The jury having found that the bank was an innocent purchaser before maturity for value and without notice, it follows as a matter of law that the plaintiff, to whom these notes were transferred, was also an innocent purchaser, standing as he did in the shoes of the bank, invested with all the rights that the bank would have had, had it retained these notes and instituted suit upon the same. In other words, the plaintiff having purchased the notes of the bank under these circumstances, he would be entitled to re-

cover, notwithstanding the fact that at the time of the purchase he may have had knowledge of the fraud in connection with the original transaction.

Under the decisions of the Supreme Court of North Carolina it has been held that the appellate court in the exercise of its discretion may in granting a new trial determine whether the trial in the court below should be restricted to one or more of the issues passed upon by the jury, in the first instance. In a personal injury suit (*Tillett v. Railway*, 115 N. C. 663, 20 S. E. 480), the court in disposing of the case said:

"The findings upon the third and fourth issues must therefore be set aside and a new trial granted as to the questions involved in those two, leaving the verdict upon the other issues undisturbed."

Also in the case of *Nathan v. Railway*, 118 N. C. 1070, 24 S. E. 511, the court said:

"In the case of *Tillett v. Railroad*, supra, the ruling in the same case when formerly before the court on appeal (115 N. C. 662, 20 S. E. 480) was reaffirmed, and it was held, as in many cases previously decided, to be within the sound discretion of the appellate court to determine whether a new trial should be restricted to one or more or all of the issues passed upon by the jury. Cites *Holmes v. Godwin*, 69 N. C. 467; s. c., 71 N. C. 309; *Burton v. Railroad*, 84 N. C. 201, 192; *Boing v. Railroad*, 91 N. C. 199; *Lindley v. Railroad*, 88 N. C. 547."

Therefore, in the exercise of a sound discretion, this court should, in my opinion, hold that the third issue should not be disturbed, and when the case is sent back for a new trial the lower court should be directed to enter judgment in favor of the plaintiff for the amount of the two notes in question.

It would be a needless waste of time to have the jury again pass upon these questions, inasmuch as the evidence offered in the court below to the effect that the bank was an innocent purchaser was uncontradicted. However, it is insisted in the principal opinion that Hickman, in the purchase of the first two notes, was acting as the agent of J. Crouch & Son. A careful examination of the record fails to disclose any evidence from which it might be inferred that in the purchase of these two notes from the bank the plaintiff was only acting as a "dummy" or as the agent of Crouch & Son. There is certainly nothing in the pleadings that would have justified the submission of an issue of this character, nor could the jury have considered this theory in view of the pleadings and the issues based thereon. In other words, in order to enable the defendants to avail themselves of the defense suggested in the principal opinion, it would be necessary to amend the pleadings so as to set up an entirely new and distinct defense to this action, which I think should not be done in a case like this where the issues have been fairly submitted under the pleadings, and the defendants have had an opportunity to present what they originally conceived to be their defense to this action.

Were it not for the fact, as I have stated, that the defendants are estopped from setting up the plea that they were induced to sign the notes in question by the false and fraudulent representations of McLean, and it therefore becomes immaterial as to whether the plaintiff

was or was not an innocent purchaser for value without notice of these notes, I would be inclined to concur with the majority of the court in holding that there is sufficient evidence to justify the jury in finding as they did in response to the fourth issue that the plaintiff was not an innocent purchaser of the note referred to in the fifth issue.

WEEKS v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. June 18, 1914.)

No. 180.

1. INDICTMENT AND INFORMATION (§ 52*)—REQUISITES OF INFORMATION— VERIFICATION OR ACCOMPANYING AFFIDAVIT.

In the United States the informations used by the prosecuting officers are the informations used by the Attorney General in England, and not those exhibited by masters of the crown, and which were governed by 4 and 5 William and Mary, c. 18; and as at common law an information could be filed by the Attorney General simply on his oath of office, and without verification, the verification of an information by a prosecuting attorney in this country is unnecessary, unless required by some constitutional or statutory provision.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 163-168; Dec. Dig. § 52.*]

2. INDICTMENT AND INFORMATION (§ 52*)—INFORMATION IN FEDERAL COURTS —NECESSITY FOR VERIFICATION OR AFFIDAVIT OF PROBABLE CAUSE.

The provision of the fourth constitutional amendment that "no warrants shall issue but upon probable cause supported by oath or affirmation," which is a limitation upon the powers of the federal government only, does not require an information filed by a district attorney of the United States to be verified or supported by an affidavit based on personal knowledge and showing probable cause, unless such information is made the basis of an application for a warrant of arrest. If the sole purpose of the information is to state the accusation, a defendant may be charged and tried for a misdemeanor on an information not verified nor so supported.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 163-168; Dec. Dig. § 52.*]

In Error to the District Court of the United States for the Southern District of New York.

Criminal prosecution by the United States against Oscar J. Weeks, doing business under the name of O. J. Weeks & Co. Judgment of conviction, and defendant brings error. Affirmed.

Walter Jeffreys Carlin, of New York City, for plaintiff in error.

H. Snowden Marshall, U. S. Atty., of New York City (Robert Stephenson, of New York City, of counsel), for the United States.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The defendant has been convicted of a crime committed in violation of the Pure Food and Drugs Act, approved June 30, 1906 (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1911, p. 1354]). The information charged the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

defendant with having shipped from New York City to St. Louis, Mo., a certain article of food, labeled in part as follows:

"Cream thick—Serial No. 2049—Manufactured by O. J. Weeks & Co., New York, New York. It is guaranteed to contain no gelatine, gum arabic, egg albumen or similar article."

This label, it was charged, was false and misleading and calculated to mislead and deceive purchasers in that the article of food contained as one of its ingredients an article similar to gum arabic, to wit, India gum. The information was signed by the United States Attorney, but was not verified, nor were any affidavits filed or submitted to the court. The defendant appeared and demurred to the information, and in specification of points under his demurrer alleged:

"That the said information is not supported by a verification or oath showing personal knowledge or probable cause."

His demurrer was overruled, and, being required to plead, he pleaded not guilty. At the close of the trial his counsel renewed his motion that the information be dismissed for reasons before stated, but his motion was denied, and the case was submitted to the jury, and a verdict of guilty was rendered.

The question we have to decide, therefore, is whether an attorney for the United States can proceed in the courts of the United States by information to prosecute one who is alleged to have committed a misdemeanor, where the information is not verified or supported by an affidavit showing personal knowledge or probable cause.

There can be no conviction or punishment for a crime without a formal and sufficient accusation. A court can acquire no jurisdiction to try a person for a criminal offense unless he has been charged with the commission of the particular offense and charged in the particular form and mode required by law. If that is wanting, his trial and conviction is a nullity, for no person can be deprived of either life, liberty, or property without due process of law. The forms or modes of accusation which the law recognizes are: Indictment or presentment by a grand jury; and information by the public prosecutor.

The colonists who came to this country from England brought with them the common and statute laws of England as they existed at the time of their emigration and in so far as they were applicable to the local circumstances of the colonies which they established. Among the principles of the common law which they thus brought were those which regulated the mode of proceeding in criminal cases: The law relating to indictments and informations and the right to trial by jury. Prior to the Declaration of Independence, various statutes had abolished in the colonies as well as in England a number of the oppressive provisions of English law relating to criminal trials. Among the principles which had thus been abrogated, for example, was that which denied to a person accused of a capital crime the right to have compulsory process for his witnesses, and that which withheld from him the right to examine on oath those witnesses who voluntarily appeared for him, as well as that which forbade him the aid of counsel in

his defense, except only as regarded the questions of law. See *United States v. Reid*, 12 How. 361, 363, 13 L. Ed. 1023 (1851).

The proceeding by information is said to have been unpopular in England and to some extent in the colonies. But it has never been abolished in England, although in some of our states it has been done. At the time of the Declaration of Independence it was a familiar mode of criminal procedure in all the colonies.

When the statute of 3 Henry VII extended the jurisdiction of the court of star chamber and informations became restricted in practice to that court, the members of which were the sole judges of the law, the fact, and the penalty, a very oppressive use was made of them for something more than a century, "so as continually to harass the subject and shamefully enrich the crown." 4 Blackstone, Comm. p. 310. And when the court of star chamber was abolished in the time of Charles I, and proceedings by information were again used in the Court of King's Bench, the prejudice which had arisen from the long abuse of informations was so strong that it was strenuously contended that all proceedings by information were illegal as being contrary to the nature of English laws and to Magna Charta. But the objections were overruled; Sir Matthew Hale saying:

"That although in all criminal cases the most regular and safe way, and most consonant to the statute of Magna Charta, is by presentation or indictment of 12 sworn men, yet, for crimes inferior to capital ones, proceedings might be by information, and this, from long and frequent practice, was certainly established as the law of the land." 5 Mod. 463; Show. 106; Bacon's Ab., Information, A; 2 Hawk. P. C. 260; 4 Black. Com. 310; 1 Ersk. Speeches, 275; *State v. Dover*, 9 N. H. 468 (1838).

And the unpopularity of informations was not restricted to the mother country but, as we have already said, existed to some extent in this country. Mr. Justice Wilson of the Supreme Court of the United States, and who was also a member of the Constitutional Convention of 1787, in the lectures which he delivered as professor of law in the University of Pennsylvania in 1790-92, after calling attention to the two kinds of informations—those filed *ex officio* by the public prosecutor and those carried on in the name of the commonwealth or crown but in fact at the instance of some private person or common informer—said:

"The first have been the source of much; the second have been the source of intolerable vexation; both were the ready tools, by using which Empson and Dudley and an arbitrary star chamber fashioned the proceedings of the law into a thousand tyrannical forms. Neither, indeed, extended to capital crimes; but ingenious tyranny can torture in a thousand shapes without depriving the person tortured of his life."

After calling attention to the fact that in England restraints had been imposed upon informations at the instance of private persons but not upon those filed *ex officio* by the public prosecutor, he went on to say:

"By the Constitution of Pennsylvania, both kinds are effectually removed. By that Constitution, however, informations are still suffered to live; but they are bound and gagged. They are confined to official misdemeanors; and even against those they cannot be slept but by leave of the court. By that

Constitution, 'no person shall, for any indictable offense, be proceeded against criminally by information,' 'unless by leave of the court, for oppression and misdemeanor in office.'" 2 Wilson's Works (Andrews' Ed.) p. 450.

There seems to be no doubt that prosecution by information is as ancient as the common law itself. The subject had no reason to complain because this method of prosecution was adopted, for, as Blackstone (4 Commentaries, p. 310) states:

"The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had been by indictment."

Moreover, it seems to have always been the rule that the substantial parts of the information had to be drawn with as much exactitude as the corresponding parts of an indictment for the same offense.

In the early years of the federal government, informations were principally used, if not exclusively used, for the recovery of fines and forfeitures. And Mr. Justice Story in his Commentaries on the Constitution, § 1780, published in 1833, said, in speaking of informations:

"This process is rarely recurred to in America; and it has never yet been formally put into operation by any positive authority of Congress under the national government, in mere cases of misdemeanors, though common enough in civil prosecutions for penalties and forfeitures."

But within the last 50 years prosecutions by informations have increased greatly in the federal courts. See *Ex parte Wilson*, 114 U. S. 417, 425, 5 Sup. Ct. 935, 29 L. Ed. 89.

It appears, as Stephens states in his *History of the Criminal Law*, vol. 1, p. 295, that from the earliest times the law officers of the king accused persons of offenses not capital in his own court without the intervention of a grand jury. But the right to prefer a criminal information is at common law restricted to misdemeanors.

"At common law any information will lie for any misdemeanor, but not for a felony." 22 Cyc. 187, and cases there cited.

The offense charged in the information now under consideration was plainly a misdemeanor, and for more than 200 years in England the right has been established to prosecute by information, and, without the sanction of a grand jury, a person charged with having committed a misdemeanor.

[1] Bacon in his *Abridgment*, vol. 3, 635, after stating that an information differs principally from an indictment in that "an indictment is an accusation found by the oath of 12 men, whereas an information is only the allegation of the officer who exhibits it," goes on to explain that there were two kinds of criminal informations in use in England under the common-law procedure. The first, which was for offenses more immediately against the king, was filed, he says, by the Attorney General *ex officio* and without leave of court. The second, which was for offenses against private individuals, was exhibited by masters of the crown, and, as matter of course, prior to the statute of 4 and 5 William and Mary, c. 18. But, after that statute was enacted, informations of the second class, he declares, could not be filed except upon leave of court, and all such informa-

tions had to be supported by the affidavit of the person at whose suit it was filed.

In the United States it has been suggested that informations brought by the prosecuting officers answer to the informations filed by the masters of the crown, and which, as said, had to be supported by affidavit and not to the informations of the first class or those which related more immediately to the king and which could be filed without affidavit. Those who make this suggestion rely upon the statement found in Blackstone's Commentaries, vol. 4, p. 309, where that distinguished commentator says:

"The objects of the king's own prosecutions, filed *ex officio* by his own Attorney General, are properly such enormous misdemeanors as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offenses so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal, which power, thus necessary, not only to the ease and safety, but even to the very existence of the executive magistrate, was originally reserved in the great plan of the English Constitution, wherein provision is wisely made for the due preservation of all its parts. The objects of the other species of informations filed by the master of the crown office upon the complaint or relation of a private subject are any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the government (for those are left to the care of the Attorney General), but which, on account of their magnitude or pernicious example, deserve the most public animadversion."

Now this statement may seem to imply that the Attorney General's right to file informations for misdemeanors was not unlimited but was restricted to misdemeanors which tended to disturb or endanger the government. But, if this was his meaning, it is evident that he was mistaken in his understanding of the law.

Chitty in his great work on the Criminal Law, p. 884, says:

"Informations may be filed by the Attorney General for any offense below the dignity of felony, which tends, in his opinion, to disturb the government or immediately interfere with the interests of the public or the safety of the crown. He most frequently exercises this power in cases of libels on governments or high officers of the crown, etc. He seems, indeed, at his option to exact it when any offense occurs which may thus be prosecuted in the crown office. He may file an information against any one whom he thinks proper to select, without oath, without motion or opportunity for the defendant to show cause against the proceeding."

And Cole in his work on Criminal Informations, p. 9, says that:

"The Attorney General may exhibit an *ex officio* information for any misdemeanor whatever."

And Hawkins in his Pleas of the Crown, vol. 2, p. 369, says:

"As to the first of these particulars, viz., in what cases such informations lie, it hath been holden that the king shall put no one to answer for a wrong done principally to another, without an indictment or presentment, but that he may do it for a wrong done principally to himself. But I do not find this distinction confirmed by experience, for it is everyday's practice, agreeable to numberless precedents, to proceed by way of information, either in the name of the Attorney General or of the master of the crown office, for offenses of the former kind, as for batteries, cheats, seducing a young man

or woman from their parents in order to marry them against their consent, or for any other wicked purpose, spiriting away a child to the plantations, rescuing persons from legal arrests, perjuries, and subornations thereof, forgeries, conspiracies, whether to accuse an innocent person or to impoverish a certain set of lawful traders, * * * and other such like crimes done principally to a private person, as well as for offenses done principally to the king."

In Clark on Criminal Procedure, pp. 128, 129, it is said:

"By an early English statute (4 and 5 William and Mary, c. 18), however, which is old enough to have become a part of our common law, if applicable to our conditions, it was provided that informations by masters of the crown office could only be filed by leave of court, and that they should be supported by the affidavit of the person at whose suit they were preferred. The law remained that informations filed by the Attorney General (and as already stated he could file them for any misdemeanor) need not be verified, and that he was the sole judge of the necessity or propriety of filing them. * * * There is some authority for the proposition that the kind of information to be used at common law in this country is that which in England was filed by the masters of the crown office. * * * But, by the better opinion, the other kind of information is the one in use with us."

In Bishop's Criminal Procedure, § 144, it is said:

"In our states the criminal information should be deemed to be such, and such only, as in England is presented by the attorney or solicitor general. This part of the English common law has plainly become common law with us. As with us the powers which in England were exercised by the attorney or solicitor general are largely distributed among our district attorneys, whose office does not exist in England, the latter officers would seem to be entitled, under our common law, to prosecute by information, as a right adhering to their office and without leave of court."

If it is true, and it seems to be, that the district attorneys exercise the powers which in England were exercised by the attorney or solicitor general, then they are entitled to proceed upon information, and that without leave of the court and without affidavit.

It is necessary to keep in mind what Mr. Stephens in his General View of the Criminal Law of England, p. 156, calls the "most characteristic principle of the law of England" on the subject of criminal procedure, namely, that in that country "everyone, without exception, has the right to use the queen's (king's) name for the purpose of prosecuting any person for any crime." The statute (4 and 5 W. & M. c. 18) was intended to restrict the right of prosecution by private, and not public, prosecutors. Prior to that act it had been within the power of any individual to file an information without disclosing to the court the grounds upon which it was exhibited. 4 T. R. 290. And the meaning of the statute was that the clerk of the crown should thereafter file no information of a private prosecutor without leave of the court, and that the fact that there was probable cause for filing it should be disclosed in order that the court might know whether to grant leave, and it was further intended to preclude the issuance of process on such informations without recognizance. Comyn's Digest, vol. 4, p. 558, note "d." But there was no intention to limit the right of the Attorney General to prosecute by information, as he always had done. It was not necessary in England, either before or after the statute, that he should obtain leave of the court before fil-

ing his information, and there was therefore not the same reason why he should verify any information which he filed. Moreover, he was acting throughout under his oath of office, and it was not assumed that he would proceed upon information without probable cause.

We think that the weight of authority is that in this country, as the text-writers assert, the information used by the prosecuting officers are the informations used by the Attorney General in England and not those exhibited by masters of the crown and which were governed by 4 and 5 William and Mary, c. 18. And as at common law an information could be filed by the Attorney General simply on his oath of office and without verification, it has been held in this country that verification of an information by a prosecuting attorney is unnecessary, unless required by some constitutional or statutory provision. *Long v. People*, 135 Ill. 435, 25 N. E. 851, 10 L. R. A. 48; *People v. Graney*, 91 Mich. 646, 52 N. W. 66; *State v. Pohl*, 170 Mo. 422, 70 S. W. 695; 22 Cyc. 281.

We pass, therefore, to inquire whether there is anything in the Constitution of the United States or in the acts of Congress which in any way alters the common law respecting the right of the prosecuting officers of the government of the United States to proceed by information in criminal cases in the federal courts.

The Constitution of the United States leaves all offenses against the United States open to prosecution by information except those which are capital or infamous. The restriction as to those offenses is contained in the fifth amendment:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

The Supreme Court in *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89 (1885), authoritatively decided what meaning is to be attached to the word "infamous" in this connection. The court held that a crime punishable by imprisonment for a term of years with hard labor is an infamous crime. In the constitutional sense it is not the character of the crime but the nature of the punishment which renders the crime infamous. The offense with which the defendant in this case is charged is not an infamous one but one upon which he might be tried upon information.

The Acts of Congress not only have not prohibited the use of informations but have on the contrary expressly authorized their use in certain cases. See section 1022 of the Revised Statutes (U. S. Comp. St. 1901, p. 720).

The fourth amendment to the Constitution of the United States provides as follows:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

Mr. Justice Story in his Commentaries on the Constitution, vol. 2, § 1902, in speaking of this amendment, states that:

"It is little more than the affirmance of a great constitutional doctrine of the common law."

If that be true, and if it also be true that at common law the Attorney General could file an information without verification or affidavit of probable cause, his oath of office being regarded as sufficient, then this particular amendment should not be regarded as altering the rule upon that subject.

In *United States v. Maxwell*, 3 Dill. 275, Fed. Cas. No. 15,750 (1875), in an opinion written by Judge Dillon, it is said:

"We are of the opinion, therefore, that offenses not capital or infamous may in the discretion of the court be prosecuted by information. We cannot recognize the right of the District Attorney to proceed on his own motion, and shall require probable cause of guilt to appear by the oath of some credible person before we will allow an information to be filed and a warrant of arrest to issue. But with these safeguards there is no more reason to fear an oppressive use of information than there is reason to fear an abuse of the powers of a grand jury."

The facts in that case were that prior to the term complaint on oath had been made before a United States commissioner charging the defendant with several violations of the internal revenue laws, and the defendant was arrested upon a warrant issued by the commissioner and held to answer to the District Court. At the term the District Attorney upon the said complaint, warrant, and recognizance moved the court for leave to file criminal information against the defendant charging him with the said offenses, which leave was granted and the information accordingly filed. The defendant appeared and pleaded guilty. Afterwards his counsel made a motion in arrest of judgment upon the ground that the defendant could only be punished criminally upon an indictment and not upon an information. The motion in arrest of judgment was overruled; the court using, in the course of its opinion, the language already quoted. The case cannot be regarded as holding that an information must be verified. The court in a dictum announced that it would not permit an information to be filed and a warrant of arrest to issue without some evidence being presented under oath that probable cause of guilt existed.

In *United States v. Smith* (C. C.) 40 Fed. 755 (1889), in a case which arose in the Circuit Court for the Eastern District of Virginia, Judge Hughes said:

"A preliminary question raised in the argument was whether the District Attorney may of right; by virtue of his official prerogative, file informations charging citizens with offenses brought officially to his knowledge. This cannot be done, under the rules and practice of this court, except upon previous complaint under oath, after opportunity has been given the accused to appear before the examining officer, and to confront the witnesses testifying in support of the complaint. This requisite makes it necessary that the District Attorney shall have leave from the court to file an information; and, if it is within the discretion of the court whether to grant the leave or not, then the right to file is not a prerogative of the prosecutor's office, and the court may require him, before granting leave, to bring the accused, by rule or other proceeding, before the court, to show cause, if cause there be, against the filing of the information."

The case most frequently cited in the federal courts on this subject is that of *United States v. Tureaud* (C. C.) 20 Fed. 621, decided in 1884 in the Fifth Circuit by Judge Billings of the Eastern District of Louisiana. It was decided in that case that informations must be based upon affidavits which show probable cause arising from facts within the knowledge of the parties making them. And the court quashed an information which was based on an affidavit which read:

"George A. Dice, being duly sworn, says: All the statements and averments in the foregoing information are true, as he verily believes."

It was conceded:

"That under the usages of the government of Great Britain this information belongs to the class of formal accusations which could be made by the king in his courts without any evidence and against all evidence."

The opinion then continued:

"But the adoption of the fourth amendment affected all kinds and modes of prosecution for crimes or offenses, for there can be no legal pursuit of accused persons without apprehension. All prosecutions require warrants. An information, a suggestion of a criminal charge to a court, is a vain thing, unless it is followed by a *capias*. The procedure by information, therefore, after it was acted upon by this amendment, lost its prerogative function or quality. It could not thereafter be the vehicle of preferring any arbitrary accusation—not by kings because we have in the department of criminal law no successor to him, so far as he represented a right to institute, if it pleased him, unsupported incriminations. Nor by the District Attorney, nor any other officer of the United States, for the Constitution has said in effect that in no way nor manner shall magistrates or courts issue warrants, except upon proofs, which are to be upon oath and make probable excuse."

What is said as to the necessity for a verification of the information we think is correct in any case where the application for the issuance of a warrant of arrest is based on the information. In *United States v. Polite*, 35 Fed. 58 (1888), in the District Court for the District of South Carolina, it is said that:

"Informations must be based upon affidavits which show probable cause arising from facts within the knowledge of the parties making them, and mere belief is not sufficient."

In this case the information was not sworn to, but accompanying it were the papers of the commissioner who held the preliminary examination, including the sworn testimony of the witnesses taken in the presence of the accused. It was held that this was sufficient, and a motion to quash was refused.

In *Johnston v. United States*, 87 Fed. 187, 30 C. C. A. 612 (1898), in the Circuit Court of Appeals for the Fifth Circuit, the two preceding cases are referred to and approved. The information was not sworn to but was accompanied by an affidavit. The court said:

"The affidavit on which the information was based was wholly insufficient to warrant the arrest and trial of the plaintiff in error, and is altogether too general in terms as to the offense against the United States said to have been committed; and it shows no knowledge, information, nor even belief on the part of the affiant as to the guilt of the party charged, beyond the bare statement that 'there is probable cause to believe that the said offense has been committed by P. T. Johnston.' However false the affidavit may be, it would be next to impossible to assign and prove perjury upon it."

In *United States v. Baumert* (D. C.) 179 Fed. 735, 742 (1910), District Judge Ray, in a carefully prepared opinion said:

"Under the common law the information was not necessarily verified; but, as stated, this led to abuses and the adoption of the fourth amendment to the Constitution, which in legal effect demands that no warrant shall issue upon an information filed by the United States attorney, unless it state facts, a crime, etc., and is supported by the oath of the officer filing it, who must speak from personal knowledge, or by the oaths or affirmations of others who speak from personal knowledge."

There is nothing in the opinion rendered which holds that an information must in all cases be verified or supported by an affidavit showing probable cause. But only that an information must be so verified or supported when an application for the issuance of a warrant is based on it. The sole question before the court was as to the issuance of a warrant, and the court declined to direct its issuance on an information made on the information and belief of the District Attorney alone.

In *United States v. Morgan*, 222 U. S. 274, 282, 32 Sup. Ct. 81, 82 (56 L. Ed. 198 [1911]), the Supreme Court, in the case of one prosecuted for a violation of the Pure Food and Drugs Act, said:

"A further answer is that as to this and every other offense the fourth amendment furnishes the citizen the nearest practicable safeguard against malicious accusations. He cannot be tried on an information unless it is supported by the oath of some one having knowledge of facts showing the existence of probable cause. Nor can an indictment be found until after an examination of witnesses, under oath, by grand jurors—the chosen instruments of the law to protect the citizen against unfounded prosecutions, whether they be instituted by the government or prompted by private malice."

This statement as to the necessity of the information being supported by the oath of some one having knowledge of facts showing the existence of probable cause is obiter dictum. That court has certainly never decided that, under such circumstances as exist in the case now before us, no trial could be had.

In *Foster's Federal Practice* (5th Ed.) § 494, p. 1659, this usually accurate writer states the rule as follows:

"An information cannot be filed without leave of the court. * * * An information must be supported by an affidavit showing probable cause for the prosecution arising from facts within the knowledge of the affiant, or by the depositions of witnesses taken upon a preliminary examination or affidavits upon which a warrant of arrest against the accused was previously issued, which may be sufficient."

The limitation imposed by this amendment is a limitation solely upon the powers of the federal government and not upon the powers of the state governments. This principle of construction was settled as early as 1833 by a decision written by Chief Justice Marshall in the leading case of *Barron v. Baltimore*, 7 Pet. 243, 8 L. Ed. 672, and has been adhered to by the Supreme Court in numerous cases which subsequently have arisen. But in the constitutions of some of the states a provision exists similar to that embodied in the fourth amendment. And we may briefly inquire as to the effect given to it, as respects informations, by the decisions of the state courts. They

have held in a number of cases that a constitutional provision similar in terms to that embodied in the fourth amendment to the Constitution of the United States is violated if proceedings are had under an information which is not supported by the oath or affirmation of any person (*Lustig v. People*, 18 Colo. 217, 32 Pac. 275 [1893]; *State v. Gleason*, 32 Kan. 245, 4 Pac. 363 [1884]; *Myers v. People*, 67 Ill. 503 [1873]; *Eichenlaub v. State*, 36 Ohio St. 140 [1880]; *De Graff v. State*, 2 Okl. Cr. 519, 103 Pac. 538 [1909]; *Thornberry v. State*, 3 Tex. App. 36 [1877]; *State v. Boulter*, 5 Wyo. 236, 39 Pac. 883 [1894]); but the state courts are not agreed in this view, some of them having reached a contrary conclusion. See *State v. Smith*, 114 La. 322, 38 South. 204 (1905); *State v. Guglielmo*, 46 Or. 250, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466, 7 Ann. Cas. 976 (1905); *Territory v. Cutinola*, 4 N. M. (Gild.) 160, 14 Pac. 809 (1887).

[2] In the case at bar the information was not verified; neither was it supported by any affidavit. The information begins:

"Now comes Henry A. Wise, United States Attorney for the Southern District of New York, leave having been first had and obtained, and respectfully informs this court that," etc.

It does not appear, however, that, in obtaining leave of the court to file the information, there was ever presented to the court any complaint under oath or any affidavit showing probable cause to believe that the person accused in the information had ever committed the offense charged against him. If the fourth amendment makes it necessary that, under all circumstances, an information must be verified or supported by an affidavit showing probable cause, then proceedings had in the prosecution of the defendant cannot be sustained. But the right secured to the individual by the fourth amendment, as we understand it, is not a right to have the information, by which he is accused of crime, verified by the oath of the prosecuting officer of the government or to have it supported by the affidavit of some third person. His right is to be protected against the issuance of a warrant for his arrest, except "upon probable cause supported by oath or affirmation," and naming the person against whom it is to issue. If the application for the warrant is made to the court upon the strength of the information, then the information should be verified or supported by an affidavit showing probable cause to believe that the party against whom it is issued has committed the crime with which he is charged. But, if no warrant has issued, no arrest been made, and the person has voluntarily appeared, pleaded to the information, been tried, convicted, and fined, we fail to discover wherein any right secured to him by the fourth amendment has been infringed. The fact that in the case at bar the defendant demurred to the information because it was not verified, and then pleaded not guilty only after his objection to the demurrer was overruled, does not affect the matter. There was nothing in the ruling of the court that deprived him of his constitutional right to have no warrant issued for his arrest "but upon probable cause supported by oath or affirmation." No such warrant has been at any time issued, and no application for its issuance has ever been so much as requested.

The Pure Food and Drugs Act makes it a crime against the United States if any part of the label on goods sent in interstate commerce is false and misleading. The label used on the goods shipped by the defendant guaranteed that the goods contained "no gelatine, gum arabic, egg albumen or similar article." The claim of the government is that, while the goods contained no gum arabic, they did contain India gum, and that India gum was "similar" to gum arabic. The jury found that this was so after being instructed that, if they had a reasonable doubt on the subject, they must find for the defendant. There was sufficient evidence to warrant the submission of the case to the jury, and we find no error in the rulings of the court.

Judgment affirmed.

HAHLO et al. v. BENEDICT.

BENEDICT v. HAHLO et al.

(Circuit Court of Appeals, Second Circuit. June 11, 1914.)

No. 289.

1. SHIPPING (§ 54*)—CHARTER—LIABILITY FOR INJURY TO VESSEL.

Although a charter party in terms requires the charterer to redeliver the vessel in as good condition as when received, the courts will imply a condition which will relieve him from noncompliance if the reason therefor is the fault of the owner's servant.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219-221; Dec. Dig. § 54.*]

2. SHIPPING (§ 39*)—CHARTER—LIABILITY FOR INJURY TO VESSEL.

A provision of a charter party that "the captain shall pay the charterer the same attention as if he were the owner and take the yacht where ordered by the charterer * * *" gives the charterer full control over the navigation of the vessel, and makes the captain his agent, regardless of who hired him.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 141-148; Dec. Dig. § 39.*]

3. SHIPPING (§ 54*)—CHARTER—LIABILITY FOR STRANDING OF VESSEL.

The stranding of a yacht on a known shore in the daytime and in open weather *held* due to the fault of the master, who under the charter was the servant of the charterer and not of the owner.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219-221; Dec. Dig. § 54.*]

4. SHIPPING (§ 194*)—GENERAL AVERAGE—SUBJECTS OF COMPENSATION.

Expense incurred by a yacht for wages and supplies while going to and from a port of refuge, which she was compelled to make because of stranding, constitutes a proper general average charge, but must be separated from other expenses of the voyage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 613-617; Dec. Dig. § 194.*]

General average, see notes to *Pacific Mail S. S. Co. v. New York, N. & R. Mining Co.*, 20 C. C. A. 357; *The Santa Ana*, 84 C. C. A. 316; *British & Foreign Marine Ins. Co., Ltd., v. Maldonado & Co., Inc.*, 106 C. C. A. 133.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

5. SHIPPING (§ 58*)—CHARTER—LIABILITY OF CHARTERER FOR INJURY TO VESSEL—DAMAGES.

Under a charter by which the charterer became liable for any loss or injury to the vessel not recoverable under a policy of insurance held by the owner, where the vessel was stranded through fault of the charterer's servants, he was entitled to set-off against his liability items of expenditure which could have been brought into general average and proved under the policy, and of which the owner was given timely notice.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 233-244, 314, 327; Dec. Dig. § 58.*]

6. SHIPPING (§ 40*)—TIME CHARTER—DEMURRAGE FOR DELAY IN REDELIVERY.

Under a time charter of a yacht, a provision that in case of failure to redeliver at the expiration of the charter period the charterer should pay demurrage is valid and enforceable.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 40.*]

Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by Arthur H. Hahlo and another, executors, against E. C. Benedict, and cross-libel. Decree for libelants, and respondent appeals. Modified and affirmed.

Peter S. Carter, of New York City, for appellant.

J. P. Kirlin, of New York City, for appellees.

Before COXE and ROGERS, Circuit Judges and HAND, District Judge.

HAND, District Judge. The first question is of liability, Which party is responsible for the losses which arose from the stranding? This question is to be determined by the charter party itself. The stipulations of the respondent are contained in the sixth article:

"The charterer [charterer] agrees * * * to redeliver the yacht * * * on the expiration hereof at New York, N. Y. in as good condition as that in which he received her, reasonable wear and tear and such damage as he may not be liable to make good excepted * * * and should the charterer not then so redeliver the yacht he agrees to pay demurrage."

The seventh article is as follows:

"The charterer [charterer] agrees to pay for * * * any loss to the yacht or equipment * * * not covered or recoverable under the policy of insurance hereinafter provided for or which may have occurred from any cause other than one arising out of the breach of conditions set out in paragraph 1 of this agreement."

The ninth clause reads as follows:

"The captain shall pay the charterer [charterer] the same attention as if he were the owner and take the yacht where ordered by the charterer within the limits of navigation specified in the policy of insurance."

[1, 2] The obligation of the charterer under article sixth to redeliver the boat is without condition, and courts might have held that he undertook by the stipulation in question to redeliver the boat regardless of whose servant the captain might be. *Sun P. & P. Co. v. Moore*, 183

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

U. S. 642, 22 Sup. Ct. 240, 45 L. Ed. 366. However, it is recognized that it would be unreasonable to require absolute compliance by the charterer, if the reason for noncompliance was the fault of the owner's servant. Hence all the cases consider that question and have implied such condition into the agreement to redeliver. The ninth article certainly intends to substitute the charterer for the owner, during the term of the charter; that is to say, it subjects the captain to the same direction from the charterer as he would be bound to give the owner were it not for the charter. In the face of this provision it becomes of small consequence who originally engaged the captain, provided the stranding resulted from his fault. In *Hills v. Leeds* (D. C.) 149 Fed. 878, and *The Del Norte*, 119 Fed. 118, 55 C. C. A. 220, the offending servant had been in fact selected by the owner, but he was under the control of the charterer. In the *Del Norte*, the phrase was "under order and direction" of the charterer. In *Hills v. Leeds*, supra, the phrase was:

"The hirer is to have the same authority as the owner of the boat so far as regards the management of the yacht and the control of the captain and engineer, and that, in the event of either of them proving disobedient or incompetent, the hirer shall have the right to discharge him or them, and engage others in their place."

Although more expanded than the clauses of article ninth of this charter, the intent is the same as here. In *The Barnstable*, 181 U. S. 464, 21 Sup. Ct. 684, 45 L. Ed. 954, it is true that the charterers had appointed the crew, but the test was who had control during the charter. The same thing is true in *Baumvoll v. Gilchrest*, L. R. (1892) 1, Q. B. 253. There Lord Esher says, at page 259, that the question depends upon—

"whether the owner has by the charter, where there is a charter, parted with the whole possession and control of the ship, and to this extent that he has given to the charterer power and right independent of him and without reference to him to do what he pleases with regard to the captain, the crew, and the management and employment of the ship."

Mr. Justice Story, in *Marcardier v. Insurance Co.*, 8 Cranch, 39, 49, 3 L. Ed. 481, puts the test in these words, "exclusive possession, command, and navigation." The same thing is repeated in *Reed v. United States*, 11 Wall. 591, 600, 20 L. Ed. 220. In *Leary v. United States*, 14 Wall. 607, 610, 20 L. Ed. 756, the phrase is, "entire command and possession of the vessel and the consequent control over her navigation." This test seems to be approved in *United States v. Shea*, 152 U. S. 178, 14 Sup. Ct. 519, 38 L. Ed. 403. We cannot doubt, therefore, that the master was the agent of the owner at this time, and we do not think it material who actually selected or employed him. That being true, there is no reason to except the charterer from the covenant of the sixth article.

[3] The next question is of the negligence of the master, because the sixth article of the charter exempts the charterer from any damage which he may not be liable for and the tenth article exempts him from his hire in case the yacht is incapacitated by damage or accident for which he is not responsible, and he would not be responsible if the

loss happened from inevitable accident or peril of the sea. It must be a very clear case which would hold it an inevitable accident for a vessel to run ashore on a known coast two hours after sunrise in open weather. It may seem now too simple to say that the cause was the yacht's running too near inshore, but that in fact is the whole story, and carries its own blame along with it. There was no necessity to bring her so near the reef, and there was all the more danger if a haze or smoke obscured the exact position of the land. The master does not pretend that the reef on which she stranded was unknown or even uncharted; it is true that the exact position of the rock that she struck was not charted, but everybody knew that the bottom off the Colorado Reef was not laid down with the exactitude of the East river. To bring her deliberately inshore under those circumstances was to take a chance of just what actually happened. Some question has been made of the easterly set of the tide on the Island of Cuba. This seems to be a possible explanation, but masters are responsible for known currents, and it is not suggested that there was anything unknown, or at least unknowable, about this particular current. If they navigate in waters which are not known, they should keep a leeway of safety. We do not understand that any one claims there was a greater easterly set that day than usual. It therefore appears that the charterer is liable under the stipulations contained in the sixth and seventh articles of the charter.

[4] The next question relates to damages. In making up the general average statement adjustment was made between what supplies were consumed at Havana, or on the way there, and the rest. These wages and supplies were treated as part of the salvage service, upon the theory that it was necessary to proceed to Havana as a port of refuge for inspection before the Virginia could safely go to New York. As such they fell within *Risley v. Ins. Co. of N. A.* (D. C.) 189 Fed. 529. However, only so much could be brought into general average as were properly apportionable to that portion of the voyage; the rest remained outside the insurance altogether. We do not understand that the charterer questions the propriety of the division between the period before and after the detention for inspection as made, or asserts that the items are incorrect, provided the expenses on the way to Havana, and while detained there, only could be included in general average. We think that under general average only so much can be included.

[5] On the other hand, we think that in spite of the negligence of the charterer's servants in stranding the yacht, he is entitled to set-off those items of his own expenditure which could have been brought into general average by the owner. The owner was advised of the claim in season, the charterer made claim of them against him. Since he held the policies pro tanto for the benefit of the charterer and was charged with a duty to act for him with reasonable assiduity, we believe that as soon as he learned of the claim he ought at least to have made inquiry as to their genuineness and provability under the policies, and that his disregard in that respect subjects him to a set-off equal in amount with what would have been allowed the charterer. The learned commissioner seemed to suppose that it makes a difference because the charterer has paid nothing to the owner, and that to set off these

claims would be to charge him because of the charterer's own default. We think that this misconceives the relations of the parties; the set-off is allowed because the owner owed a positive duty to the charterer to prove for him upon the policies, and while the losses did originate from Bond's negligence, that did not deprive the charterer of his right to be protected under the policies. The items to be included are the meat destroyed, \$311.10, and wireless messages, \$34.80. The lighthouse tender charge is found to be a gratuity. If the provisions claimed, \$435.50 and \$271.03, were not brought before the underwriters, the set-off will contain also an allowance made for them on the basis of the time consumed going to, and at, Havana, as a port of refuge. This adjustment can probably be made by consent, or may be brought before Judge Hand for disposition in case of a dispute.

[6] The next question is of the damages for failure to deliver until June 27, 1911. This is expressly covered by the sixth article of the charter party, and will control unless the court set it aside as a penalty. It is hardly useful to add at length to the extraordinary confusion upon this subject. Equity, wisely or not, has always relieved against money penalty, and will penetrate any disguise. Hence it will not serve to call a true penalty liquidated damages. However, contracts do mean what they say, and if the parties call a provision liquidated damages, the court ought to accept it until it is shown that it is a penalty. How can it be shown? Obviously only by proof that nobody could honestly suppose that the provision would only cover the obligee's loss; if that is shown, then the mere words used will yield, but the court will not start with a presumption against what the parties say they meant. *Sun Publishing & Printing Co. v. Moore*, 183 U. S. 642, 22 Sup. Ct. 240, 45 L. Ed. 366. Now there is not the slightest justification here for disregarding the formal expression of the parties' intention. The yacht had a charter value, uncertain but real, one which this suit shows to be hard of proof. Both sides agreed that she had it, by the very best of evidence—their willingness to let and hire her at the same sum for the first 60 days. Nothing could be more unreasonable than to disregard their deliberate words and to try to substitute some other measure. We think it not necessary to consider whether the provision here is really liquidated damages, or rather an extension of the charter. *Morgan v. Garfield & Proctor Coal Co.* (D. C.) 113 Fed. 520.

Quite other considerations apply to the period after June 27th. Whatever may be the *prima facie* case arising from the charter rate itself (*Dewar v. Mowinckel*, 179 Fed. 355, 102 C. C. A. 539; *Smith v. The Governor Ames*, 187 Fed. 40, 109 C. C. A. 94), it applies only when the parties have not gone into proof. Now there was only one qualified witness called on this subject and he swore to values considerably less than the amount fixed in the charter party. It is quite apparent from his testimony that \$5,000 for the month in question was the figure most satisfactory to him, though larger sums he regarded as possibilities. We believe that in view of the very stringent rule in *The Conqueror*, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937, a proper proportion of \$5,000, less owner's charges, \$670, is the utmost that should be taken as the hire value. It is indeed a little doubtful whether any allowance at all should be made under *The Conqueror*, *supra*, the

proof being only at the mouths of experts. However, the grounds for that decision are, we think, to be found especially on pages 133 and 134 of 166 U. S., on page 519 of 17 Sup. Ct., 41 L. Ed. 937:

"She was purchased by her owner for his personal pleasure, and there is not an atom of testimony tending to show that he bought her for hire, or would have leased her if he had been able to do so, even for the large sum of \$100 per day fixed as her value.

"Again, the court may properly take judicial notice of the fact that the yachting season in our northern waters practically comes to an end before the 1st of November, and, as *The Conqueror* was seized on August 27th, during more than one-half the time for which demurrage was allowed she probably would have been laid up at her wharf. It is true there was a possibility that her owner might have desired her for use in a winter's cruise to tropical waters; but there was not the slightest evidence of that, and the contingency of her being so used was too remote to justify an allowance upon that basis."

Here there is evidence that she would have been leased in June and July, just as she was leased in August. The season was at its very height, and we cannot say that the proof was speculative in spite of a narrow market. The *Conqueror*, *supra*, has, however, established so strict a proof that we are not disposed to allow more than the lowest value.

Interest upon the demurrage up to June 27, 1911, was certainly proper. *Milburn v. Boxes of Oranges and Lemons*, 57 Fed. 236, 6 C. C. A. 317. A question may arise regarding the demurrage for the last 22 days, especially in view of the decision of a majority of this court in *The Sitka*, 159 Fed. 1023, 85 C. C. A. 488, affirming without opinion the District Court in 156 Fed. 427, a collision case. We do not see, however, any reason not to apply the rule applicable in actions at common law upon contracts where the damages are not liquidated, which leaves interest as matter of discretion, nor do we see any reason to differ with the learned commissioner in his allowance of interest.

With the modifications indicated, the decree is affirmed, without costs in this court.

In re FRANK E. SCOTT TRANSFER CO.

CHICAGO AUDITORIUM ASS'N v. CENTRAL TRUST CO. OF ILLINOIS.

(Circuit Court of Appeals, Seventh Circuit. January 15, 1914.)

No. 2020.

1. BANKRUPTCY (§ 318*) — EXECUTORY CONTRACT — ANTICIPATORY BREACH — PROVABLE DAMAGES.

Where the bankrupt contracted to furnish livery and baggage service at reasonable rates for an hotel association for five years and pay \$21,000 for the privilege in monthly installments, but became bankrupt during the term, the hotel association was entitled to prove against the estate in bankruptcy a claim for damages predicated on the anticipatory breach of the contract, due to the bankrupt's inability to further perform.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 481, 482; Dec. Dig. § 318.*]

2. BANKRUPTCY (§ 318*)—CLAIMS PROVABLE—EXECUTORY CONTRACT—TERMINATION.

Where a contract by a bankrupt to furnish livery and baggage service to a hotel association for five years and to pay \$21,000 for the privilege provided that the association reserved the right to revoke the privileges by giving six months' notice in writing, such provision rendered the contract mutually obligatory only for a term of six months, so that, on the intervention of bankruptcy, the hotel association could claim damages only for that period.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 481, 482; Dec. Dig. § 318.*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

In the matter of bankruptcy proceedings of the Frank E. Scott Transfer Company. From an order of the District Court, confirming an order of the referee disallowing a claim filed by the Chicago Auditorium Association for damages arising out of alleged anticipatory breach of an executory contract, and allowing only a portion of the claim, on objections of the Central Trust Company of Illinois, as trustee of the bankrupt estate, the Chicago Auditorium Association appeals. Reversed.

This appeal is from an order of the District Court in bankruptcy, confirming an order of the referee, which disallows a claim filed by the appellant for damages arising out of alleged anticipatory breach of an executory contract entered into by the bankrupt, and allows only the portion of such claim as presented for \$311.20, which had accrued under the contract when bankruptcy intervened.

The contract in question is thus described in the brief for appellant: "By the terms of said contract, entered into February 1, 1911, the association granted to the transfer company the exclusive baggage and livery privilege of the Auditorium Hotel, in the city of Chicago, for a period of five years from the date of the contract. This exclusive privilege was stated in the contract to consist of the sole and exclusive right, so far as it was within the legal capacity of the association to grant, to transfer and carry to and from the said hotel all articles of baggage, and all passengers and persons, and to furnish livery to the guests and patrons of the hotel. In consideration of this grant by the association, the transfer company agreed to furnish prompt and efficient livery and baggage service at reasonable rates during the continuance of the contract, and to pay the association the sum of \$6,000 for the baggage privilege, and the sum of \$15,000 for the livery privilege, a total of \$21,000, payable in monthly installments of \$350. This contract was carried out by both parties thereto, up to and including the date on which the petition in bankruptcy was filed against the transfer company."

This statement of the contract is incomplete, however, as it further provides, in favor of the appellant, as "party of the first part," as follows "The party of the first part, however, reserves the right, which is an express condition of the foregoing grants, to cancel and revoke either or both of said privileges, by giving six months' notice in writing of its election so to do, whenever the service is not, in the opinion of the party of the first part, satisfactory, or in the event of any change in management of said hotel; and in case of the termination of either or both of said privileges by exercise of the right and option reserved by this paragraph, such privilege or privileges shall cease and determine at the expiration of the six months' notice aforesaid, and both parties hereto shall in that case be released from further liability respecting the concession so canceled and revoked."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Rudolph Matz and Wm. D. Bangs, both of Chicago, Ill., for appellant.

C. J. Silber, of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

SEAMAN, Circuit Judge. [1] The single question for review on this appeal is whether the claim for damages, predicated on an alleged anticipatory breach of the executory contract in suit, constitutes a provable claim in bankruptcy. It does not appear to be met and answered by any decision of the Supreme Court called to our attention, and if not free from difficulty under various other authorities cited, we believe its solution lies within narrow compass—hinging upon the tenability of the appellant's contentions of the legal effect of the bankruptcy proceedings: (a) That they produced an anticipatory breach of the bankrupt's contract to furnish livery and baggage service as provided; and (b) thus created simultaneous liability of its estate in bankruptcy for damages so arising.

The general doctrine of anticipatory breach of an executory contract whenever the contractor disenables himself from performance is well established (*Lovell v. St. Louis Life Ins. Co.*, 111 U. S. 264, 274, 4 Sup. Ct. 390, 28 L. Ed. 423; *Roehm v. Horst*, 178 U. S. 1, 7, 20 Sup. Ct. 780, 44 L. Ed. 953, and cases reviewed) and its application, when the contractor "becomes bankrupt and goes into liquidation," is upheld in *Carr v. Hamilton*, 129 U. S. 252, 256, 9 Sup. Ct. 295, 32 L. Ed. 669, in reference to a policy of life insurance, for the reason that the company thereby "becomes civiliter mortuus; its business is brought to an absolute end." It has likewise been pronounced applicable to an executory contract "broken by the insolvency of the railway companies and the appointment of receivers" thereof, whenever the receivers reject the contract, and that in such event the "rejection relates back to the beginning of the receivership." *Pennsylvania Steel Co. v. New York City Ry. Co.*, 198 Fed. 721, 736, 744, 117 C. C. A. 503, 2d Circuit.

Upon the concrete question presented in this case, however, whether intervention of bankruptcy constitutes such breach for which damages are provable therein, considerable diversity appears in various rulings of the District Courts, as reported, in the administration of bankruptcy under the present acts, and it is contended for support of the ruling herein against that proposition that several decisions in the Circuit Court of Appeals of other circuits (*Watson v. Merrill*, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719, 8th Circuit; *In re Roth & Appel*, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270, 2d Circuit; *Colman Co. v. Withhoft*, 195 Fed. 250, 115 C. C. A. 222, 9th Circuit), disallowing claims for rent or damages accruing subsequent to bankruptcy under leases held by the bankrupt, are applicable and of controlling weight and force. On the other hand, two decisions of like appellate tribunals are cited (*In re Swift*, 112 Fed. 315, 50 C. C. A. 264, 1st Circuit; *In re Neff*, 157 Fed. 57, 84 C. C. A. 561, 28 L. R. A. [N. S.] 349, 6th Circuit) as direct authorities for upholding provability of the claim in controversy.

Laying aside for the moment the first-mentioned line of authorities and their distinction from the present issue, we proceed to consideration of *In re Swift*, supra, and *In re Neff*, supra, and the doctrine of anticipatory breach of contract arising from bankruptcy, upheld in both cases. In the *Swift Case*, the bankrupt as stockholder had purchased stocks for the claimant and was "carrying the same on margin," when the broker petitioned for adjudication as a bankrupt, after having made a voluntary assignment. The opinion delivered by Judge Putnam discusses the contentions whether the date or fact of voluntary assignment or of proceedings in bankruptcy was controlling, and rules, in effect, that the fact of voluntary assignment became immaterial, and that the issue of anticipatory breach rested on the legal effect of the bankruptcy proceedings—citing *Lovell v. Ins. Co.*, supra, and other authorities. Thereupon it is held that proceedings in bankruptcy "rendered unnecessary a demand and tender," and the "proof of debt relates to the time when they were commenced"; that "the contract ripened simultaneously with the beginning of the proceedings in bankruptcy, as the consequence thereof in connection with the adjudication which followed." In the *Neff Case* the opinion is by Mr. Justice Lurton, then Circuit Judge, in reference to an executory contract on the part of the bankrupt to purchase certain stocks two years after date at a price named. Bankruptcy intervened before maturity, and claim was filed for recovery, under a stipulation of fact that the corporations issuing the stock "were insolvent before the bankruptcy of said Neff, and that this stock was of no value." The doctrine of anticipatory breach is defined (with numerous citations), and its application for allowance of the claim is then stated: "Bankruptcy is a complete disablement from performance, and the equivalent of an out and out repudiation, subject only to the right of the trustee, at his election, to rehabilitate the contract by performance"; and it is sufficient for allowance "that a claim becomes provable in consequence of bankruptcy." The opinion cites and approves the above-mentioned *Swift Case*, and the excellent opinion of Judge Lowell in the District Court, reported as *In re Pettingill Co.*, 137 Fed. 143, 147.

We are of opinion that these decisions are well founded, both in their definition of the general doctrine referred to and in respect of the instantaneous effect of proceedings in bankruptcy for anticipatory breach of the unperformed contract, unless the trustee in bankruptcy elects performance thereof in the interest of the estate, and that it is equally applicable whether the proceedings are voluntary or involuntary, notwithstanding the distinction in that particular suggested in one or more of the District Court citations. Provability of the claim for damages rests on this instantaneous legal effect of the proceedings, as no subsequent breach can authorize the claim. It is thus brought within clause 4 of section 63a (Bankr. Act July 1, 1898, c. 541, 30 Stat. 562, 563 [U. S. Comp. St. 1901, p. 3447]), which includes all indebtedness founded upon contract existing "at the time of the filing of the petition in bankruptcy" (*Zavelo v. Reeves*, 227 U. S. 625, 631, 33 Sup. Ct. 365, 57 L. Ed. 676), to be liquidated pursuant to section 63b. Whether the trustee may have authority to carry out the contract in question, if he so elects, is not involved for consideration, as no such

election is set up, and it is plain that any right which may be conferred to that end by the Bankruptcy Act lends no force to the appellee's contention that the claim presented was for a contingent liability. The liability arising under the breach of this contract was direct, and in no sense contingent, nor affected by the ruling in *Dunbar v. Dunbar*, 190 U. S. 340, 344, 23 Sup. Ct. 757, 47 L. Ed. 1084, cited in support of the contention, except as hereinafter stated.

In reference to the above-mentioned authorities disallowing claims for breach of leasehold contract arising through bankruptcy, each must rest for approval on the distinction well pointed out in the opinion of the Circuit Court of Appeals of the Second Circuit (In re Roth & Appel, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. [N. S.] 270) between the relation and rights of lessor and lessee of realty under such instruments and the rights of the contracting parties under general executory contracts. This distinction is observed as well in a note appended to the opinion in *Pennsylvania Steel Co. v. New York City Ry. Co.*, supra, and thereupon these rulings become inapplicable to the present inquiry.

[2] Our conclusion is, therefore, that damages for anticipatory breach of the contract are provable under the claim presented, and that error is well assigned for disallowance of the entire claim. It appears from the contract, however, as exhibited with the claim, that it reserves in favor of the appellant an option "to cancel and revoke either or both of said privileges" granted by the contract "by giving six months' notice in writing of its election so to do," and that both parties shall "in that case be released from further liability" at the expiration of the six months. Under this provision the contract is mutually obligatory for a term of six months only, and uncertain and without force for any longer term of service in futuro, within *Dunbar v. Dunbar*, supra, and authorities cited. Thus no damages for breach are provable beyond such period.

The order of the District Court is reversed accordingly, with direction to reinstate the claim and proceed therein in conformity with this opinion.

ARMOUR & CO. v. ZVEGA.

(Circuit Court of Appeals, Eighth Circuit. July 23, 1914.)

No. 4102.

1. MASTER AND SERVANT (§ 286*)—ACTION FOR INJURY TO SERVANT—ISSUES AND PROOF.

Plaintiff, while employed in loading tierces of lard on an elevator in defendant's building, was injured by the falling of a heavy plank door giving entrance to the elevator, which opened by sliding upward in grooves and was held in place by a stick set upright in one of such grooves. Plaintiff's petition charged negligence generally in failing to provide a safe and suitable manner of holding the door in position when raised and more specifically in the use of the stick for that purpose. The evidence tended to show that the door fell because of the fact that the corner under which the stick was placed was eaten away, presumably by rats, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

rested insecurely on the stick. *Held*, that it was not error to submit to the jury the question of defendant's liability because of such defect in the door, although it was not directly charged in the petition, especially as, when the fact was brought out in the testimony, defendant was granted a continuance for four days to meet such issue.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

2. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

Refusal of a requested instruction on the question of assumed risk in an action for injury to an employé *held* not error, in view of the charge given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

In Error to the District Court of the United States for the District of Nebraska; William H. Munger, Judge.

Action at law by Charles Zvega against Armour & Co. Judgment for plaintiff, and defendant brings error. Affirmed.

T. J. Mahoney, of Omaha, Neb. (J. A. C. Kennedy, of Omaha, Neb., on the brief), for plaintiff in error.

Joseph W. Woodrough, of Omaha, Neb. (David A. Fitch, of Omaha, Neb., on the brief), for defendant in error.

Before HOOK and CARLAND, Circuit Judges, and REED, District Judge.

CARLAND, Circuit Judge. [1] Charles Zvega, 23 years of age, on July 2, 1912, was in the employ of Armour & Co. at Omaha, Neb. His duty consisted in loading barrels or tierces of lard upon an elevator for the purpose of having them raised to an upper floor, there to be loaded upon cars for shipment. The entrance to the elevator from the room in which the tierces of lard were contained was through a sliding door, about 5 feet wide and about 4 feet high. It was made of double planks and opened by sliding upward. It was about 2 inches thick and weighed from 75 to 100 pounds. When the door was raised it was supported by what is called in the evidence a squeegee stick, placed under the lower end of the door, and inserted in the groove in which the door moved up and down. This squeegee stick was like a broomstick, but a little heavier. It was about 4½ or 5 feet long. On the day in question Zvega had raised the door and placed the squeegee stick thereunder at the east side thereof, and while transferring the tierces of lard from the floor of the room, in which they were contained to the platform of the elevator, the door fell, crushing his hand and arm. He brought this action for the purpose of recovering damages for the injuries which he received as above stated. A verdict was rendered in his favor, and Armour & Co. has brought the case here, alleging error in the rulings of the trial court. Having in view the only question of negligence submitted to the jury by the court, the charge of negligence in the complaint was as follows:

"This opening is provided with a perpendicular sliding door; said door is constructed of heavy, substantial material. To open said door it is necessary

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to raise same perpendicularly in the guides for that purpose provided, and the defendant, Armour & Co., negligently and carelessly failed to provide a safe and suitable manner of holding said door in position when raised; * * * that the heavy door or slide which covered said opening through which the plaintiff was required to move the barrels was sustained and held up only by a stick of wood, and that there was danger and great risk that this support would become dislodged and removed, thereby causing said heavy door to slide and fall with great force and violence, by reason of the vibration or jar caused by the elevator, or by the removal and handling of the barrels or tierces through said opening."

At the trial it was disclosed that the lower corner of the east side of the sliding door had been eaten, supposedly by rats, so that the point of the door which would rest upon the squeegee stick when the door was raised was rendered small, and that instead of having the full width and surface of the bottom of the door as originally constructed to rest upon the supporting stick, there was only a point of wood left which would rest upon the stick when in position, thus causing the door to be more liable to fall than as if said door was as originally constructed. There was a motion for the direction of a verdict in favor of Armour & Co. on the ground that the plaintiff had not complained in his complaint of any defect in the door, such as the evidence disclosed. The trial court was of the opinion, however, that the allegation of negligence in the complaint, with reference to the door, referred to the condition of the door at the time of the accident, and that the plaintiff had a right to urge as negligence the condition of the door as it existed at the time he was hurt. The record further discloses that Armour & Co. was given a continuance of four days, ostensibly for the purpose of meeting this new phase of the evidence. At the expiration of the adjournment the case was resumed, and the whole matter of the condition of the door was gone into, and the case finally went to the jury upon the question of whether it was negligence on the part of Armour & Co. to allow such a condition as existed in the door to remain. The applicable principles of law governing the case are well known and simple. It was the duty of Armour & Co. to use ordinary care to furnish Zvega with a reasonably safe place to perform his duties. Zvega on entering the service of Armour & Co., assumed all the risks and hazards of the service which were open and plainly obvious to him. He could rely upon the presumption that Armour & Co. had performed its duty. If by any negligence on his part he directly contributed to the injuries he received, he could not recover. He had been in the employ of Armour & Co. for two years, and in the particular service in which he was engaged at the time of his injury about two months. He had raised the door once before and placed the stick thereunder. The trial court ruled that Zvega could not complain of the manner that Armour & Co. had adopted for holding the door in position when raised, as the manner of so doing was fully known to him and was plainly obvious. It also ruled that the evidence in support of the two other grounds of alleged negligence, namely, the placing of the tierces of lard too near the elevator door, and insufficient light, would not authorize a verdict, and they were taken from the jury. As said before, the single question submitted to the jury was whether or not, Armour & Co. was negligent in allowing

the door to be in the condition it was, with reference to the portion thereof which had been eaten away, supposedly by rats. Zvega testified that he did not know that the door had been eaten away at the place specified. The trial court charged the jury that if Zvega knew of this hole, there could be no recovery by him. A majority of this court are of the opinion that there was evidence sufficient to go to the jury upon this point. How long the hole in the door had existed does not appear, except the inference that may be drawn from the fact that pieces of tin seemed to have been nailed over it.

In regard to the alleged error in the ruling of the court in allowing a recovery for the defect in the door, we think that, in view of the adjournment of the court and the full opportunity allowed to the defendant to go into that question, there was no prejudicial error. We do not think there was any error in the charge of the court upon the law of assumption of risk, or upon the question of whether Zvega was guilty of contributory negligence. If he knew that the hole was in the door, he might have been guilty of contributory negligence for not placing the stick at the other end of the door where there was no hole. If he knew of the existence of the hole, he assumed the risk. The judge so charged the jury in both instances. So the case comes down to the narrow question, which was submitted to the jury, as to whether Zvega knew the hole was in the door. As has been said before, the majority of this court is of the opinion that there was evidence to go to the jury upon this question.

[2] Counsel for Armour & Co. requested the court to charge as follows:

"If the defect in the lower left-hand corner of the door was so open and obvious and apparent that the plaintiff with the light that existed at the time, which was shown to have been good, could not have raised the door to the height to place the stick under it, and have placed said stick immediately under the left-hand lower corner of said door, without seeing and observing the defect then existing in that corner of the door, then with that knowledge and with the defect being so obvious and apparent, the plaintiff should be presumed to have assumed the risk resulting from said defect, and your verdict should be for the defendant."

Laying aside the question as to whether the court would have been justified in telling the jury under the evidence that the light was good, we think, as the court told the jury that Zvega could not recover if he knew of the existence of the hole, and as the jury had the whole evidence before them from which to determine this fact, that it was not prejudicial error for the court to refuse to instruct them that if Zvega could not have placed the stick under the door without discovering the hole, he must be presumed to have assumed the risk. This was only another way of saying what the court had already said, and we must presume that if the jury was of the opinion that Zvega could not have placed the stick under the door without discovering the hole, they would have found that he knew of the same, and under the charge of the court would have returned a verdict accordingly.

We have considered the other errors assigned, and find them without merit.

Judgment affirmed.

UNITED KANSAS PORTLAND CEMENT CO. v. HARVEY.

(Circuit Court of Appeals, Eighth Circuit. July 23, 1914.)

No. 4069.

1. COURTS (§ 347*)—OBJECTION TO EVIDENCE ON GROUND OF INSUFFICIENCY OF PETITION.

The practice of objecting to the introduction of any evidence in a cause on the ground that the petition or complaint does not state a cause of action is very objectionable, and is not recognized in the federal courts, even though it may be permitted in the courts of the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. § 347.*]

2. PLEADING (§ 406*)—WAIVER OF OBJECTIONS TO PETITION OR COMPLAINT—FILING OF ANSWER.

In the federal courts it is only when a defect in a petition is of such a nature that it cannot be cured by the verdict of a jury, and therefore can be taken advantage of by a motion in arrest of judgment after verdict, that it is not waived by the filing of an answer, which operates as a waiver of all technical defects.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1355-1359, 1361-1365, 1367-1374, 1386; Dec. Dig. § 406.*]

3. APPEAL AND ERROR (§ 889*)—REVIEW—PLEADING—AMENDMENT—TREATING PETITION AS AMENDED.

Under Rev. St. § 954 (U. S. Comp. St. 1901, p. 696), which permits the amendment of pleadings to conform to the proofs, where evidence was introduced by both parties with respect to a matter which was material, the petition will be treated as having been amended, when necessary to properly put such matter in issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3621, 3622; Dec. Dig. § 889.*]

In Error to the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Action at law by Fred Harvey against the United Kansas Portland Cement Company. Judgment for plaintiff, and defendant brings error. Affirmed.

H. M. Langworthy, of Kansas City, Mo. (William Warner, O. H. Dean, W. D. McLeod, and O. C. Mosman, all of Kansas City, Mo., on the brief), for plaintiff in error.

H. P. Farrelly, of Chanute, Kan. (T. R. Evans, of Chanute, Kan., Hal R. Clark, of Independence, Kan., and S. W. Brewster, of Chanute, Kan., on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and TRIEBER and REED, District Judges.

TRIEBER, District Judge. The defendant in error, who will be referred to as the plaintiff, sued the plaintiff in error, who will be referred to as the defendant, to recover damages for injuries sustained by him, while in the employ of the defendant, by reason of the failure of the defendant to exercise reasonable diligence in furnishing him a reasonably safe place in which to work.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The material allegations of the petition are that on September 3, 1908, the plaintiff was employed by the defendant as an oiler for eight tubemills located in a room of defendant's cement plant, known as the tubemill room; that these tubemills were located in a line running north and south, and were used for grinding and pulverizing into fine dust material for use in another department; that said dust was emptied from the mills into a long box about 2 feet across from side to side and about 18 inches from top to bottom, the top of the box being about 4 feet above the floor; that inside of said box was a large, heavy, steel auger or screw, which was used for forcing the dust from said mills along and through said box or trough to a place known as an elevator; that said elevator carried it to another portion of the plant; that the trough, when in proper condition, was covered with boards and the elevator was entirely closed; that the trough was constantly covered with a coating of dust, such as was being conveyed by the steel auger along the inside of said trough, so that the cover or top of said box was entirely concealed from view by the said dust; that the plaintiff had no reason to know that said boards were loose or liable to be displaced from their position; that prior to the accident which caused his injury some of said boards covering the trough were carelessly and negligently left in a loose condition, so that the same could be displaced, but that the defendant failed to in any manner safeguard said place where said boards were left loose, or to inform plaintiff of its unsafe condition. That it was necessary for the plaintiff, in the performance of his duties, to go upon said trough and walk along upon it while passing from one tubemill to another and stand upon it while performing his duties in oiling said mills; that it was wholly practicable to place railings around the place where the boards were loose and unfastened, and also to place notices informing those who in the discharge of their duties had to go upon said trough that the boards were loose; that while performing his duties he stepped on the trough, supposing it to be covered, but the cover was off and his foot passed through the opening, and was injured by the steel auger in the trough. The petition then charges, among other acts of negligence which caused his injury, that he was not notified that there were loose boards upon said trough, and that defendant was guilty of carelessness and negligence in failing to inspect and keep said boards on the top of said trough firmly fastened and secure in their places on top of said trough, and that by the exercise of reasonable diligence the defendant would have known that the said board was out of its place, and that plaintiff was liable to be injured in passing over the same while in the discharge of his duties.

The defendant filed an answer containing a general denial, and in addition thereto pleaded: (1) Contributory negligence; (2) assumption of risk; and (3) that the injuries were caused by the negligence of a fellow servant.

[1] After the jury had been impaneled and sworn and counsel for both parties had made their opening statements to the jury, when the first witness was introduced by the plaintiff, the defendant objected to the introduction of any evidence "for the reason that the petition shows on its face that the plaintiff is not entitled to recover," which objection

having been overruled an exception was saved, which constitutes one of the assignments of error urged in this court. This practice is very objectionable and is not recognized in the national courts of this jurisdiction. The fact that it may be permitted in the courts of the state where this cause was pending is immaterial. *Boatmen's Bank v. Trower Bros. Co.*, 181 Fed. 804, 807, 104 C. C. A. 314. Nor does it apply even in criminal cases where technical rules of practice are much more strictly observed than in civil cases. *Morris v. United States*, 161 Fed. 672, 678, 88 C. C. A. 532.

[2] Such a practice can only serve as a trap. If the petition states a good cause of action but is technically defective, it should be raised by demurrer, and the plaintiff thus given an opportunity to amend. When an answer to the merits is filed, it is an admission on the part of the defendant that the petition is not technically objectionable, and no defect of that nature can be taken advantage of thereafter. It is only when the defect of the petition is of such a nature that it cannot be cured by the verdict of the jury, and therefore can be taken advantage of by a motion in arrest of judgment after verdict, that is not waived by filing an answer. It is not right that the plaintiff should be misled by the defendant into the belief that there are no technical defects in his petition, and that his cause will be tried on the merits, and after he has been put to the expense of bringing his witnesses a considerable distance, which is usually the case when the cause is to be tried in a national court, and then, after the jury has been sworn, either take a nonsuit or submit to a judgment against him, or at least consent to a continuance of the cause. It is true, under the common-law practice, when pleadings were considered of greater importance than the substantial rights of the parties, this practice was very common, but at this day it is universally recognized that courts are intended to promote the ends of justice and will disregard all technicalities which tend to defeat them.

The first Congress of the United States, when it enacted the first judiciary act in 1789, recognized this evil and sought to remedy it. Section 32, Act Sept. 24, 1789, c. 20, 1 Stat. 91, digested as section 954, R. S. (U. S. Comp. St. 1901, p. 696). This section provides:

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall in its discretion and by its rules, prescribe."

In *Bell v. Railroad Co.*, 4 Wall. 598, 18 L. Ed. 338, it was held that by a plea to the merits, and the parties going to a trial, all antecedent irregularities are waived.

In *Oregon R. R. & Navigation Co. v. Dumas*, 181 Fed. 781, 104 C. C. A. 641, it was held that "a demurrer to a complaint for want of facts is waived by an answer to the merits."

But aside from this, the petition states a good cause of action. The motion was properly overruled.

There are a number of assignments of error, but counsel in their brief and oral argument rely solely on the insufficiency of the evidence for submission to the jury. Counsel in their brief say:

"The sole question presented for the determination of this court is whether under the pleadings and *the evidence* in the case, the court committed error in refusing to sustain the demurrer to the evidence, and in refusing to give the peremptory instruction requested by the defendant at the close of the entire case."

[3] It is claimed that, as there was no allegation in the petition that the cover of the trough was removed by the natural operation of the plant by reason of the fact that the cover was not fastened, it was error to submit it to the jury. But the record shows that both parties introduced evidence on that point. Under the liberal practice now universally recognized by the courts, and as authorized by section 954, R. S., it would have been proper to amend the petition to conform to the proof; there being no claim that the defendant was surprised by this evidence.

In *Derham v. Donohue*, 155 Fed. 385, 83 C. C. A. 657, 12 Ann. Cas. 372, this court held that under the statute of jeofails (section 954, R. S.) where the defendant could not have been misled in his preparation for trial, it is the duty of the court to permit an amendment, if necessary. As stated in *Reynolds v. Stockton*, 140 U. S. 254; 266, 11 Sup. Ct. 773, 35 L. Ed. 464, in speaking of a case in which, while the matter was not, in fact, put in issue by the pleadings, but evidence had been introduced by both parties, and the matter actually litigated:

"In such a case the proposition so often affirmed, that that is to be considered as done which ought to have been done, may have weight, and the amendment which ought to have been made to conform the pleadings to the evidence may be treated as having been made."

And this rule prevails in the courts of Kansas. *Wilkins v. Tourtellott*, 29 Kan. 514; *Organ Co. v. Lasley*, 40 Kan. 521, 20 Pac. 228; *Excelsior Mfg. Co. v. Boyle*, 46 Kan. 202, 26 Pac. 408.

It is next claimed that the evidence shows that the cover was removed and left off by a fellow servant. The witness McCormick testified that the boards were removed by one Copenhauer, a fellow servant of the plaintiff. But Copenhauer, who was also a witness for the defendant, on his direct examination, positively denied this. Besides, that question was not submitted to the jury. The court held that on that ground the plaintiff could not recover, and submitted the case alone on the question whether the top of this box came off through the operation of the mill and from the manner in which it was operated. There was substantial evidence that when the trough would fill up with the dust, unless it was cleaned out, it would force the boards, which were lying loose on the top of the trough, off, and that by reason of the accumulation of dust and the dim light in the room the fact that the top was off would not be noticed by one engaged in work as was the plaintiff. It also appears that the top could have been placed on hinges and properly fastened, so that it would not be forced off by the dust.

As it was not claimed in the argument that the court erred in its charge to the jury on that point, and a careful examination of the charge shows no error, the finding of the jury is conclusive, and therefore the judgment is affirmed.

SCHWARTZ v. LOFTUS et al.

(Circuit Court of Appeals, Eighth Circuit. July 29, 1914.)

No. 4111.

1. EXECUTORS AND ADMINISTRATORS (§ 438*)—ACTION AGAINST ESTATE—ENFORCEMENT OF LIABILITY OF STOCKHOLDER—PARTIES.

The administratrix of a decedent is a necessary party to a suit to establish and enforce the statutory liability of the estate as owner of stock in an insolvent corporation.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1765-1785, 1790; Dec. Dig. § 438.*]

2. LIMITATION OF ACTIONS (§ 85*)—SUIT AGAINST ADMINISTRATRIX—ABSENCE OR DEPARTURE FROM STATE.

The provisions of Gen. St. Kan. 1909, § 5613 (Code Civ. Proc. § 20), that limitation shall not commence to run in favor of a person who is out of the state until he shall come into the state, and that, if a person leaves the state after a cause of action against him has accrued, the running of the statute shall be suspended during the time of his absence, apply to a suit against the administratrix of a deceased person to establish the statutory liability of the deceased as a stockholder in an insolvent corporation, and charge the estate with such liability, and limitation does not run against such suit during the time the administratrix is out of the state; the complainant having no claim which could be proved against the estate until personal liability of the deceased is established.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 449-455; Dec. Dig. § 85.*]

3. EQUITY (§ 72*)—LACHES—GROUNDS OF BAR—PREJUDICE FROM DELAY.

While the lapse of time is an element which courts of equity consider in sustaining or refusing to sustain the defense of laches, time alone ordinarily is not sufficient to constitute the defense, but, in addition thereto, the situation of the parties must have so changed as to render the prosecution of the suit inequitable.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 207, 210-220, 225, 226; Dec. Dig. § 72.*]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit in equity by Arthur L. Schwartz against Mary R. Loftus, administratrix of the estate of Matthew Ryan, Sr., deceased, and others. From a decree dismissing the bill on motion, complainant appeals. Reversed.

Maurice H. Winger, of Kansas City, Mo. (Chas. Edwin Cooley and New & Krauthoff, all of Kansas City, Mo., on the brief), for appellant.

William W. Hooper, of Leavenworth, Kan. (Lee Bond, of Leavenworth, Kan., on the brief), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and REED, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CARLAND, Circuit Judge. The bill in this case was filed for the purpose of enforcing against the estate of Matthew Ryan, Sr., the personal liability of deceased as a stockholder in a corporation organized under the laws of the state of Kansas, known as the Ryan Bros. Cattle Company. The defendants, except Mary R. Loftus, administratrix of said estate, are devisees and legatees interested therein, and third parties who have succeeded to portions of the estate by purchase or otherwise. The bill also prayed that the amount of the stock liability of Matthew Ryan, Sr., when ascertained, be charged as a paramount lien on the real estate described therein and on any personal property still remaining of the estate of Matthew Ryan, Sr., deceased. All of the defendants interposed a joint and several demurrer to the bill. The demurrer specified as grounds of demurrer: First, that the bill did not state facts sufficient to constitute a cause of action; second, that the bill on its face showed that any cause of action the complainant ever had against the defendants had long since been barred by the statute of limitations of the state of Kansas; third, that the complainant had no capacity to sue. The trial court sustained the demurrer on the second ground and overruled the same as to the other grounds. The bill by leave of court was then amended, and the defendants moved to dismiss the same for the same reasons that they had demurred thereto, except that the motion to dismiss specified, in addition to the statute of limitations of the state of Kansas, the ground of laches. The trial court overruled the motion to dismiss on all grounds except that of laches, and dismissed the bill for that reason.

Appellant appeals from the judgment of dismissal, and the assignments of error relate to the subject of laches alone. None of the defendants appealed. We have stated the proceedings in the court below with some particularity in order to show that the question of whether the suit has been barred by laches is the only one before us. It would serve no useful purpose to set out the allegations of the bill in full, and only those portions thereof will be stated as bear upon the question of laches.

The Ryan Bros. Cattle Company was incorporated under the laws of Kansas November 28, 1887. Matthew Ryan, Sr., deceased, became and was at his decease the owner of 1,660 shares of the par value of \$100 each of the capital stock of said company. On September 16, 1901, a corporation of Illinois, known as Rosenbaum Bros. & Co., loaned the Ryan Bros. Cattle Company \$300,000 on the promissory note of the cattle company, secured by chattel mortgage. This indebtedness was subsequently reduced to the sum of \$41,691.20, and on March 21, 1904, new notes were given for that amount by the cattle company to J. Rosenbaum, who in turn indorsed and delivered the same to appellant, who instituted an action thereon in the district court of Leavenworth county, Kan., which resulted in a judgment in favor of appellant and against the cattle company on May 9, 1905, in the sum of \$44,087.50. Executions on said judgment were issued and returned unsatisfied in May and June, 1905. Matthew Ryan, Sr., died testate June 20, 1903, in Leavenworth county, Kan. His will was duly admitted to probate in said county; Matthew Ryan, Jr., being

appointed executor of the will. Subsequently Matthew Ryan, Jr., having died, Jephtha D. Ryan was appointed executor. November 25, 1904, Jephtha D. Ryan resigned, and Mary R. Loftus was appointed administratrix with the will annexed, and still remains such administratrix; the estate of Matthew Ryan, Sr., still remaining unsettled in the probate court of Leavenworth county, Kan. The shares of stock in the Ryan Bros. Cattle Company, owned by Matthew Ryan, Sr., still constitute a part of the estate of Matthew Ryan, Sr., and, together with the real estate mentioned in the bill, remains unadministered. The bill in this case was filed June 22, 1912. Mary R. Loftus, administratrix, is, and at all times since the 9th day of May, 1905, has been, a citizen and resident of the state of New York.

Voluminous facts are stated in the bill for the purpose of showing that the real estate mentioned therein was conveyed to the defendants with intent to defraud the creditors of Matthew Ryan, Sr., and that the facts constituting the fraud were not discovered by appellant until October 24, 1911; the same having been concealed from appellant until certain findings which were made by the court in the case of *Helen F. Ryan v. William J. Cullen*, 89 Kan. 879, 133 Pac. 430, pending in the district court of Leavenworth county, Kan., were filed. It appears from the foregoing that the suit has for its object: First, the establishment of the amount due on the judgment against the Ryan Bros. Cattle Company as an indebtedness against the estate of Matthew Ryan, Sr., deceased, by virtue of deceased having been a shareholder in said company; second, the satisfaction of said indebtedness out of such property of the estate as still exists. In approaching the consideration of the question of laches, it is necessary to first consider the nature of the liability which is sought to be enforced. On September 16, 1901, the date when the loan was made by Rosenbaum Bros. & Co. to Ryan Bros. Cattle Company, article 12, § 2, Constitution of Kansas, provided:

"Dues from corporations shall be secured by the individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law; but such individual liability shall not apply to railroad corporations nor corporations for religious or charitable purposes."

Section 1302, General Statutes of Kansas 1901, provided for the enforcement of the liability created by the Constitution, but on March 17, 1903 (Laws 1903, c. 152), the Legislature of Kansas repealed all provisions for the enforcement of the constitutional provision above quoted, and subsequently, at the general election in 1906, the constitutional provision itself, which created the liability sought to be enforced, was abrogated.

The Supreme Court of the United States and the Supreme Court of the state of Kansas, however, have decided that the constitutional provision herein quoted and the laws with reference thereto became a part of any contract made with a corporation, which created a liability for a debt during the time such laws were in force, and that the obligation of such contracts remained unimpaired, notwithstanding the repeal of the laws which created the liability. *Douglass v. Loftus*

et al., 85 Kan. 723, 119 Pac. 74, Ann. Cas. 1913A, 378; Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380; Whitman v. Bank of Oxford, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587. It has also been decided that the stock liability sought to be enforced in this action is in its nature contractual. Woodworth v. Bowles, 61 Kan. 569, 60 Pac. 331; Howell v. Manglesdorf, 33 Kan. 194, 5 Pac. 759; Whitman v. Oxford National Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587.

The appellant's cause of action accrued in June, 1905, at the time the executions were returned unsatisfied. Douglass v. Loftus, 85 Kan. 720, 119 Pac. 74, Ann. Cas. 1913A, 378. It appears that about seven years elapsed from the time the cause of action accrued until the bill was filed. Section 17, Code of Civil Procedure of the state of Kansas (Gen. St. 1909, § 5610), provides as follows:

"Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards: * * * Second, within three years; an action upon contract, not in writing, express or implied; an action upon a liability created by statute, other than a forfeiture or penalty."

Section 5613, General Statutes of Kansas 1909 (Code Civ. Proc. § 20), reads as follows:

"If when a cause of action accrues against a person he be out of the state, or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is so absconded or concealed; and if after the cause of action accrues he depart from the state, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought: Provided, this act shall not apply to any foreign corporation authorized to do business in the state upon which service of process can be had within the state."

[1] As bearing directly upon the question of laches, we may first consider whether the statute of limitations, above stated, ever ran against the claim of appellant, so far as the estate of Matthew Ryan, Sr., is concerned. The solution of this question depends upon the further question as to whether appellant could have established the alleged stock liability of Matthew Ryan, Sr., without making Mary R. Loftus, the administratrix, a party. We do not think he could. It is true that no personal judgment is claimed or could be rendered against Mary R. Loftus except in her representative capacity, but the liability sought to be established could not have been established in the lifetime of Matthew Ryan, Sr., without making him a party to the proceeding. Being dead, the liability may not be established without making his personal representative a party. No condition of circumstances occurs to us that would allow the establishment of a stock liability against the estate of a deceased person, unless the personal representative provided by law was in court. The probate court had no power or authority to establish this liability. Douglas v. Loftus, *supra*. We are now speaking of enforcing the liability against the estate of Matthew Ryan, Sr., deceased, and will subsequently consider the case with reference to the real estate now in the hands of fraudulent vendees, as is alleged. That Mary R. Loftus was a neces-

sary party to a suit to establish the stock liability of Matthew Ryan, Sr., deceased, against his estate is decided in the following cases: *Wells v. Wells*, 71 Ind. 509; *Smith v. Turley*, 32 W. Va. 14, 9 S. E. 46; *McGlaughlin v. McGlaughlin*, 43 W. Va. 226, 27 S. E. 378.

[2] That section 5613, *supra*, applies to the personal representative of the deceased person's estate is decided by the following cases: *Hayden v. Pierce*, 144 N. Y. 512, 39 N. E. 638; *Titus v. Poole*, 145 N. Y. 414, 40 N. E. 228; *Conolly v. Hyams*, 176 N. Y. 403, 68 N. E. 662; *Jennings v. Browder*, 24 Tex. 192; *Smith v. Arnold*, 69 Tenn. (1 Lea) 378; 18 Cyc. 935.

In *Hayden v. Pierce*, *supra*, it was said:

"The learned counsel for the defendant suggests that to hold that the defendant's absence from the state operated to enlarge the time for bringing the action would enable the executor or administrator of a deceased person, residing in another state, to delay the settlement of the estate indefinitely. * * * It may be quite true, as urged, that the plaintiff could have commenced its action within six months, so as to have avoided any question as to the bar of the statute, but that consideration is not now pertinent to the inquiry. The question is not what the plaintiff might or could have done, but what she was obliged to do in order to save her rights. The absence of the defendant (a testatrix of the estate of the deceased person) from the state operated to enlarge the time for the commencement of the action, under the general provisions of chapter 4, which apply to this case, and hence the claim was not barred."

In *Anglo-American Land, M. & A. Co. v. Lombard*, 132 Fed. 721, 68 C. C. A. 89, it was held by this court that the statute of limitations of Kansas is tolled as to an action to enforce a stockholder's liability while the person liable is out of the state. We are of the opinion, therefore, that the continued absence of the administratrix from the state of Kansas tolled the statute of limitations, and that it had not run when the bill was filed, so far as the estate of Matthew Ryan, Sr., is concerned. We are further of the opinion that no proceeding in rem would have been of any benefit to the appellant, for the plain reason that he could never have had a claim of any kind against the estate of Matthew Ryan, Sr., deceased, until he had established the stock liability of Matthew Ryan, Sr., and that liability could not be established without the presence of the personal representative of the deceased in court. The assets of the estate of Matthew Ryan, Sr., deceased, until his debts were paid were in the custody of the law and not subject to mesne or final process from any court. 2 *Woerner*, Am. Law Admin. (2d Ed.) pp. 882, 815, § 392; *Achenbach*, Adm'x. v. *Pomeroy Coal Co.*, 2 Kan. App. 357, 42 Pac. 734.

Having no claim against the estate of Matthew Ryan, Sr., deceased, we do not think appellant was charged with the duty of applying to the probate court to have a resident administrator appointed. It is doubtful whether he would have had any right to do so; certainly he was not guilty of laches in not doing so. We are also satisfied that the allegation in regard to the concealment of the fraud as to the real estate, and that it was not discovered until about six months prior to the filing of the bill in this case, sufficiently excuses any delay, so far as the real estate is concerned, if a different statute of limitations should be held to apply to that. Certainly there is no statute which

would bar the right of action within six months from the discovery of the fraud.

[3] The defense of laches has so often been made the subject of discussion in this court that it is unnecessary to quote from all the decided cases. The general principle which guides our action has been stated many times.

In *Burgess v. Hillman*, 200 Fed. 929, 119 C. C. A. 225, we said:

"The rule in such cases (laches) has been ably stated by Judge Sanborn in delivering the opinions of this court in *Kelley v. Boetcher*, 85 Fed. 55, 29 C. C. A. 14; *Boynton v. Haggart*, 120 Fed. 821, 57 C. C. A. 301; *Wyman v. Bowman*, 127 Fed. 257, 62 C. C. A. 189; and *Wilson v. Plutus Mining Co.*, 174 Fed. 317, 98 C. C. A. 189. In *Kelley v. Boetcher*, it was said: 'In the application of the doctrine of laches, the settled rule is that the courts of equity are not bound by, but that they usually act or refuse to act in analogy to, the statute of limitations relating to actions at law of like character. [Citing cases.] The meaning of this rule is that, under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous statute of limitations at law; but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it.' 200 Fed. 931."

In the case above quoted from, the court said further:

"When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches; and, when such a suit is brought after the statutory time has elapsed, the burden is on the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case."

In *Davey v. Dodge*, 213 Fed. 722, this court again followed the principles above stated.

The real questions for decision in this case, as in all others of like character, is: First, does the bill present a reasonable excuse for the delay in bringing the suit; second, would it be inequitable, so far as the defendants are concerned, if the relief prayed by the bill should be granted? We think a reasonable excuse has been presented, and we cannot conceive of any injustice which would result to the defendants in allowing the action to proceed. While the lapse of time is an element which courts consider in refusing or granting the defense of laches, time alone ordinarily is not sufficient to constitute the defense, but in addition thereto the situation of the parties must have so changed as to render the prosecution of the suit inequitable. These circumstances usually appear in the form of increased value of real estate, either in the rise of the price thereof or in the making of valuable improvements thereon, the death of witnesses, and any other circumstance which would make it inequitable to allow a suit to proceed. *Patterson v. Hewitt*, 195 U. S. 309, 317, 25 Sup. Ct. 35, 49 L. Ed. 214; *Brown v. County of Buena Vista*, 95 U. S. 157, 160, 24 L. Ed. 422; *Townsend v. Vanderwerker*, 160 U. S. 171, 186, 16 Sup. Ct. 258, 40 L. Ed. 383; *Baker v. Cummings*, 169 U. S. 189, 208, 18 Sup. Ct. 367, 42 L. Ed. 711; *Gallihier v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738; *Alsop v. Riker*, 155 U. S. 448, 15 Sup. Ct.

162, 39 L. Ed. 218; Penn Mutual Life Ins. Co. v. Austin, 168 U. S. 685, 698, 18 Sup. Ct. 223, 42 L. Ed. 626; O'Brien v. Wheelock, 184 U. S. 450, 493, 22 Sup. Ct. 354, 46 L. Ed. 636; Northern Pac. R. Co. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931; Valvona-Marchiony Co. v. Marchiony (D. C.) 207 Fed. 380, 386.

Nothing appears in the case at bar, except the lapse of time, and we think that the absence from the state of Mary Loftus presents, under the facts of this case, a sufficient excuse for the delay.

The decree below is therefore reversed, and the case remanded, with instructions to the trial court to deny the motion to dismiss and allow the defendants to answer the bill, if they shall be so advised.

AMMERMAN v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. July 8, 1914.)

No. 4090

INDICTMENT AND INFORMATION (§ 125*) — DUPLICITY — INTRODUCING LIQUOR INTO INDIAN COUNTRY.

Act March 1, 1895, c. 145, § 8, 28 Stat. 697, which prohibits the introduction of intoxicating liquors into "Indian Territory" and Act Jan. 30, 1897, c. 109, 29 Stat. 506, prohibiting the introduction of intoxicating liquor into the "Indian country," therein defined, create distinct offenses, punishable differently, and requiring evidence of a different character to justify a conviction, and an indictment, charging in the same count a violation of both acts, is bad for duplicity.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.*]

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Criminal prosecution by the United States against J. O. Ammerman. Judgment of conviction, and defendant brings error. Reversed.

The plaintiff in error was indicted for violation of the laws prohibiting the introduction of intoxicating liquors into the Eastern district of Oklahoma. The indictment is as follows: "Indictment Introducing Liquor into Indian Country. United States of America, Eastern District of Oklahoma. In the District Court of the United States in and for the Eastern District of Oklahoma, at the April Term thereof, A. D. 1913, at Tulsa. The grand jurors of the United States of America, duly impaneled, sworn, and charged, at the term aforesaid of the court aforesaid, to inquire into and due presentment make of offenses against the said United States, on their oath do find, present, and charge that one, J. O. Ammerman, and William J. Creekmore, on the 6th day of March, A. D. 1913, in the county of Tulsa, state of Oklahoma, in the said district and within the jurisdiction of said court, the said county then and there being a portion of the Indian Country of the United States of America did, at the time and place aforesaid, unlawfully, knowingly, willfully, and feloniously introduce and carry into said Indian Country and into the county aforesaid from without said Indian Country, and from without the said district and from without the said state of Oklahoma, one quart of malt, vinous, spirituous, distilled, ardent, and intoxicating liquor, to wit, alcohol, whisky, beer, and wine; the said county and district having been a portion of the territory of the said United States known as the Indian Territory, and at all times was and now is a part of the Indian Country of the said United States

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of America, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

A demurrer to the indictment was filed which, among other grounds, sets up the following: "Third. Said indictment is bad for duplicity in that it charges, or attempts to charge, the defendants, and each of them, with a violation of section 8 of the act of Congress of March 1, 1895, 28 Stat. 693, and with a violation of the act of January 30, 1897, 29 Stat. 506." The demurrer was overruled and proper exceptions saved. Upon a trial there was a verdict of guilty, the verdict reading: "We, the jury in the above entitled cause, duly impeached and sworn upon our oaths, find the defendant J. O. Ammerman guilty as charged in the indictment."

A motion for a new trial having been overruled, the defendant was sentenced, upon the verdict of the jury, to imprisonment in the United States penitentiary at Leavenworth, Kan., for the term of three years, and to pay a fine of \$100 and all costs of the prosecution.

Norman R. Haskell, of Oklahoma City, Okl., and James C. Denton, of Muskogee, Okl. (E. G. McAdams, of Oklahoma City, Okl., on the brief), for plaintiff in error.

W. P. McGinnis, Asst. U. S. Atty., of Muskogee, Okl. (D. H. Linebaugh, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

Before SANBORN and SMITH, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge (after stating the facts as above). Section 8, Act March 1, 1895, c. 145, 28 Stat. 693, is as follows:

"That any person, whether an Indian or otherwise, who shall, in said (Indian) Territory, manufacture, sell, give away, or in any manner, or by any means furnish to anyone, either for himself or another, any vinous, malt, or fermented liquors, or any other intoxicating drinks of any kind whatsoever, whether medicated or not, or who shall carry, or in any manner have carried, into said territory any such liquors or drinks, or who shall be interested in such manufacture, sale, giving away, furnishing to anyone, or carrying into said territory any of such liquors or drinks, shall, upon conviction thereof, be punished by fine not exceeding five hundred dollars and by imprisonment for not less than one month nor more than five years."

Act Jan. 30, 1897, c. 109, 29 Stat. 506, is as follows:

"Any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter."

It will be noticed that the punishment provided for a violation of the act of 1897 is imprisonment for not less than 60 days and a fine of not less than \$100 for the first offense, and not less than \$200 for each offense thereafter, but provides for no maximum imprisonment or fine.

In view of the fact that the act of 1897 is an amendment to Act July 23, 1892, c. 234, 27 Stat. 260, as was held by the Supreme Court in *United States v. Wright*, 229 U. S. 226, 230, 33 Sup. Ct. 630, 57 L.

Ed. 1160, it may be assumed, although we do not deem it necessary to determine it in this case, that the maximum punishment provided for in the act of 1892 is still in force. That act is a substitute for section 2139 of the Revised Statutes and reads as follows:

"Sec. 2139. No ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretense, into the Indian country. Every person who sells, exchanges, gives, barter, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind to any Indian under charge of any Indian superintendent or agent, or introduces or attempts to introduce any ardent spirits, ale, wine, beer, or intoxicating liquor of any kind into the Indian country shall be punished by imprisonment for not more than two years, and by a fine, of not more than three hundred dollars for each offense. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority in writing from the War Department, or any officer duly authorized thereunto by the War Department. All complaints for the arrest of any person or persons made for violation of any of the provisions of this act shall be made in the county where the offense shall have been committed, or if committed upon or within any reservation not included in any county, then in any county adjoining such reservation, and, if in the Indian Territory, before the United States court commissioner, or commissioner of the circuit court of the United States residing nearest the place where the offense was committed, who is not for any reason disqualified; but in all cases such arrests shall be made before any United States court commissioner residing in such adjoining county, or before any magistrate or judicial officer authorized by the laws of the state in which such reservation is located to issue warrants for the arrest and examination of offenders by section ten hundred and fourteen of the Revised Statutes of the United States. And all persons so arrested shall, unless discharged upon examination, be held to answer and stand trial before the court of the United States having jurisdiction of the offense."

It will thus be seen that the acts of 1895 and 1897 create distinct offenses, punishable differently, and necessitating evidence of a different character to justify a conviction. The act of 1897 prohibits the introduction of intoxicating liquors into the Indian *country*, and expressly defines what shall be Indian country within the meaning of the act. On the other hand, the act of 1895 prohibits the introduction of liquors into the Indian *Territory* as it then existed, and which act, it has been authoritatively held, is still in force, in that part of the state of Oklahoma which, before the state was admitted into the Union, constituted the Indian Territory. *Ex parte Webb*, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248; *United States v. Wright*, supra; *United States Express Co. v. Friedman*, 191 Fed. 673, 112 C. C. A. 219; and the late case of *Joplin Mercantile Co. v. United States*, 213 Fed. 926, 131 C. C. A. 160.

The indictment, it will be noticed, charges a violation of both statutes. It charges that:

"In the county of Tulsa and state of Oklahoma, the said county then and there being a portion of the Indian Country of the United States of America, did introduce and carry into said Indian Country from without said Indian Country, and from without said district and from without the state of Oklahoma, one quart of alcohol. * * * The said county and district having been a portion of the territory of the said United States known as the Indian *Territory*, and at all times was and is now a part of the Indian *Country* of the said United States of America."

The first part of the indictment charges the introduction of intoxicating liquors into that part of Tulsa county which is Indian *country*, and the latter part of the indictment charges the defendant with having introduced intoxicating liquor into the county, which was a portion of the territory of the United States known as the "Indian Territory." This is clearly duplicitous, as was held by this court in *John Gund Brewing Co. v. United States*, 204 Fed. 17, 122 C. C. A. 331, and authorities there cited. Perhaps no better illustration of the danger of permitting such an indictment to stand can be found, than this case affords. The verdict of the jury finds the defendant guilty as charged in the indictment. Does this mean that the defendant was guilty of violating the act of 1895 or the act of 1897? The learned trial judge was evidently of the opinion that the defendant was guilty of violating the act of 1895, introducing intoxicating liquors into that part of the state of Oklahoma which was formerly the Indian Territory, for he sentenced him to imprisonment in the penitentiary for three years, while under the act of 1897, treating it as leaving the maximum punishment provided in the act of 1892 still in force, confinement in prison is limited to two years.

We are of the opinion that the court below erred in overruling the demurrer to the indictment, and the cause is reversed, with directions to set aside the judgment and sustain the demurrer to the indictment.

ALLISON v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. July 8, 1914.)

No. 4188.

In Error to the United States District Court for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Criminal prosecution by the United States against R. J. Allison. Judgment of conviction, and defendant brings error. Reversed.

R. L. Davidson, of Tulsa, Okl., and Norman R. Haskell, of Oklahoma City, Okl. (W. I. Williams, of Tulsa, Okl., and E. G. McAdams, of Oklahoma City, Okl., on the brief), for plaintiff in error.

W. P. McGinnis, Asst. U. S. Atty., of Muskogee, Okl. (D. H. Linebaugh, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

Before SANBORN and SMITH, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge. The indictment in this cause is identical with that in *Ammerman v. United States*, 216 Fed. 326, decided this day, and for the reasons therein stated, this cause is reversed, with directions to set aside the judgment and sustain the demurrer to the indictment.

NUNN v. HAZELRIGG.

(Circuit Court of Appeals, Eighth Circuit. July 8, 1914.)

No. 3968.

1. INDIANS (§ 5*)—TRIBAL CITIZENSHIP—CONCLUSIVENESS OF ROLLS MADE BY COMMISSION.

The decision of the Commission to the Five Civilized Tribes, under the authority given by Act June 10, 1896, c. 398, 29 Stat. 321, that a person was entitled to enrollment in the Creek Tribe either as a citizen or freedman, not appealed from, is conclusive of such right and also of his relationship to the tribe, whether by blood or as a freedman.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 5.*]

2. INDIANS (§ 15*)—CONVEYANCE BY ALLOTTEE—VALIDITY.

Under section 16 of the supplemental agreement with the Creek Nation, approved June 30, 1902, c. 1323, 32 Stat. 500, which provides that lands allotted to citizens shall not be incumbered nor alienated by the allottee or his heirs before the expiration of five years from the date when the agreement was approved, and that "any agreement or conveyance, of any kind or character, violative of any of the provisions of this paragraph, shall be absolutely void and not susceptible of ratification in any manner," a deed executed by a Creek allottee, enrolled as a citizen of Creek blood, after the five-year period but made in confirmation of one made before the expiration of that time, and without further consideration, is void, and will not support an action of ejectment.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. § 15.*]

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Action at law by J. T. Hazelrigg against Charles J. Nunn. Judgment for plaintiff, and defendant brings error. Reversed.

E. J. Van Court, of Eufaula, Okl. (Van Court & Reubelt, of Eufaula, Okl., on the brief), for plaintiff in error.

Benjamin Martin, Jr., of Muskogee, Okl. (Villard Martin, of Muskogee, Okl., on the brief), for defendant in error.

Before SANBORN and SMITH, Circuit Judges, and POPE, District Judge.

SMITH, Circuit Judge. This suit was brought in United States District Court for the Eastern District of Oklahoma in ejectment by the defendant in error, J. T. Hazelrigg, hereafter called the plaintiff, to recover an undivided one-half of approximately 108 acres of land, and against Charles J. Nunn, plaintiff in error, hereafter called the defendant. The land in question is a part of the lands of the Creek Nation and constitutes the surplus allotment to one Tena Dan, now Cross. She was enrolled by the commission of the Five Civilized Tribes, known as the Dawes Commission, as an eighth blood Creek Indian. The petition was in a brief form, allowed by the laws of Oklahoma.

The answer alleges in substance: That the land in question was patented to Tena Dan by the principal chief of the Muskogee, or Creek, Nation September 3, 1902, and the patent was approved by the Acting

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Secretary of the Interior December 22, 1902. The land was conveyed April 22, 1904, by the said Tena Cross and husband by warranty deed to Mary A. Morrow, and on the 27th day of September, 1904, by the said Mary A. Morrow, a widow, by warranty deed to the defendant Charles J. Nunn. On November 4, 1907, said Tena Cross, under the name of Tena Dan, again conveyed said land by warranty deed to Thomas Haggard. On November 22, 1907, said Tena Cross, under that name, conveyed said land by warranty deed to Thomas Haggard to correct the error in the former deed. On November 5, 1907, Thomas Haggard and wife conveyed the land by warranty deed to Charles J. Nunn. The defendant alleges: That on the 27th day of September, 1904, he went into possession and occupancy of said lands under said deed from Mary A. Morrow, and that since said date his possession has been, and is now, exclusive, open, notorious, and adverse to all persons. That, at the time defendant purchased said land from the said Mary A. Morrow, he did so in good faith for the purpose of providing himself with a home, and paid, as a consideration for said deed, the full value of said land. That at said time the defendant knew the said Tena Cross, née Dan, and her parents, and knew that she and her said parents claimed to be negroes, and were in fact negroes, and had no knowledge that the said Tena Dan was enrolled as a "mixed blood Indian" on the rolls of the Creek Nation. That the defendant is informed and believes, and upon such information and belief avers and charges, that plaintiff claims to derive his alleged title to said land under the deed hereafter referred to.

"That immediately upon the public having access to the said Indian rolls, and it being ascertained that the said Tena Dan was falsely entered thereon as of mixed blood, plaintiff entered into a conspiracy with J. C. Ruby, G. R. Ruby, and Virgil R. Coss and others, all near relatives and business associates, to cheat and defraud defendant and cloud his said title. That, in furtherance of said conspiracy, the said G. R. Ruby well knowing the premises, and the fact that the said Tena Dan was enrolled as a mixed blood citizen, of the Creek Nation, on July 1, 1907, procured from the said Tena Dan, in the name of J. C. Ruby, a deed (Exhibit G) to said land, which said deed was taken for the use and benefit of said G. R. Ruby, and the same was procured by fraud and no consideration was paid therefor. That with the intention of validating said void deed, and in furtherance of said conspiracy, the said G. R. Ruby, without further consideration, on August 9, 1907, procured a deed (Exhibit H), from the said Tena Dan on said land. That on the 20th day of August, 1907, in furtherance of said conspiracy, and in order to further complicate and cloud defendant's title, the said G. R. Ruby and wife, without consideration, conveyed said land to the said Virgil R. Coss, which said deed is hereto attached, marked 'J,' and made a part of this answer. That on the 13th day of September, 1907, in furtherance of said conspiracy, and in order to further complicate and cloud defendant's title, the said Virgil R. Coss, without consideration conveyed an undivided one-half interest in said land to the said J. T. Hazelrigg, plaintiff herein, which said deed is hereto attached, marked Exhibit K, and made a part of this answer."

[1] The commission to the Five Civilized Tribes authorized by section 16 of the act of March 3, 1893 (27 Stats. 612, 645, c. 209), and the provision of the act of March 2, 1895 (28 Stats. 910, 939, c. 189), and commonly known as the Dawes Commission, was authorized and directed by the act of June 10, 1896 (29 Stats. 321, 339, c. 398), to:

"Proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled. * * * In the performance of such duties, said commission shall have power and authority to administer oaths, to issue process for and compel the attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever heretofore taken, where the witnesses giving said testimony are dead or now residing beyond the limits of said territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes: Provided, that if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the commission provided for in this act, it or he may appeal from such decision to the United States District Court: Provided however, that the appeal shall be taken within sixty days, and the judgment of the court shall be final. That the said commission, after the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose right may be conferred under this act, and said rolls shall be, and are hereby, made rolls of citizenship of said nations or tribes, subject, however, to the determination of the United States courts, as provided herein. The commission is hereby required to file the lists of members as they finally approve them with the Commissioner of Indian Affairs to remain there for use as the final judgment of the duly constituted authorities. And said commission shall also make a roll of freedmen entitled to citizenship in said tribes and shall include their names in the lists of members to be filed with the Commissioner of Indian Affairs."

By the act of June 28, 1898 (30 Stats. 495, 503, c. 517), it is provided:

"The roll of Creek freedmen made by J. W. Dunn, under authority of the United States, prior to March fourteenth, eighteen hundred and sixty-seven, is hereby confirmed, and said commission is directed to enroll all persons now living whose names are found on said rolls, and all descendants born since the date of said roll to persons whose names are found thereon, with such other persons of African descent as may have been rightfully admitted by the lawful authorities of the Creek Nation. * * * Said commission shall make such rolls descriptive of the persons thereon, so that they may be * * * identified."

This makes it important to understand who were meant by Creek freedmen as used in this statute. African slavery existed among the Creeks before the Civil War. The Creeks made a treaty with the so-called Confederate States on July 10, 1861. The Emancipation Proclamation had reference only to the states and parts of states, and did not under its terms extend to Indian Territory or to the slaves owned by Creeks.

On the 18th day of December, 1865, the adoption of the thirteenth amendment, abolishing slavery, was duly proclaimed; it provided:

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Until the act of March 3, 1871 (16 Stats. 544, 566, c. 120, R. S. 2079), the Indians were regarded as alien people residing in the United States. The Supreme Court has held that members of Indian tribes were not "born in the United States and subject to the jurisdic-

tion thereof," within the meaning of the fourteenth amendment of the Constitution. *Elk v. Wilkins*, 112 U. S. 94, 5 Sup. Ct. 41, 28 L. Ed. 643. To avoid any doubt as to whether the thirteenth amendment would be similarly construed, and for the purpose of securing the co-operation of the Creeks, the government made a treaty with them on June 14, 1866, article 2 of which provides:

"Article II. The Creeks hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted in accordance with laws applicable to all members of said tribe, shall ever exist in said nation; and inasmuch as there are among the Creeks many persons of African descent, who have no interest in the soil, it is stipulated that hereafter these persons lawfully residing in said Creek country under their laws and usages, or who have been thus residing in said country, and may return within one year from the ratification of this treaty, and their descendants and such others of the same race as may be permitted by the laws of the said nation to settle within the limits of the jurisdiction of the Creek Nation as citizens (thereof,) shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and national funds, and the laws of the said nation shall be equally binding upon and give equal protection to all such persons, and all others, of whatsoever race or color, who may be adopted as citizens or members of said tribe."

Out of the condition of slavery and subsequent action in relation thereto arose a considerable class of so-called Creek freedmen who were entitled to share in the allotment of Creek lands.

The Dawes Commission thus created and existing was a quasi judicial body. *Kimberlin v. Commission of Five Civilized Tribes*, 104 Fed. 653, 44 C. C. A. 109. It was expressly required to make separate rolls of the Indians and freedmen. To be enrolled as a Creek Indian, it was not sufficient for an applicant to show that he was an Indian, but he must show, and the commission must find, that he was an Indian of the Creek Tribe; and to be enrolled as a freedman it was not sufficient to show that he was an African, but he must show, and the commission must find, that he was a former slave or the descendant of a former slave of some member of the Creek Tribe, or at least a slave of some other person adopted by the Creek Nation. It was therefore necessary for an applicant for enrollment to show upon what grounds he was entitled to such enrollment; that he was of Creek Indian blood; that he was a Creek freedman, became a citizen of the tribe by the treaty of June 14, 1866; or that he had without any such rights become a member of the tribe by adoption. And, when the commission found by any one of these methods a person was entitled to enrollment, the manner in which he was found to be entitled to such enrollment was adjudicated as much as the mere fact of the right of enrollment. The cases are so numerous on this subject that it will be useless to stop to cite them. But the adjudication that Tena Dan was of Indian blood did not involve the question of her quantum of Indian blood; she was entitled to be enrolled if she was of Creek Indian blood; and the question whether she was a full-blood or one-eighth blood was not involved.

At the time of the deed from Tena Cross to Mrs. Morrow she was prohibited by law from alienating her surplus allotment. It is,

of course, manifest that if Tena Dan-Cross was not of Indian blood, and was not enrolled as of Indian blood, the deed made by her to Mrs. Morrow on April 22, 1904, was valid; but she had been adjudged by the Dawes Commission to be of Indian blood and so her deed was invalid.

Reference is made to the act of April 26, 1906 (section 19, c. 1876, 34 Stats. 137, 144), and to the act of May 27, 1908 (section 3, c. 199, 35 Stats. 312, 313). It must be remembered that those acts had to do with restrictions theretofore existing upon transfer by the Creek Indians, and proposed to base new restrictions upon the quantum of Indian blood, and it became material to provide that under those laws the rolls should be conclusive as to the quantum of such blood, but neither statute had anything to do with whether the rolls were an adjudication of the possession of Indian blood, as distinguished from the quantum of Indian blood.

[2] We therefore conclude that the sale to Mrs. Morrow and the subsequent sale to the defendant were invalid, and, for the reasons indicated, the case of *Hegler v. Faulkner*, 153 U. S. 109, 14 Sup. Ct. 779, 38 L. Ed. 653, cited by the defendant, is not in point. But the court sustained a special demurrer to the first, second, and third paragraphs of the answer. These included the portions of the answer we have literally quoted.

It will be remembered that it had been alleged in the answer that the defendant was and had been since the 27th day of September, 1904, in the exclusive, open, notorious, and adverse possession of the land in question. This being an action in ejectment, it was essential that if the plaintiff recover he should recover upon the strength of his own title, and not upon the weakness of the defendant's. It was alleged that, before the restrictions were removed, Tena Dan conveyed the land to J. C. Ruby, and that the deed of August 9, 1907, was given without consideration and with the intention of validating said void deed.

It is provided by section 16 of the act of June 30, 1902 (32 Stats. 500, 503):

"Lands allotted to citizens shall not in any manner whatever or at any time be incumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. * * * Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

This act provides for its submission for ratification to the Creek Tribal Council, and this was the approval referred to in the section quoted. This approval was proclaimed on August 8, 1892 (32 Stats. 2021). *Tiger v. Western Investment Co.*, 221 U. S. 286, 301, 31 Sup. Ct. 578, 55 L. Ed. 738.

In *Alfrey v. Colbert*, 168 Fed. 231, 234, 93 C. C. A. 517, it was said:

"We are of the opinion that it was the intention of Congress that no conveyance forbidden by any of the terms of the sixteenth section of the act should be susceptible of ratification or be made good by estoppel. The section in its completeness has a common subject-matter, the disposition of allotments, and the provisions regarding it would naturally be grouped or placed in a single subdivision or paragraph of an agreement or in a single section of a law. The express restrictions upon alienation as to both homesteads and surplus lands appear in the first paragraph, not in the second, and it was to them the final clause was obviously directed. The act of June 30, 1902, differs from acts of Congress in general, in that the subdivisions thereof are not designated as sections. The body of the act was a prior agreement between the Dawes Commission and representatives of the Creek Tribe of Indians, and, with some changes, it was confirmed by Congress and submitted to the tribal council for ratification. The subdivisions or paragraphs of the prior agreement were consecutively numbered, and that arrangement was preserved when it was incorporated in the act. A similar arrangement and omission to designate numbered subdivisions or paragraphs as sections will be found in the agreement with the Choctaws and Chickasaws embodied in Act July 1, 1902, c. 1362, 32 Stat. 641. We think it quite clear that 'paragraph' was used synonymously with 'subdivision' or 'section,' and that it does not mean the minor undesignated part of the text, the arrangement of which may well be the mere result of taste, without intention to control the sense or import. The term 'paragraph,' in an act of Congress, will be construed to mean 'section,' whenever to do so accords with the legislative intent. *Marine, Collector, v. Packham*, 52 Fed. 579, 3 C. C. A. 210, 212."

We conclude that the court below erred in sustaining a demurrer to this portion of the answer. The pleadings did not show that the defendant had any title to the land in question, but if his allegation was true that the plaintiff's title was derived from a conveyance made prior to the time of the expiration of the period of restriction, and that the only other deed which he holds was given without consideration, and in ratification of the void deed, then it was void under the section of the act of 1902 quoted.

The result is that while the judgment is affirmed as to the conclusiveness of the judgment of the Dawes Commission, as to the question with reference to the defendant's ownership, the judgment is reversed, and the cause remanded, with a direction to set aside the judgment and verdict and this ruling on demurrer and award a new trial.

ABBOTT et al. v. UNDERWOOD.†

(Circuit Court of Appeals, Eighth Circuit. July 16, 1914.)

No. 4114.

1. APPEAL AND ERROR (§ 1022*) — REVIEW — PRESUMPTIONS — REFERENCE BY CONSENT—FINDINGS OF MASTER.

On a reference by consent of the parties, the findings of fact made by the master, especially when approved by the district judge, are at least presumptively correct.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.*]

2. DESCENT AND DISTRIBUTION (§ 52*)—REALTY OF WIFE—CONTRACTS TO CONVEY—RIGHTS OF SURVIVING HUSBAND.

Under Gen. St. Kan. 1909, §§ 2942, 2961, which provide that on the death of a husband his wife, if she is or has been a resident of the state, shall

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied December 4, 1914.

be entitled in fee simple to one-half of all the real estate owned by the husband at any time during the marriage to which she has made no conveyance, and that the husband shall be entitled to the same rights and estate in the property of his deceased wife, an executory contract by a wife to sell land owned by her, in which her husband did not join, cannot be specifically enforced by the purchaser after her death as to the one-half of the land which then became the property of the husband.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 83, 135-140, 144, 147-149, 151-153, 161-167, 169-171, 296-308; Dec. Dig. § 52.*]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit in equity by L. H. Underwood against Linus Abbott and others. Decree for complainant, and defendants appeal. Reversed.

The appellee, who will be referred to herein as the plaintiff, instituted an action for specific performance against the surviving husband and the children of Harriet L. Abbott, deceased. The material allegations in the bill are that about September 20, 1899, plaintiff's sister, Harriet L. Abbott, now deceased, who was the owner of the 80 acres of land in the state of Kansas in controversy herein, agreed in writing to sell the same to him for the sum of \$600, payable, \$200 in two years or less, and the balance of \$400 to be paid at a later date, with 6 per cent. interest thereon; that in pursuance of that contract the plaintiff took possession of said land, which was then uncultivated, with no improvements thereon, moved his family on it, and made valuable improvements, and has since then continuously occupied the same with his family as his homestead; that owing to a failure of crops he was unable to make the first payment of \$200 when it became due, but by agreement with his sister the time was extended, he paying the interest on the purchase money and the taxes on the land at all times since 1899; that after Mrs. Abbott's death he paid the interest to her surviving husband, the defendant Linus Abbott, and also made other payments to him, which he refused to accept as payments on the land, and repudiated the contract of his wife. A tender of \$600 was made by the plaintiff with his bill with a prayer for specific performance. The defendant, Linus Abbott, for himself, and also as guardian ad litem for his children, who were minors, filed an answer, denying that there was any contract of purchase and sale made by his deceased wife, but that the plaintiff was simply in possession of the land as a tenant of his deceased wife, and asked that the bill be dismissed. After the issues had been made up, a written stipulation was entered into by the parties, for the appointment of a special master to hear the evidence and report to the court his findings of facts and recommend respecting the decree to be entered. The master filed a lengthy report, finding as facts that the transaction between the plaintiff and his sister, Harriet L. Abbott, constituted a contract of purchase and sale of the land in controversy; that plaintiff, in pursuance of that contract, took possession of the land with his family, making it his homestead; that he made valuable improvements thereon, exceeding in value \$1,000; that he paid the taxes on the land ever since; that he had paid \$200 on the purchase price after the death of Mrs. Abbott, and afterwards sent \$120, which Mr. Abbott refused to accept as payment on the land, and recommended that the court grant the prayer of the plaintiff upon his depositing in the registry of the court, for the benefit of the defendants, the sum of \$835.25, which he found was the unpaid balance of the purchase price, with the interest thereon up to that time. Exceptions to the findings of facts and the recommendation for the decree were filed by the defendants, but overruled by the court, and a decree entered in accordance with the recommendation of the master, from which this appeal was taken.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Eugene S. Quinton, of Topeka, Kan., and J. L. Travers, of Osborne, Kan., for appellants.

A. M. Harvey and J. E. Addington, both of Topeka, Kan. (W. E. Mahin, of Osborne, Kan., of counsel), for appellee.

Before SANBORN, Circuit Judge, and TRIEBER and REED, District Judges.

TRIEBER, District Judge (after stating the facts as above). [1] As the reference to the master was by consent of the parties, the findings of facts made by the master, especially when approved by the district judge, are at least presumptively right. *Kimberley v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *Crawford v. Neal*, 144 U. S. 585, 596, 12 Sup. Ct. 759, 36 L. Ed. 552; *Davis v. Schwartz*, 155 U. S. 631, 637, 15 Sup. Ct. 237, 39 L. Ed. 289.

[2] But we find that the master, as well as the learned trial judge, overlooked a very important question of law. From the findings of the master it appears that the Abbotts were married at the time the contract of sale was made, and at one time were residents of the state of Kansas. The Statutes of Kansas 1909, on the subject of the lands of the husband and wife, provide:

Section 2942:

"One-half in value of all the real estate in which the husband, at any time during the marriage, had a legal or equitable interest, which has not been sold on execution or other judicial sale, and not necessary for the payment of debts, and of which the wife has made no conveyance, shall, under the direction of the probate court, be set apart by the executor as her property, in fee simple, upon the death of the husband, if she survives him: Provided, that the wife shall not be entitled to any interest, under the provisions of this section, in any land to which the husband has made a conveyance, when the wife, at the time of the conveyance, is not or never has been a resident of this state."

Section 2961:

"All the provisions hereinbefore made in relation to the widow of a deceased husband shall be applicable to the husband of a deceased wife. Each is entitled to the same rights or portion in the estate of the other, and like interests shall in the same manner descend to their respective heirs. The estates of dower and by curtesy are abolished."

In construing these sections the Supreme Court of Kansas in *Kennedy v. Haskell*, 67 Kan. 612, 73 Pac. 913, held that the word "or" in the last sentence of section 2942 should be read as "and," and if the survivor has ever been a resident of the state he or she is entitled to the benefits of the statute.

In *Union Pac. Ry. Co. v. Barnard & Leas Mfg. Co.*, 1 Kan. App. 23, 41 Pac. 201, it was held that unless the wife joins in a contract of sale, her rights under that statute are not divested.

The evidence fails to show that the defendant Linus Abbott, the husband of Harriet L. Abbott, at the time this contract was made by her, joined in the contract of sale. In fact, it appears conclusively that he did not. Therefore his interest in the land was, under the statutes of Kansas, inchoate while the wife lived, and became absolute upon her death and his survival. The interest of the husband, in case

he survives his wife, is not as that of an heir, but as husband. *Flanigan v. Waters*, 57 Kan. 18, 20, 45 Pac. 56. From this it follows that the court erred in decreeing specific performance for the undivided half interest of Linus Abbott. The decree as to the children of Harriet L. Abbott, who took only as her heirs, is correct, and should be affirmed.

As the plaintiff receives only one-half of the land which he contracted for, it would be inequitable to compel him to pay to the heirs of Mrs. Abbott the full amount of the purchase money. The decree should therefore be modified, with instructions to the court below to ascertain what one-half of the agreed purchase price with interest thereon amounts to, and, upon payment thereof into the registry of the court for the benefit of the children, that the children be divested of all their right, title, and interest in and to the land in controversy, and that the same be vested in the plaintiff.

As to the undivided one-half interest of Linus Abbott, he is entitled to one-half of the reasonable yearly rents and profits of the land, with interest thereon since he became the owner thereof by the death of his wife. But he should be charged with one-half of the taxes paid on the land by the plaintiff, with interest thereon since the death of Mrs. Abbott, and also one-half of the value of the permanent improvements made by the plaintiff on the land. The latter should be ascertained by the increased value of the land at the time of the decree by reason of the improvements made by the plaintiff under his contract of purchase. The costs of this court will be divided, each party paying one-half.

The cause is reversed and remanded, with directions to proceed in conformity with the views herein expressed.

WESTERN COAL & MINING CO. v. HISE et al.

(Circuit Court of Appeals, Eighth Circuit. July 8, 1914.)

No. 3987

DEATH (§ 38*)—ACTIONS FOR CAUSING DEATH—SPECIAL LIMITATIONS.

Kirby's Dig. Ark. § 5083, which is a part of the general statute of limitations and provides that if an action is brought within the time prescribed and the plaintiff shall suffer a nonsuit a new action may be brought within one year thereafter, does not apply to an action for wrongful death brought, under section 6290 of such digest, which makes the bringing of an action within two years an indispensable condition to the liability.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 53; Dec. Dig. § 38.*

What law governs actions for wrongful death, see note to *Burrell v. Fleming*, 47 C. C. A. 606.]

In Error to the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

Action at law by Helen Hise and Vesta Hise, who sues by Helen Hise as next friend, against the Western Coal & Mining Company. Judgment for plaintiffs, and defendant brings error. Reversed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Ira D. Oglesby, of Ft. Smith, Ark., for plaintiff in error.

T. P. Winchester and W. R. Martin, both of Ft. Smith, Ark., for defendants in error.

Before SANBORN and SMITH, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge. This suit is brought by the defendants in error, referred to herein as plaintiffs, to recover damages for the death of the husband and father of the plaintiffs, by reason of the negligence of the defendant, the plaintiff in error.

It appears from the complaint that the injury and death occurred on January 19, 1910. That a suit to recover damages therefor was instituted on October 19, 1910. On June 19, 1912, the plaintiffs took a voluntary nonsuit, and this action was instituted on December 5, 1912, which was more than two years after the death of the intestate. A demurrer was filed by defendant with its answer, which was by the court overruled, and proper exceptions taken.

Section 6290 of Kirby's Digest of the Statutes of Arkansas, commonly known as Lord Campbell's Act, upon which the claim of the plaintiffs is based, contains a proviso that "every such action shall be commenced within two years after the death of such person."

Section 5083 of Kirby's Digest, which is found in the chapter on Limitations, provides that "if any action shall be commenced within the time respectively prescribed in this act, and the plaintiff therein suffer a nonsuit, * * * such plaintiff may commence a new action within one year after such nonsuit suffered or judgment arrested or reversed."

This cause was disposed of by the trial court, before the opinion of this court, in *Partee v. Railroad Co.*, 204 Fed. 970, 123 C. C. A. 292, and that of the Supreme Court of Arkansas in *Anthony v. Railway Company*, 108 Ark. 219, 157 S. W. 394, were announced.

In the *Partee* Case this same question was before this court under the statutes of Oklahoma, which are practically the same as those of Arkansas, and it was there held that the statute authorizing a new suit to be brought, after a nonsuit is taken, does not apply to Lord Campbell's Act. The ground upon which that decision is based is that:

"The statute, which in itself creates a new liability, and creates an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action, within the time it fixes, is an indispensable condition to the liability and of the action which it permits."

The Supreme Court of Arkansas in *Anthony v. Railway*, supra, recognized the same doctrine, and refused to apply the exception made by the Arkansas statute of limitations in favor of married women and infants. In that case it was also held by the Supreme Court of Arkansas that the defendant may avail himself of this objection by demurrer. The court erred in refusing to sustain the demurrer to the complaint, and the cause is accordingly reversed.

GWLADYS S. S. CO., Limited, v. GANS S. S. LINE.
(Circuit Court of Appeals, Second Circuit. June 23, 1914.)

No. 192.

SHIPPING (§ 49*)—CHARTERS—RATIFICATION OF CHARTER MADE BY AGENT.

Where a charter party was signed for the charterer by an agent who was without authority, or was deceived or mistaken as to the cargo capacity of the vessel, but before delivery the true capacity was learned by the charterer, he had his election to ratify or repudiate the charter as a whole, but could not accept the vessel and afterward set off against the charter hire a claim for damages for shortage of carrying capacity.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 187-200, 202; Dec. Dig. § 49.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the Gwladys Steamship Company, Limited, against the Gans Steamship Line. Decree for libellant, and respondent appeals. Affirmed.

C. B. Smith, of New York City, for appellant.

C. R. Hickox, of New York City, for appellee.

Before COXE and ROGERS, Circuit Judges, and HAND, District Judge.

HAND, District Judge. The meaning of the charter as printed may be taken to be "exclusive of bunkers," but the meaning of the charter as delivered is clearly "cubic feet capacity as shown by the plan." Nobody disputes that the only plan which could at that time have been meant was the "Nora's," and that when Farrington signed he had the plan before him. Hence the contract could only mean cubic capacity, including bunkers, and there was no misdescription. The contract must speak for itself; no prior conversations are admissible in its interpretation.

The defenses are lack of authority, mutual mistake or fraud, which of the two is doubtful. As to lack of authority, the defense is irrelevant because the respondent knew all the facts when it accepted the ship. The protest was ineffective; one must ratify an unauthorized contract or repudiate it as a whole. As to mutual mistake, there was none. Farrington might have misled Gans, but neither Bromage nor the libellant shared in the mistake when the contract was signed, or supposed that Gans was under any mistake. As to this defense, however, the same considerations apply as do to the lack of authority. Having affirmed the charter with full knowledge, the respondent may not repudiate a part.

It is possibly true that if the respondent had an action on the case in deceit, it would survive acceptance. We need not consider whether it could be a good counterclaim here. The theory would be that Bromage made a false representation to Farrington to be transmitted to Gans, and that Gans was damaged because he signed the charter party on the strength of the representation. However, there is nothing

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing in that position either, because Gans suffered no damage. He could have repudiated the ship by hypothesis on delivery, and begun his bargaining anew. If it be said that his loss lay in the fact that his chance had then gone to get another ship, the answer is that nothing of the sort appears in the proof. These hypotheses all presuppose that Bromage made an innocent false statement to be transmitted to Gans, and that this may be the basis of a cause of action, a matter open to great doubt. The general rule certainly is that the defendant must know his statement to be false. There is no ground for supposing that Bromage meant to mislead Gans, assuming the conversation was as Farrington says.

Decree affirmed, with costs.

GRAND RAPIDS SHOW CASE CO. v. BAKER et al.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1914.)

No. 2350.

1. PATENTS (§ 141*)—REISSUES—ENLARGEMENT OF CLAIMS.

A reissue cannot be permitted to enlarge the claims of the original patent by including matter once intentionally omitted, and acquiescence in the rejection of a claim, its withdrawal by amendment, either to save the application or to escape an interference or the acceptance of a patent containing limitations imposed by the Patent Office, which narrow the scope of the invention as at first described and claimed, are instances of such omission.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 206-213; Dec. Dig. § 141.*]

2. PATENTS (§ 136*)—REISSUES—GROUNDS OF REISSUE.

The deliberate acts of the applicant's attorney in protracted proceedings in the Patent Office leading to the issuance of the patent cannot be treated as inadvertence, accident, or mistake which will authorize a reissue.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 198½; Dec. Dig. § 136.*]

3. PATENTS (§ 144*)—REISSUES—REVIEW OF DECISION OF PATENT OFFICE.

A court will review the decision of the Patent Office on the question of inadvertence, accident, or mistake in proceedings for a reissue where the matter is manifest from the record.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 215-217; Dec. Dig. § 144.*]

4. PATENTS (§ 328*)—VALIDITY OF REISSUE—WARDROBE.

The Kennedy reissue patent, No. 11,907 (original No. 631,525), for a wardrobe, is void in so far as its claims are broadened to include other forms of construction of the extensible garment-hanging racks or slides than the one to which the original patent was expressly limited in the course of the proceedings in the Patent Office. Limited as it must be to the specific structure of the original patent, also *held* not infringed.

5. PATENTS (§ 178*)—INFRINGEMENT—PATENT FOR IMPROVEMENTS.

A patent for a device which is but a secondary improvement on existing devices and marks but a small step in the art is entitled only to a correspondingly narrow range of equivalents.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 254½; Dec. Dig. § 178.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. PATENTS (§ 328*)—INFRINGEMENT—ARTICLE SUPPORT FOR WARDROBES.

The Vanderveld patent, No. 825,362, for an extensible article support for wardrobes, as limited by the prior art, *held* not infringed.

Appeal from the District Court of the United States for the Western Division of the Northern District of Ohio; John E. Sater, Judge.

Suit in equity by the Grand Rapids Show Case Company against Barney R. Baker, Walter A. Eversman, Lizzie Eversman, and the Curtis-Leger Fixture Company. Decree for defendants, and complainant appeals. Affirmed.

Charles M. Wilson and Hugh E. Wilson, both of Grand Rapids, Mich. (Cyrus W. Rice, of Grand Rapids, Mich., of counsel), for appellant. Frederick Benjamin, of Chicago, Ill., for appellees.

Before WARRINGTON and KNAPPEN, Circuit Judges, and SANFORD, District Judge.

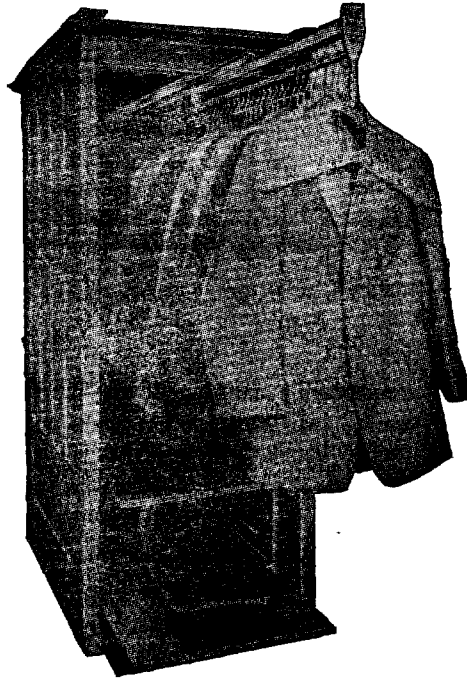
SANFORD, District Judge. This is a bill in equity brought by the appellant, the Grand Rapids Show Case Co., the plaintiff below, against Barney R. Baker and the other individual appellees, doing business as B. R. Baker & Co., for the alleged infringement of letters patent No. 11,907, on wardrobes, reissued to John E. Kennedy, May 7, 1901, and subsequently assigned to the plaintiff, and letters patent No. 825,362, on article-supports for wardrobes, issued to the plaintiff, as assignee of Anthony Vanderveld, July 10, 1906; the bill alleging that the inventions described in said two letters patent were adapted for, and capable of, conjoint use in one structure, and were both infringed by the structure used by the defendants. The appellee the Curtis-Leger Fixture Co., being the manufacturer of the structure used by the defendants, under letters patent No. 909,990, on extensible supporting devices, issued to Elmer A. Clark, January 19, 1909, was allowed to intervene and conduct the defense, and is hereinafter called the defendant. The defenses were anticipation and want of invention; invalidity of the Kennedy reissued patent; non-infringement; and multifariousness. After a hearing on pleadings and proof, the court below, being of opinion that the defendants' structure did not infringe either of the plaintiff's patents, dismissed the bill of complaint, with costs; from which decree the plaintiff has appealed to this court.

The devices in controversy, which are known as garment racks or slides, are extensible garment-hanging devices, used in connection with wardrobes in stores for the sale of ready-made garments. Each consists, in the commercial structures, of three horizontal members of equal length, arranged vertically, the upper member being fixed in position inside the wardrobe, and the two others, from the lower of which the garments are suspended, being progressively slidable or extensible, upon a telescoping principle. When retracted or closed, the entire rack, with the suspended garments, is inside of and protected by the wardrobe; when fully extended, the intermediate member projects about half its length beyond the upper fixed member, and the lower member about half its length beyond the intermediate member, thus ex-

tending the lower member entirely outside of the wardrobe and making the suspended garments readily accessible.

The following illustration shows a wardrobe, with the defendants' garment rack extended:

In the defendants' commercial device the upper fixed member of the garment rack consists of a hollow rectangular casing, with a slit in the bottom; the intermediate member, of two bars joined in the form of an I beam; and the lower member, to which a garment-hanger rod is attached, of a hollow rectangular casing similar to the upper member, but inverted, with the slit in the top. The web of the intermediate beam extends through the slits into the interior of each of the two rectangular casings, its flanges being within their cavities, and thus connecting them together. In its operation the upper flanges of the beam slide upon the lower flanges of the upper casing, and the upper flanges of the lower casing slide, in turn, upon the lower flanges of the beam; there being roller bearings or other anti-friction devices inside of each of the casings at suitable points of contact with the beam. The following illustration shows the interfitting arrangement of the casings and beam, both connecting them together and enabling them to slide the one upon the other:



Kennedy's Reissued Patent. The specification of Kennedy's reissued patent states that the object of his invention "is to design a form of wardrobe more particularly applicable for stores for ready-made garments, whereby storage-space may be economized, classification of size and price facilitated, and time saved in selling and handling the goods," and that "it consists, essentially, of a wardrobe, each section of which is provided with extensible supports or hanging devices, comprising each a plurality or set of members, preferably tubes or rods, the uppermost member of each set being mounted upon or carried by the frame of the wardrobe, and the lower member being suspended by suitable carriers from the said upper member."

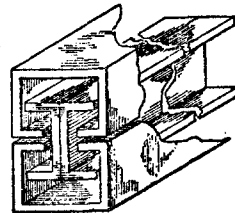
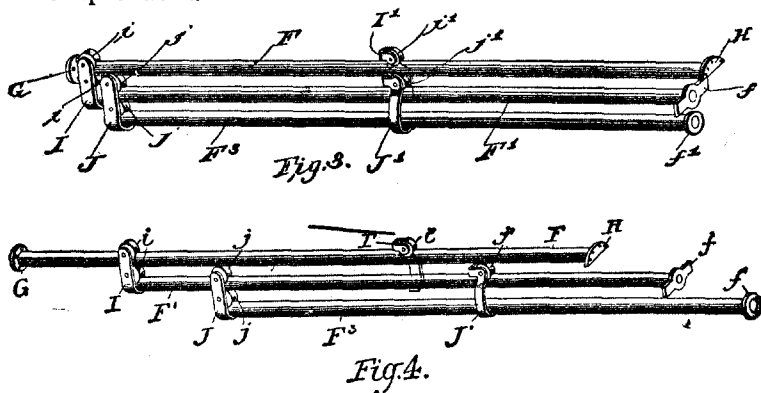


Figure 3 of the drawings, showing one of the extensible hanging devices retracted, and Figure 4, showing such device partly extended, are here reproduced.



The extensible hanging device is thus described in the specification:

"I have herein shown the extensible support or hanging device as comprising an elongated main supporting member *F*, preferably made as a tube or rod, and a plurality of longitudinally-movable auxiliary members supported by and below the main member, as *F*¹ *F*². The main member *F* is supported on the back *B* by the bracket *G* and on the top front board by the bracket *H*, said brackets being suitably attached to member *F*. The auxiliary member *F*¹, shown as situated next below the fixed member *F*, is suspended therefrom and sustained thereby by upturned carrier-brackets *I*¹, brazed or otherwise connected to the member *F*¹ at its inner end and intermediately of its length, respectively, as clearly illustrated in Figs. 3 and 4. The end bracket is provided with means to counteract the upward thrust of the adjacent end of its attached member, and herein the bracket *I* is shown as provided with grooved rollers *i*, journaled therein above and below the member *F* to engage therewith, the bracket *I*¹ having a single grooved roller *i*¹ resting on the member *F*. The third or undermost member *F*² of the set or series is similarly provided at its inner end and intermediately of its length with upturned carrier-brackets *J*¹*J*², respectively, suitably secured at their lower ends to the member *F*². Suitable rollers *j* are journaled in the bracket *J* to engage and run upon the top and bottom of the intermediate member *F*¹, while the bracket *J*¹ has a single grooved roller *j*¹ to travel upon the top of the member *F*¹, which latter is shown as provided at its outer end with a stop-collar and handle *f*, stop-collar *f*¹ being secured to the outer end of the member or rod *F*²."

The specification contains six claims, in one of which the horizontal members of the extensible hanger are described as three "tubes" or "rods"; in two, as a main supporting "member" and a plurality of auxiliary "members"; and in three, as a main supporting "rod or tube" and a plurality of auxiliary "rods or tubes." Claims 1, 2 and 3, which sufficiently illustrate these three classes, are as follows:

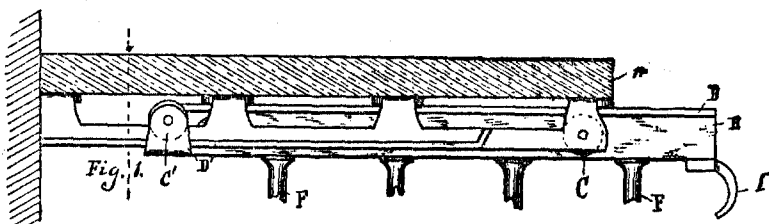
"1. The combination with the wardrobe, of a tube or rod having fixed supports in the frame of the wardrobe above the level of the door or opening, a second tube supported by the fixed tube and having the outer end free, and suspended at the inner end and intermediately of its length from the fixed tube by upturned brackets, so that said second tube may be slid out approximately half its length beyond the outer end of the fixed tube, and a third tube suspended from the second tube and having its outer end free, and supports at its inner end and intermediate of its length, co-operating with the

second tube, whereby the third tube may be slid out approximately its entire length beyond the outer end of the fixed tube and the front of the wardrobe. 2. In an apparatus of the class described, an elongated main supporting member fixedly sustained at its ends, a plurality of longitudinally-movable auxiliary members supported by and below the main member, each auxiliary member having attached to it at its inner end, and intermediately of its length, respectively, upturned brackets to engage and travel upon the member next above it, and means carried by each of said end brackets to counteract upward thrust of the adjacent end of its attached member, said auxiliary members being longitudinally movable relative to the main member and to each other. 3. In an apparatus of the class described, a main supporting-rod or tube fixedly sustained at its ends, a plurality of longitudinally-movable auxiliary rods or tubes supported by and below the main rod, each auxiliary rod or tube having attached thereto upturned brackets at its inner end and intermediately of its length, respectively, to engage and travel upon the rod or tube next above it, and means carried by each of said end brackets to counteract upward thrust of the adjacent end of its attached rod and to transmit such thrust to the rod next above it, said auxiliary rods or tubes being longitudinally movable relative to the main rod or tube and to each other."

The plaintiff contends, in effect, that Kennedy was a pioneer in the invention of such extensible garment racks in combination with a wardrobe; that the claims of his reissued patent are to be broadly construed, and cover, with their equivalents, all forms of such extensible racks consisting of a main supporting member fixed in the frame of the wardrobe, with two or more auxiliary members, supported therefrom and from each other, and connected in such manner that the lower member may be extended approximately its entire length beyond the outer end of the fixed supporting member and the front of the wardrobe; and that it is hence infringed by the defendants' device. The defendants insist, upon the other hand, that this reissued patent is entirely invalid because unauthorized by the statutory provisions in reference to the reissue of patents; that, independently of this, Kennedy's invention was not of a pioneer character or entitled to a broad range of equivalents; that, further, by reason of the proceedings had in the patent office under his application for his original patent he is limited, whatever may have been the original scope of his invention, to the specific structure disclosed in the original application, in which the horizontal members of the extensible rack consisted of three cylindrical rods or tubes, extending wholly outside of each other, and connected by exterior carrier-brackets, provided with rollers coming in contact with the outer surface of the rods or tubes and serving as a means both of connection and of extension; and, hence, that this reissued patent is not infringed by the defendants' device, in which the horizontal members consist of two hollow casings and a beam projecting inside of the two casings, forming thereby a self-connected structure in which the lower members slide directly upon the upper members, by contact within the interior of the two casings, without the intervention of any exterior carrier-brackets or other connections or contact with any exterior rollers.

Kennedy's application for his original patent was filed June 23, 1898. The principle of the extension, on a telescopic or sliding principle, of the different parallel members of extensible mechanical appliances, with suitable connections and anti-friction bearings, was then old in the arts. This had been shown in the Mahoney patent No. 159,521, on

extension ladders, whose several sections were connected and extended by means of clamps and grooves; in the O'Sullivan patent No. 302,278, on fire-escapes, whose several cylindrical masts were connected and extended by means of guides or collars; in the Newman patent No. 459,613, on fire-escapes, whose several sections were connected and extended by means of hook-shaped slides; and in the Hobbs patent, No. 509,901, on dental engine-brackets, whose several rods were connected and extended by means of plates arranged with bearing surfaces. Obviously, however, none of these devices were closely analogous to the extensible hanging devices now in question or used in the same or related arts. The Holzhalb patent, No. 356,125, issued January 18, 1887, on clothes-racks for wardrobes, being an attachment to wardrobe-shelves, whereby any garment might readily be reached without disturbing the others, had, however, disclosed a sliding rack or carrier provided for the attachment of garment-holders or hooks, whose flanges slid upon wheels suspended by angle-pieces from a metal piece screwed underneath the wardrobe shelf, and which, with the suspended garments, could be drawn almost entirely outside of the wardrobe. Figure 1 of its drawings, showing a vertical transverse section of this device, is heré reproduced:



Kennedy's original specification stated that his invention (in so far as related to the extensible hangers), consisted,

"essentially, of a wardrobe, each section of which is provided with extension tubes or rods, the uppermost of each set being carried by the frame and the lower being suspended by suitable carriers from the upper tube."

Figure 1 of the drawings was a sectional perspective view of a portion of a wardrobe case, showing "the extensible rods" in position in the wardrobe and the door closed; Figure 2, a similar view showing the door of the wardrobe open and "the extensible rods" drawn forth; Figure 3, a sectional plan showing the dividing uprights between two compartments of the wardrobe; and Figure 5, a view of the handle and catch of the wardrobe door.

Figure 4, which was an enlarged view of "the extensible rods," was substantially identical with Figure 3 of the reissued patent, reproduced hereinabove.

This original specification repeatedly described the horizontal members of the extensible hangers as "tubes," but also occasionally used the words "rods" and "tubular members;" neither the broad and unrestricted term "members," nor any equivalent, being, however, used. All of the figures in the drawings showed a cylindrical form of all of the horizontal members, and their connection, one with the other, by means

of exterior carrier brackets, containing rollers upon which they moved when extended; such brackets, with the rollers and stops, being specifically described. However, the original specification contained the following language, immediately preceding the first claim:

"Again, although I describe my garment-support as being tubular in form, it will be, of course, understood that I consider any suitable form of bar or rod in lieu thereof as equivalents."

The original application contained ten claims, the first six of which related to the extensible hangers, the last four, in whole or in part, to a sliding door and lock for the wardrobe. Claim 1, which sufficiently illustrates the first six claims, was as follows:

"1. In a wardrobe, a garment support comprising the main bar having a suitable support at each end, and the supplemental bars, and carrier-brackets connecting the supplemental bars to each other and supporting them upon the main tubular bar, whereby the supplemental bars may be extended lengthwise from underneath the main bar as and for the purpose specified."

In all the other claims, however, the horizontal members of the extensible hangers were described as "tubes," "tubular bars" or "extensible tubes."

The Examiner held that these ten claims covered three independent inventions, and called for a division and limitation of the claims to cover a single invention. Thereupon Kennedy canceled claims 7, 8, 9 and 10. The Examiner then directed that the word "tubular" should be inserted in the first line of claim 1 before the word "bar." He, at the same time, rejected claims 1, 2 and 3, upon reference to the Holzhalb patent, No. 356,125, for wardrobe clothes-rack, above mentioned; and also rejected claims 4, 5 and 6; as covering merely an aggregation of the applicant's particular clothes-hanger and wardrobe.

Kennedy thereupon canceled all of these six rejected claims, and inserted four new claims. Of these, claim 1 was for "the combination, with a wardrobe, of a garment support comprising a member supported horizontally in the upper part thereof, (and) a second member supported by and beneath the first member, and adapted to slide longitudinally in relation thereto;" claim 2, for a similar combination in which the second "member" of the garment support was described as "a corresponding member slidably supported from the first member, with means for supporting the sliding member in a position entirely outside of the wardrobe;" claim 3, for the combination, with a wardrobe, of a fixed "tube" supported horizontally in the upper part thereof, a second "slidable" tube depending therefrom, and a third "tube" depending from the second and extensible beyond the end of the fixed tube; and claim 4, for the combination with a wardrobe of three like "tubes," with brackets and rollers.

The Examiner rejected all four of these claims: claim 1, upon reference to the Holzhalb patent; and claims 2, 3 and 4 upon reference to the Holzhalb patent and the Hobbs patent, No. 509,901, on dental brackets, above mentioned, as involving no invention in multiplying the number of slidable arms used by Holzhalb, especially in view of the Hobbs patent. Kennedy thereupon canceled claims 1 and 2, containing the broad term "member," amended claims 3 and 4 by inserting certain

details, asked a reconsideration for claim 4, and submitted an argument seeking to differentiate his device from the Holzhalt and Hobbs patents.

The Examiner again rejected claims 3 and 4, upon the references and for the reasons of record against them. Kennedy thereupon canceled these claims and inserted two new claims, as follows:

"1. The combination, with the wardrobe, of a tube or rod having fixed supports for the same in the frame of the wardrobe above the level of the door or opening, a second tube depending from the fixed tube and having the outer end free, and supported at the inner end and intermediately of its length by depending brackets from the fixed tube, so that it may be slid out approximately half its length beyond the outer end of the fixed tube, and a third tube depending from the second tube and having its outer end free and supports at its inner end and intermediate of its length connected to the second tube whereby it may be slid out approximately half its length and substantially beyond the end of the fixed tube and front of the wardrobe as specified. 2. The combination, with the wardrobe, of a tube or rod having fixed supports for the same in the frame of the wardrobe above the level of the door or opening, a second tube having a bracket and rollers at the inner end by which it is supported from the fixed tube, and the outer free end provided with the laterally extending stop, a third tube having a bracket secured to the inner end and rollers journaled in the same by which it is supported at the inner end outside the bracket on the second tube and a stop at the outer free end, the intermediate bracket secured to the lowermost tube and having an upward extension and roller supported on the second tube and a further upward extension supported on the fixed tube whereby the tubes are supported in their closed position and supported, braced and held together in their drawn position as specified."

The Examiner then allowed these two claims, and directed that, as the "applicant has elected the invention disclosed in Figures 1 and 4 of the drawing," Figures 2, 3 and 5 and all descriptive matter relating thereto in the specification should be canceled (this direction as to Figure 2, which was the same as Figure 1, except that it showed the wardrobe door open and the hanger extended, being obviously a mere inadvertence). Kennedy thereupon canceled Figures 3 and 5, showing the dividing uprights, handle and catch, and their description, and changed Figure 4, showing "the extensible rods," to Figure 3. He also, although not directed so to do, canceled the three paragraphs of the specification immediately preceding the first claim, the last of which, hereinabove quoted, had contained the statement that while he had described his garment support as being "tubular in form," he considered "any suitable form of bar or rod in lieu thereof as equivalents." In the specification as finally amended, the extensible hanging device, with the tubes or rods, carrier-brackets, rollers and stops of which it was composed, were thus described:

"*F* is the top tube, which is supported on the back *B* by the bracket *G*, the end of which extends into the tube, and on the top front board by the bracket *H*, which extends into the tube. *F*¹ is the tube situated next below the tube *F*, and supported thereon by the carrier-brackets *I* and *I*¹, which are suitably braced or otherwise connected to the lower tube *F*¹. The bracket *I* is preferably provided with grooved rollers *i*, journaled therein at the top and bottom of the tube *F*. The bracket *I*¹ is provided with a single grooved roller *i*¹, resting on the tube *F*. *F*² is the undermost tube, which is provided with carrier-brackets *JJ*¹, suitably secured at the bottom to the tube *F*². The bracket *J* has journaled in it at the top suitable rollers *j*, which are designed to run

on the tube F^1 . The bracket J^1 has suitably journaled in it at the top the grooved roller j^1 , which is designed to run upon the tube F^1 . The end of the tube F^1 is provided with a stop-collar and handle f , and the end of the tube F^2 has secured to it a stop collar f^1 . It will be noticed on reference to Figure 3 that when the tubes are extended the bracket I^1 and roller thereon are stopped by the bracket I and the bracket J^1 and roller are stopped by the stop-collar f , so that when the tubes are extended out to their fullest extent the tube F^2 is practically entirely outside the compartment of the wardrobe altogether. Such tube F^2 is designed to receive and hold suitable garment-supporters, from which a number of garments may be hung."

The patent was then allowed; and was issued to Kennedy August 20, 1899, being No. 631,525.

On May 31, 1900, Kennedy filed an application for a reissue of this patent, with an amended specification and claim, upon the ground that the original patent was "inoperative, for the reason that the specification (was) defective, incorrect and ambiguous," particularly in that claim 1 was "ambiguous, uncertain and open to various meanings" and claim 2 was "inoperative, incomplete and inaccurate" in various respects set forth in detail in the application, relating entirely to the meaning of the words used in the claims as affecting the mechanical details of the structure; which "erroneous, improper, ambiguous and misleading errors" rendering the patent "inoperative" had arisen through accident and mistake, without any fraudulent or deceptive intention, and by reason of the applicant's unfamiliarity with patent matters and the errors of his attorneys. This reissue was refused by the Examiner for the reason that the statements in the claims referred to in the application did not render the patent inoperative for the reasons assigned, but were "clear from any ambiguity or uncertainty when read in connection with the specification and drawings." Kennedy then requested a reconsideration of his application, "particularly as to the second claim of the patent," conceding, "for the sake of argument," that the first claim was not inoperative; and asked that if the reissue should be granted as to the second claim it should also be allowed as to the first claim, which had been "more clearly and definitely drawn," and that four additional claims submitted with his application might at the same time be allowed. On reconsideration the Examiner directed the addition of a figure similar to Figure 3 of the drawings, "but showing the rods partly extended;" and allowed all the claims. Kennedy thereupon amended his application so as to incorporate Figure 4, reproduced hereinabove, showing the extensible devices partly extended. The application for the reissue was then allowed; the original patent surrendered; and patent No. 11,907 reissued to him, May 7, 1901.

The description contained in the reissued patent is greatly broadened from that of the original. In the specification of the original patent the extensible hanger is described as consisting of a set of "extension rods or tubes;" in that of the reissued patent, as comprising "a plurality or set of members, preferably tubes or rods." In the specification of the original patent the words "tube" or "rod," in the singular or plural, are invariably used in referring to the horizontal members of the extensible hanger; in that of the reissued patent, these words, or their equivalent, are used only eight times, while the broad term "mem-

ber," unrestricted as to form, is used, in either the singular or the plural, twenty-eight times. And while each of the two claims of the original patent refers only to three "tubes" or "rods," two of the six claims to which they are expanded in the reissued patent, refer broadly to a fixed supporting member and a plurality of movable auxiliary members.

It is clear, in the first place, that Kennedy, by his attorneys, in the proceedings in the patent office under his application for the original patent, in the effort to meet the rulings of the Examiner and to avoid the supposed effect of the prior patents of Holzhalb and Hobbs, deliberately abandoned in his specifications, both in the description and the claims, the use of any broader words than "tube" or "rod," canceling all claims which contained the broad term "member," and limited his claims to an extensible hanging device consisting of "rods" or "tubes," that is, members with a cylindrical outer surface, connected by and sliding upon exterior carrier-brackets, with rollers and stops, as specifically described in his final description and drawings. This deliberate limitation of his claims is emphasized by the fact that, although not so required by the Examiner, he canceled in his final description the statement that he considered any "suitable form of bar or rod" as the equivalent of the "tubular" form of his garment support. The scope of the original patent was, therefore, clearly limited to the specific invention covered by its claims. *Keystone Co. v. Phoenix Co.*, 95 U. S. 274, 276, 278, 24 L. Ed. 344; *Railroad Co. v. Mellon*, 104 U. S. 112, 118, 26 L. Ed. 639; *Corbin Co. v. Eagle Co.*, 150 U. S. 38, 40, 14 Sup. Ct. 28, 37 L. Ed. 989; *Brown v. Stilwell Co.* (6th Circ.) 57 Fed. 732, 737, 6 C. C. A. 528; and cases cited.

Having thus deliberately limited the claims of his original patent to the specific form of extensible hanging device, disclosed in the final description and drawings, he was not, in our opinion, entitled to thereafter obtain a reissue of the patent, broadening and enlarging his claims so as to include other forms of the extensible hanging device.

Section 4916 of the Revised Statutes (U. S. Comp. St. 1901, p. 3393), authorizing the reissue of a patent, provides that:

"Whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, * * * if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the Commissioner shall, on the surrender of such patent * * * cause a new patent for the same invention, and in accordance with the corrected specification, to be issued * * * for the unexpired part of the term of the original patent. * * * Every patent so reissued * * * shall have the same effect and operation * * * as if the same had been originally filed in such corrected form; but no new matter shall be introduced into the specification. * * *"

[1-3] Under the liberal construction given to this statute and the earlier statutes from which it is derived,¹ it is well settled that if, by

¹ The earlier statutes relating to the reissue of patents are: Act of July 3, 1832, c. 162, § 3, 4 St. 559; Act of July 4, 1836, c. 357, § 13, 5 St. 117, 122; Act of Mar. 3, 1837, c. 45, § 5, 5 St. 191, 192; Act of July 8, 1870, c. 230, § 53, 16 St. 198, 205; Act of Mar. 3, 1871, c. 132, 16 St. 583. These several statutes are cited and the essential differences in their provisions pointed out in *Walker on Patents* (4th Ed.) § 211, p. 200, et seq. They are also reviewed in *Parker Co. v. Yale Co.*, 123 U. S. 87, 8 Sup. Ct. 38, 31 L. Ed. 100.

reason of inadvertence, accident or mistake, a patentee fails to claim any part or all of the actual invention disclosed in his specification and drawings, and intended or sought to be covered, the patent is to be deemed to such extent "inoperative," and may be lawfully reissued so as to cover the entire invention in its claims. *Keystone Co. v. Phoenix Co.*, 95 U. S. 278, 24 L. Ed. 344; *Topliff v. Topliff*, 145 U. S. 156, 170, 12 Sup. Ct. 825, 36 L. Ed. 658; *Corbin Co. v. Eagle Co.*, 150 U. S. 42, 14 Sup. Ct. 28, 37 L. Ed. 989; *Hobbs v. Beach*, 180 U. S. 383, 394, 21 Sup. Ct. 409, 45 L. Ed. 586. However, a reissue

"cannot be permitted to enlarge the claims of the original patent by including matter once intentionally omitted. Acquiescence in the rejection of a claim, its withdrawal by amendment, either to save the application or to escape an interference; the acceptance of a patent containing limitations imposed by the Patent Office, which narrow the scope of the invention as at first described and claimed, are instances of such omission." *Dobson v. Lees*, 137 U. S. 258, 265, 11 Sup. Ct. 71, 34 L. Ed. 652, and cases cited.

And see *Corbin Co. v. Eagle Co.*, 150 U. S. 43, 14 Sup. Ct. 28, 37 L. Ed. 989; *Campbell v. American Co.* (6th Circ.) 179 Fed. 498, 502, 103 C. C. A. 122; *XXth Century Co. v. Taplin* (6th Circ.) 181 Fed. 96, 101, 104 C. C. A. 156. Nor can the deliberate acts of the applicant's attorney in protracted proceedings in the Patent Office leading to the issue of the patent, be treated as the result of inadvertence, accident or mistake. *Dobson v. Lees*, 137 U. S. 265, 11 Sup. Ct. 71, 34 L. Ed. 652. And in such cases, in determining the validity of the claims of a reissued patent, the court will review the decision of the Patent Office upon the question of inadvertence, accident or mistake, where the matter is manifest from the record. *Leggett v. Avery*, 101 U. S. 256, 259, 25 L. Ed. 865; *Topliff v. Topliff* (U. S.) 145 U. S. 171, 12 Sup. Ct. 825, 36 L. Ed. 658; *Hobbs v. Beach*, 180 U. S. 395, 21 Sup. Ct. 409, 45 L. Ed. 586. Furthermore, regardless of the question as to whether the entire reissued patent is rendered void by the insertion of a new and unauthorized claim, as suggested obiter in *Leggett v. Avery*, 101 U. S. 259, 25 L. Ed. 865, it is clear that such claim of the reissued patent is itself void and will not sustain a bill for infringement. *Leggett v. Avery*, 101 U. S. 259, 25 L. Ed. 865; *Corbin Co. v. Eagle Co.*, 150 U. S. 43, 14 Sup. Ct. 28, 37 L. Ed. 989.

[4] Applying these well settled rules to the instant case, we are of the opinion that, since Kennedy, in the proceedings in the Patent Office, by his attorneys, in order to meet the rulings of the Examiner, deliberately canceled his claims relating to a garment support having "members" slidably supported by and beneath each other, limited his claims to the specific structure disclosed in his final description and drawings, in which the extensible hanging device consisted of rods or tubes, connected by and sliding upon exterior carrier-brackets, with rollers and stops, as described, and voluntarily canceled the statement in his description as to other forms of bars or rods as the equivalent of his tubular form, such deliberate limitation of his claims cannot be held to have been due to either inadvertence, accident or mistake; and, hence, that, under the reissue statute and the authorities above cited, there was no warrant for enlarging and broadening the claims of the reissued patent beyond the claims to which the original patent had been

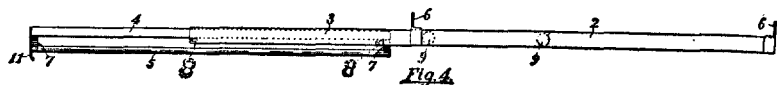
deliberately limited. Furthermore, the application for the reissued patent was not based upon the ground that the original patent was inoperative by reason of the narrowness of its claims, but solely upon alleged ambiguities and uncertainties in the wording of the claims rendering them, in effect, mechanically inoperative. Therefore, under the application itself, there was no warrant for amending the claims of the original patent except in so far as verbal corrections were necessary to make them mechanically operative. And we entirely concur in the opinion of the patent Examiner that there was no such ambiguity in fact in the original claims, when properly construed. For these reasons we therefore conclude that, in so far as the claims of the reissued patent do more than to correct verbal ambiguities in the claims of the original patent, so as to make these claims clear, unambiguous and mechanically operative, they were granted without warrant or authority of law and are to such extent void; and that, even if the reissued patent be not entirely void, a question we do not decide, its claims must be limited in their effect to a mechanically operative extensible hanging device, consisting of extensible rods or tubes connected by and sliding upon exterior carrier-brackets, with rollers and stops of specified construction and uses, substantially as described in the claims of the original patent. And we entirely concur in the opinion of the court below that when the claims of the reissued patent are thus limited in their validity, since the defendant's device neither uses the extensible tubes or rods of Kennedy's original claims nor the exterior carrier-brackets with rollers and stops therein specified, but consists of a structure in which the horizontal members of the extensible device are neither tubes or rods, but two hollow casings and a beam projecting inside of the casings, forming a self-connected structure in which the lower members slide upon the upper by contact with the interior of the upper members, without the intervention of any connecting carrier-brackets or exterior rollers, there is no infringement by the defendants' device of the claims of the Kennedy reissued patent, to the extent, if any, to which they may be valid. We may add that the changes in the first claim effected by the reissued patent do not impress us as important.

It is therefore unnecessary to determine whether, independently of the limited validity of the claims of the reissued patent, as above stated, Kennedy's invention was, in any event, in view of the prior state of the art, especially as disclosed in the Holzhalt patent on an extensible wardrobe garment hanger, of such a pioneer character and entitled to such a broad range of equivalents as to be infringed by the defendants' device.

Vanderveld Patent. The application for the Vanderveld patent was filed July 24, 1905; and it was issued July 10, 1906. The specification described his invention as relating to article-supports for wardrobes adapted to be drawn wholly outside of the case, and as consisting

"essentially, in combination and arrangement of stationary ways supported within the case, movable ways mounted therein and adapted to project partially outside the case, and a support movably supported in the movable ways and adapted to be moved wholly outside the case."

Figure 4 of the drawings, showing a side elevation of his device as it appeared when extended, is here reproduced:



As described and shown in the specifications and drawings, the upper fixed member of the extensible device consists of two connected channel bars spaced apart, with their channeled sides towards each other; the intermediate member, of two smaller connected angle-bars spaced apart, entirely inside the inclosure of the upper member and sliding by means of side rollers upon its lower flanges; and the lower member of a narrow bar, with a garment-hanger rod attached, entirely inside the enclosure of the intermediate member and sliding by means of rollers upon its lower flanges, the suspended garment-hanger projecting below the enclosures of the upper and intermediate members through the slits in the bottom of each formed by the spacing apart of the channel and angle-bars. The patent contains five claims. Claim 1, which is the broadest and sufficiently illustrates these claims, is as follows:

"1. In combination with a case, channel-bars spaced apart and fixed in the case, angle-bars spaced apart and connected and also movably supported between the channel-bars, a bar movably supported between the angle-bars, and an article-support extending downward from the bar and between the angle-bars."

It is earnestly contended in plaintiff's behalf that the two connected channel-bars constituting the upper fixed member of Vanderveld's structure are the equivalent of the hollow casing constituting the upper fixed member of the defendants' device; that the two connected angle-bars constituting the intermediate member of Vanderveld's structure are the equivalent of the hollow casing constituting the lower member of the defendants' device; that the rod constituting the lower member of Vanderveld's structure is the equivalent of the I beam constituting the intermediate member of the defendants' device; that the several members in the defendants' device operate in substantially the same manner as in the Vanderveld structure, except that they are assembled in a different order, with an immaterial reversal of position; and that, under the range of equivalents to which the Vanderveld patent is entitled, it should be held to be infringed by the defendants' device.

This question must, however, be determined in the light of the evidence in the record as to the prior unpatented device, known as the Revell rack. This rack consists of three members, the upper fixed member composed of two connecting channel-bars, spaced apart; the intermediate member, of two smaller connected channel-bars extending within the enclosure of the upper member and sliding by means of side rollers upon the lower flanges of the upper member; and the lower member, of a bar, with a garment-rod attached, extending within the enclosure of the intermediate member and sliding by means of side rollers on its lower flanges.

The model for this rack was first made by A. H. Revell & Co., of Chicago, about 1897; one or two racks were at that time made for May & Co., of Cleveland, Ohio, and installed in their store as an experiment. About twelve other racks were made by Revell & Co. for sale at about the same time; and one was installed in a sample cloak case in their store, where it remained for about two years. Since 1900 these racks have been continuously for sale by Revell & Co., and one or more have been kept made up, which were used as samples to show prospective customers, though their sale was not pushed because of their expensiveness. In 1902 they sold and shipped some of these racks to the Halle Bros. Co., of Cleveland, Ohio; and in 1904 they sold and shipped twenty racks to Koch Bros., of Allentown, Pa., six of which were afterwards returned.

Vanderveld was obviously not a pioneer in the invention of extensible garment-hanging devices for use in connection with wardrobes. The Holzhalb patent, in 1887, showed such a device consisting of two members, the lower of which could be almost entirely extended outside of the wardrobe, while the Kennedy patent, in 1889, disclosed a device consisting of the three members not forming a self-connected and self-sustaining structure, but connected by and sliding upon exterior carrier-brackets and rollers. The Revell rack, however, which had been in actual commercial use for several years before Vanderveld's application was filed, consisted of a structure almost identical in all essential respects with the Vanderveld structure, embodying in a practical form the principle of an extensible hanging device in which the horizontal members consisted, in effect, of two hollow casings, one of which extended inside of the other, and of a rod extending inside of the lower casing, forming thereby a self-connected and self-sustaining structure in which the lower members slide directly upon the upper members by roller contact within their interior, without the intervention of any exterior carrier-brackets or other connections or contact with any exterior rollers.

[5, 6] In this state of the art and in view especially of the Kennedy patent and the prior use of the Revell rack, we are of opinion that Vanderveld's invention did not extend broadly to a self-connected and self-sustaining extensible device in which the lower members slide inside of the upper members, without exterior connections or rollers, but that his claims, if valid at all, by reason of novelty, must be limited substantially to the specific structure therein disclosed, with the respective functions of the several members of the extensible device, or their equivalents, as shown in the specification and drawings; that is to say, to a device in which the fixed upper member consisted of the two channel-bars, spaced apart, the intermediate member of two angle-bars, spaced apart, and the lower member of a bar, and in which the lower members slide upon the upper members by means of rollers within the interior of the upper members, as specifically described. And since Vanderveld's invention was not of a broad and primary character, involving entirely new mechanical functions, but was a secondary improvement marking only a small step in the art and with comparatively small meritoriousness in the improvement over the Revell

rack, its range of equivalents is correspondingly narrow and the doctrine of equivalents should be less liberally applied in his favor. *Miller v. Eagle Co.*, 151 U. S. 86, 14 Sup. Ct. 310, 38 L. Ed. 121; *Jackson Co. v. D'Arcy* (6th Circ.) 181 Fed. 340, 344, 104 C. C. A. 170. There are clearly, however, essential differences between Vanderveld's structure and the defendants' device, even if, as the plaintiff insists, the hollow casings in the defendants' device are to be treated as the equivalents of the channel-bars and angle-bars of the Vanderveld structure. In the Vanderveld structure the lower casing slides entirely within the upper casing and is self-connected therewith, and the lower member is entirely inside of both of the casings, sliding upon the flanges of the lower casing, and serving no function as a connection between the casings. In the defendants' device, however, the lower casing is entirely outside of the upper casing, and the two casings are connected by the intermediate member, consisting of an I beam whose flanges extend within the interior of both the upper and lower casings and serve as a means of connection. Applying the rule of narrow equivalents to which the Vanderveld claims must be limited, we are clearly of the opinion that, in view of the prior state of the art, especially as disclosed in the Revell rack, the defendants' device is not a mere colorable departure from the Vanderveld structure coming within the range of permissible equivalents, but involves a substantial departure from the specific structure disclosed in the Vanderveld patent to which alone his claims are valid, if at all, and hence does not constitute an infringement. *Jackson Co. v. D'Arcy* (6th Circ.) 181 Fed. 345, 104 C. C. A. 170, and cases cited.

Without considering the other questions presented by the assignments of error and argument, it results that, in our opinion, for the reasons above stated, there was no error in the decree of the court below dismissing the plaintiff's bill for want of infringement of either of the patents in suit. The same will accordingly be affirmed, with costs.

GILMORE et al. v. VAUGHN.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1914. Rehearing Denied June 4, 1914.)

No. 2042.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—BOTTLE OPENER.

The Vaughn patent, No. 1,029,645, for a bottle opener, shows a patentable improvement over the device of patent No. 943,759 to the same patentee and is valid; also, *held* infringed.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Arthur L. Sanborn, Judge.

Suit in equity by Harry Lockwood Vaughn against Leslie A. Gilmore and others. Decree for complainant, and defendants appeal. Affirmed. For opinion below, see 204 Fed. 464.

Leslie A. Gilmore, of Chicago, Ill., for appellants.

James R. Offield, of Chicago, Ill., for appellee.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

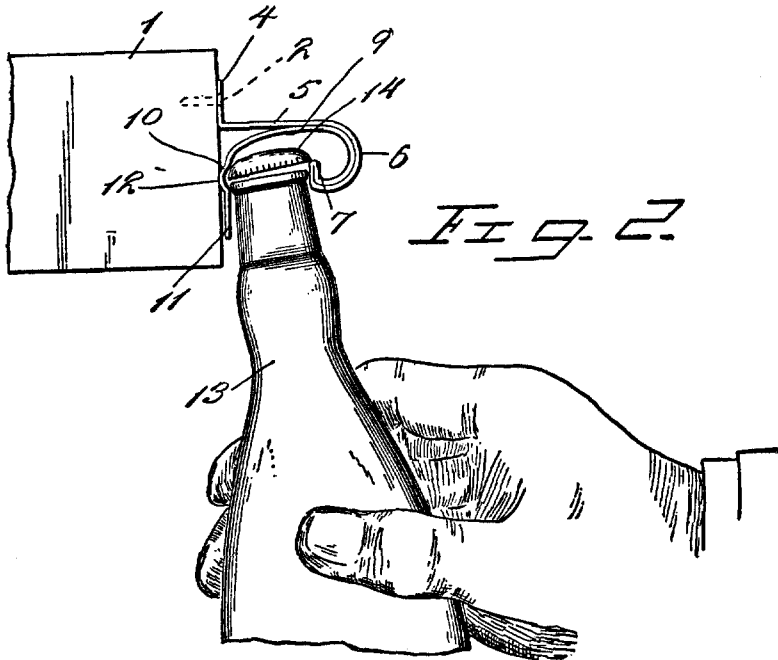
KOHLSAAT, Circuit Judge. This cause is here on appeal from the decree of the District Court adjudging patent No. 1,029,645, granted to appellee on June 18, 1912, for a bottle opener, to be valid and infringed. The one claim sued upon, viz., claim 3, reads as follows:

"A bottle opener consisting of a fixed base having a right angular extension, said extension having a semicylindrical end adapted to engage the cap of a bottle and a resilient brace therefor."

The device has for its object the removal of the crimped metal caps used for sealing bottles, and is claimed by the specification to be an improvement over the opener of patentee's prior invention, No. 943,759, granted December 21, 1909. It is made stationary by fastening to some convenient fixed support by means of screws or nails. In operation, the bottle to be opened is brought in such relation with the device that the inwardly curved lip or hook thereof engages the cap on the bottle and pries it off when the bottle is pressed toward the support. "When the bottle is being opened," says appellee's expert, speaking of the claim in suit, "there is something of a downward pull on the pry edge or lip, affording a slight yield at that point. There is also simultaneously present a slight yield at the fulcrum point of the cap upon the lower edge or groove of the depending brace, so that there is a yielding or resilient effect at both sides of the bottle cap acting in opposite directions, the result of which is that the action of the device upon the neck of the bottle is gentler than where both or either of the points of contact might be absolutely rigid."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Following is a reproduction of figure 2 of the drawings of the patent in suit:



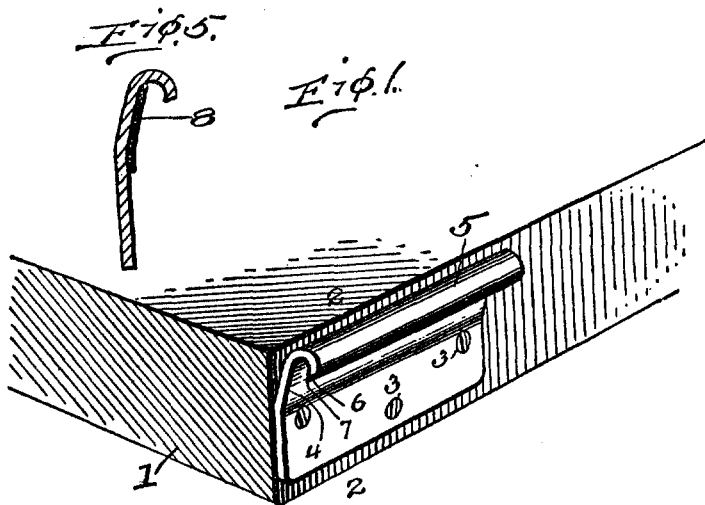
In the specification, 1 indicates a base to which the device is secured, 2 and 3 represent the screws or nails whereby it is secured; 4 indicates a supporting base, 5 a right-angular projection therefrom, 6 the semicylindrical formed edge of part 5, and 7 the free edge of part 6 bent up at right angles to form a cap engaging member. The device is made preferably of sheet metal having some resiliency, doubled upon itself at part 7 to form a 2-ply cap engaging hook the inner leaf of which is designated by 9. At a subcentral position the inner plate of the doubled metal diverges from the part 5 until its end 11 is in a plane parallel to the base 1, serving as an unanchored brace for the other parts of the device. The groove 10 is not covered by the claim in suit. The drawing shows the operation of the crown removing device.

Appellee's commercial device differs from that of his patent, in that it has no free edge of part 6 bent up at right angles to form a cap engaging member corresponding to said part 7 of the drawing, but has a free edge terminating below the part 6, which is slightly curved inwardly. It will be noticed that claim 3 alone of all the claims, fails in terms to call for said part 7 bent up at right angles to form a cap engaging member. Appellants claim that they are licensed to manufacture the same. They also deny patentability.

Appellee is also the owner of an undivided half of said above-mentioned patent No. 943,759. The record discloses that after filing application for this earlier patent, and on December 11, 1909, appellee

assigned a half interest therein to one Edward Court; that afterwards, on February 21, 1910, said Edward Court and appellee entered into an agreement with appellant Gilmore whereby the latter was given the exclusive right to manufacture and sell the patent and any "improvements upon said invention by said inventor hereafter made." The device actually manufactured under this agreement and under a subsequent copartnership agreement between appellee and said Gilmore is appellants' present manufacture; it had been previously designed and manufactured by appellee, the precise structure of his patent No. 943,759 having never been placed upon the market. It further appears that on July 18, 1910, in consideration of \$1,875, all right and title to said patent acquired under the agreement of February 21, 1910, or under the copartnership agreement, by Gilmore, were reconveyed by him to appellee. Subsequently, in September, 1910, appellants by assignments from Edward Court acquired whatever right the latter had in said patent, being a one-half interest. Appellants thereupon proceeded to manufacture and sell the device alleged to be an infringement.

It is evident from the foregoing that whatever rights appellant Gilmore may have acquired by virtue of his license of February 21, 1910, in the improvements of the patent, were relinquished by his subsequent reconveyance to appellee on July 18, 1910. So that the only question remaining is whether there were such improvements as patentably distinguish appellee's two patents. Figures 1 and 5 of the drawings of his earlier patent, No. 943,759, are here shown:



In the specification 1 indicates a support for the cap remover, which is formed preferably out of a single piece of sheet metal; 2 represents a base or body portion; 4 indicates an inclined or bent portion which extends at a slight angle from part 2 and is bent over to form a semicylindrical member 5, the edge of which is beveled as desired at 6 for forming an edge 7, extending the full length of the

opener. In figure 5 is shown a cushioning member 8 which may, the specification says, be made from any desired material that will protect the bottle.

This device, it will be noted by a comparison of the drawings of the two patents, lacks the apron or extension designated by the figure 11 in the drawing of the patent in suit. This extension 11 is termed in the claim sued upon a "resilient brace," and is the element which it is claimed evidences the patentability of the device in suit over the earlier patent. The functions of the brace, i. e., to lend flexibility and support to the device and thus prevent chipping or cracking of the bottle when being opened and undue yielding of the device, seem to be essential to the utility and most effective operation of the patent. There is nothing in the prior patent corresponding to this brace. It coacts with its adjacent member, i. e., the pry edge, in such a way that in operation each reinforces the other, thus obviating the necessity for the heavy and rigid material of the earlier patent and at the same time increasing its efficiency and affording that flexibility required to produce the desired improved result, in an improved manner.

There is evidence that the patent has gone into quite extensive use. There is nothing in the prior art which responds to the claim sued upon, unless it be the device of said drawing figure 5, which we do not deem its equivalent. Appellants have recognized its superiority over the prior patent, and its utility is unquestioned—all of which, together with the other characteristics above mentioned, attest its patentable merit. The patent is therefore held to be valid and infringed.

The decree of the District Court is affirmed.

FRANK F. SMITH METAL WINDOW HARDWARE CO. v. YATES.

(Circuit Court of Appeals, Second Circuit. June 5, 1914.)

No. 278.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—TRANSOM ADJUSTING DEVICE.

The Smith patent, No. 970,656, for a transom adjusting device, which is an automatic stop for pivoted metal windows, construed, and while not to be broadly interpreted, *held* infringed by a device in which the parts on the sash and casing, respectively, were merely reversed.

Appeal from the District Court of the United States for the Southern District of New York.

Appeal from an interlocutory decree of the District Court, Southern District of New York (216 Fed. 361) which held valid and infringed claims 2, 3, and 4 of patent No. 970,656, granted to Frank F. Smith September 20, 1910, for a "transom adjusting device."

J. H. Griffin, of New York City, for appellant.

S. J. Cox, of New York City, for appellee.

Before COXE and ROGERS, Circuit Judges, and MAYER, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1937 to date, & Rep'r Indexes

MAYER, District Judge. The validity of the patent is conceded. The sole controversy now is as to infringement.

The invention of the patent is for an automatic stop for pivoted metal windows, such as have lately gone into very general use in office buildings and factories, which, instead of sliding up and down, are pivoted near the middle so as to swing around like an ordinary transom. The invention is applicable to transoms as well as pivoted windows. These windows may be reversed so that the outside may be cleaned from within the building and opened for ventilation to any desired extent.

It is now commonly required that these windows shall be provided with means to insure their closing in case of fire, and it is in connection with windows designed to comply with these requirements that the principal utility of the invention is found. It automatically checks the window in such a manner that it will automatically close when released, or if secured in an open position by a fusible chain, will automatically close the moment the chain is melted by the heat, and thus isolate the room or rooms from which it opens.

The claims said to be infringed are as follows:

"2. In combination with a window frame having a reversible sash pivoting about an intermediate transverse axis, a sash stop acting between said frame and sash consisting of a laterally projecting gravity member 16, on the one acting against a stop, 18, on the other, the gravity member being supported on the one by a pivot, 19, to gravitate at all times automatically into alignment with the stop and being independent of said stop for its working, said gravity member and stop coming into contact when the sash has been pivoted partly open, thereby preventing its further opening, and said gravity member being pivotable out of alignment with the stop to permit reversal of the sash.

"3. In combination with a window frame having a reversible sash pivoting about an intermediate transverse axis, a sash stop acting between said frame and sash, consisting of a gravity member on the one acting against a stop on the other, the gravity member being pivotally supported on the one to gravitate at all times automatically into alignment with the stop, and being independent of said stop for its working, said gravity member and stop coming into contact when the sash has been pivoted partly open, thereby preventing its further opening, and said gravity member being pivotable out of alignment with the stop to permit reversal of the sash.

"4. In combination with a window frame having a reversible sash pivoting about an intermediate transverse axis, a sash stop acting between said frame and sash, consisting of a gravity member on the one acting against a stop on the other, the gravity member being movably supported on the one to gravitate at all times automatically into alignment with the stop, and being independent of said stop for its working, said gravity member and stop coming into contact when the sash has been pivoted partly open, thereby preventing its further opening, and said gravity member being movable out of alignment with the stop to permit reversal of the sash."

The art is narrow and defendant insists that complainant is entitled only to the specific structure disclosed by the patent.

Defendant has placed the gravity latch on the window frame and the stop on the sash, so that the latch gravitates into the path of the stop, automatically and at all times accomplishing all the functions of the device of the patent in suit and in substantially the same manner. The defendant's weight to accelerate the gravity movement of the latch and the extension below the pivot of the latch to prevent it from falling

out beyond the path of the stop are additions which do not change the principle of construction or operation of the parts.

The identity of the two sash stops in principle of construction and method of operation and the obvious reversal of parts is well illustrated in the following cut:

The difference in operation, as defendant contends, is that his device does not have the two movements which he asserts are characteristic of the device of the patent, i. e., a bodily movement with the window sash and a swinging movement on its pivot, whereby the lower end of the latch gravitates into alignment with the stop on the window frame.

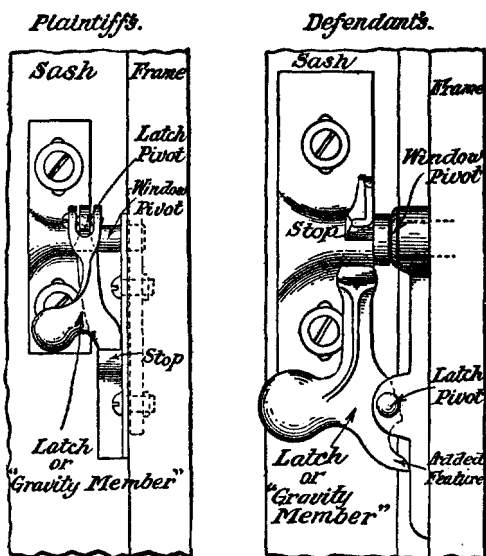
But the latch or gravity member of the patent does not move into the path of the stop, except when it has been moved therefrom by hand and, like defendant's latch or gravity member, it is in the path of the stop.

As the patent specification prophesied:

"The invention is not to be limited * * * to the sash stop with the pivoted member on the sash and the fixed stop on the frame because it is apparent that these conditions might be reversed."

While a broad interpretation should not be given to the claims, we are satisfied that the case is one of a clear reversal of parts, where the altered mechanical adjustment is not difficult, once the original idea has been conceived. *Consolidated Co. v. Hays*, 100 Fed. 984, 41 C. C. A. 142; *International Time Recording Co. v. W. H. Bundy Recording Co.*, 159 Fed. 464, 86 C. C. A. 494.

The decree is affirmed with costs.



FRANK F. SMITH METAL WINDOW HARDWARE CO. v. YATES.

(District Court, S. D. New York. October 16, 1914.)

1. PATENTS (§ 312*)—SUIT FOR INFRINGEMENT—EVIDENCE.

Although there is a legal presumption that the device of a later patent does not infringe a prior patent, and the later patent is admissible where infringement by such device is charged, it is of doubtful value as evidence, in view of the practice of the Patent Office.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544-549; Dec. Dig. § 312.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. PATENTS (§ 54*)—ANTICIPATION—ABANDONED EXPERIMENT.

A device, a single model of which was made, tried experimentally, and then abandoned, is not an adequate anticipation of a subsequently patented and successful device.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 73; Dec. Dig. § 54.*]

3. PATENTS (§ 109*)—VALIDITY—ADDITIONS TO SPECIFICATION IN PATENT OFFICE.

New matter added to the specification of a patent application in the Patent Office will not sustain claims which are not within the scope of the original disclosure.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 152; Dec. Dig. § 109.*]

PATENTS (§ 244*)—INFRINGEMENT—TRANSPPOSITION OF PARTS.

Transposition of coacting parts of a patented device, involving no new principle of operation, will not avoid infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 385; Dec. Dig. § 244.*]

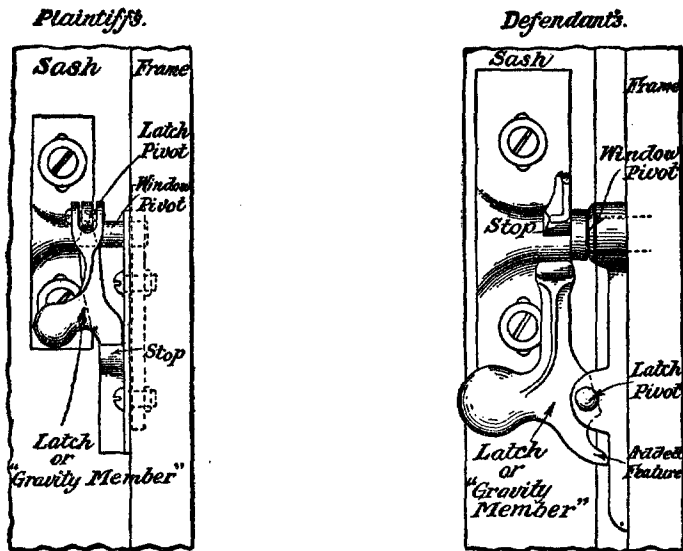
5. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—TRANSOM ADJUSTING DEVICE.

The Smith patent, No. 970,656, for a transom adjusting device, held valid and infringed.

In Equity. Suit by the Frank F. Smith Metal Window Hardware Company against John W. Yates. On final hearing. Decree for complainant.

Decree affirmed by Circuit Court of Appeals, 216 Fed. 359.

The following are sketches of the models in question:



E. W. Scherr, Jr., of New York City (Stephen J. Cox, of New York City, of counsel), for complainant.

James H. Griffin, of New York City, for defendant.

HAND, District Judge. [1] The defendant does not question the verbal applicability of the claims upon the Yates device. The presumption arising from the subsequent patent to Yates that there is no infringement is certainly supported by authorities (*Boyd v. Janesville Hay Tool Co.*, 158 U. S. 261, 15 Sup. Ct. 837, 39 L. Ed. 973), though the Patent Office, as every practitioner knows, pays not the least attention to whether the disclosure of a subsequent patent infringes the claim of a former one, and could not possibly do it, if they were to grant patents for specific forms of disclosures already patented under general claims. What the office does consider is interference between claims upon old disclosures, when not restricted to the differentia of a new species. Obviously any disclosure which supports a claim for a species must, *ex hypothesi*, infringe a prior claim for the genus. Hence the presumption seems hardly justified in fact, unless it is limited in some undisclosed way. In any event it is at best only a presumption, and, although the later patent is admissible, I have never found what value it had after it was in evidence. Here I think that the presumption is overborne by the facts.

[2] A more plausible ground in the case at bar is to say that the prior art requires some limitation of the claim, and Balling's device is that on which the defendant relies for this purpose. If Balling's device is a good anticipation, the claims cannot cover Yates; if it is not, they certainly can, for none of the other cited patents require notice. If it had been proved to be more than an impractical and untried experiment, I should be disposed to think that it anticipated the claims enough for this case, because it is quite as nearly the reversal of the patent as Yates' latch. However, the whole thing was the merest experiment, not wholly satisfactory as it was, and never tried out in practice. Balling made a single pair under Lenz's instruction, and Lenz soon after got out what he thought to be a better latch. Whether it would have worked at all no one can say, because only one window was ever fitted with them. Against this we have the uncontradicted testimony of Hall and Montgomery, each insurance inspectors, and one, an engineer, that it would not have answered upon fireproof windows. Unless the width of the window was narrowed as in Defendant's Exhibit 11, there must be a cut in the window shield, and in any case the fatal defect is that the latch must move to engage the notch in the pivot. Even if no defects could be ascertained in advance, the single use was only an experiment which was thrown aside as soon as it was once tested. Against a device which has had the success of the complainant's, courts have very steadily refused to consider such occasional and fugitive models as adequate anticipations.

[3] The most serious attack upon the patent is the change which took place in the Patent Office. I think it very likely that these changes were really planned to cover Yates' new device, and I think it equally, if not more, likely that Yates' new device was but a plan to evade the complainant's success in the interference. As to the additions to the specifications, I agree that they contribute nothing, and that unless the present claims can stand on the first disclosure, they cannot stand at all. Moreover, I suppose that a change in the claims is as bad, if not

worse, than a change in the disclosure, for the patent especially lives in the claim. For instance, one would not seriously argue that an inventor, upon further study of his disclosure, could put in a new claim of an altogether new kind. Furthermore, up to the time of the decision of the interference both Yates and Smith had always claimed a latch on the sash and a catch on the frame. Nevertheless, I cannot agree that when we speak of the "invention" which is disclosed, we are as much bound as though we were asking whether an infringer came within the claim. Otherwise, we could never allow any change in claims. Perhaps it is not best to consider too curiously just what the "invention" is; certainly it includes all obvious ways of evading the claims while you steal the real discovery for yourself. Here, no one had ever before this disclosed a way by which you could make an automatic gravity latch, operating positively. That was no doubt not a great invention, but it filled a real need, and it filled it satisfactorily as the event proved.

[4] Whether what Yates did was patentable or not is of no consequence here; certainly he made no discovery in thinking of reversing the position of latch and catch, and the change in the claims which attempted to cover that difference was not a departure from the "invention." Whether the disclosure was broad enough to justify such claims is another matter, and depends upon whether the necessary adjustment was obvious from Smith's disclosure. A counterweight to an upstanding latch would certainly suggest itself to any one, and I cannot agree with Gabler that it was necessary to cut away any part of the frame in complainant's Exhibit No. 1, a model in which the movement of the latch was not sideways as in Yates' disclosure. In short the plan of changing from sash to frame and from frame to sash seems to me quite typically the device of one who trusts that courts can be persuaded to keep the promise to the ear, while they break it to the hope. The mechanical adjustment is surely not difficult, when once you have conceived the idea.

These are the only points in the case, and it seems to me that the complainant must succeed. He will, of course, have costs.

WARREN BROS. CO. v. CITY OF GRAND RAPIDS et al.

(District Court, W. D. Michigan, S. D. November 4, 1912.)

PATENTS (§ 328*)—INFRINGEMENT—SURFACING COMPOSITION FOR PAVEMENTS.

An injunction granted, restraining the carrying out of a paving contract with a city on the ground that its performance according to its specifications would necessarily involve infringement of the Warren patent, No. 727,505, for a wearing surface of a pavement.

In Equity. Suit by the Warren Bros. Company against the City of Grand Rapids and Edward W. Seamans. On final hearing. Decree for complainant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Wilson & Johnson, of Grand Rapids, Mich. (James M. Head, of Boston, Mass., of counsel), for complainant.

Taggart & Taggart, of Grand Rapids, Mich., for defendant City of Grand Rapids.

Bulkley & Swenarton, of Chicago, Ill., for other defendants.

SESSIONS, District Judge. This is a suit to enjoin the carrying out of a contract between the two defendants for the construction of a pavement on Barclay street in the city of Grand Rapids. It is claimed by complainant that the performance of this contract according to its specifications will necessarily involve an infringement of its patent No. 727,505 for the wearing surface of a street pavement which, after careful consideration, has been construed and sustained by the Circuit Court of Appeals of this circuit in the case of Warren Bros. Co. v. Owosso, 166 Fed. 309, 92 C. C. A. 227. In that case the court thus described and construed the invention covered by claims 5, 6, 9, and 11 of the patent:

"Warren's invention, shortly stated, consists in the discovery that an aggregate of large and small pieces of stone, together with a certain proportion of stone dust, all mixed together and thoroughly permeated with bitumen or asphalt, results, when set, in a compact, stable structure, and is less liable to disintegrate from traffic or weather than any other method of grading or arranging the mineral constituents. Under the evidence, the particles are more compact in their relation to each other, and there is a minimum of friction in their interaction. The larger pieces of stone withstand the tendency of the small grains or dust to slip by each other and change the form of the pavement by disintegration and lumpy spots. The result is therefore a stability due to the arrangement of the mineral structure which enables the use of a softer asphalt or bitumen than would be otherwise feasible, inasmuch as a greater proportion of the wear and strain is carried by the mineral elements than by the binding constituent. This is, in substance, stated and claimed as an advantage over any other pavement composition by the patentee in his specifications. The fundamental idea of Warren is not that the 'density' of his composition gives the stability which he claims, but that the mineral aggregate should of itself resist displacement by traffic."

The basic idea of the Warren pavement is the so-called "inherent stability" of the mineral aggregate in its composition, which consists of the two elements of density, or absence of voids, and stability, or resistance to displacement, existing independently of the plastic binder. Its distinguishing characteristic lies in the fact that the density and stability, which together create and constitute its inherent stability, are produced by combining and mixing indiscriminately throughout the whole body of the wearing surface coarse and fine particles of mineral matter such as stone, sand, and dust or impalpable powder. The inventor claims (and for the purposes of this case his claims have been sustained and established) that when mineral particles of properly graded sizes are so combined, mixed, and coated with bituminous cement and the whole then thoroughly compacted by pressure, a solid, homogeneous, waterproof wearing surface will be produced in which the voids will be reduced to below 21 per cent. and the mineral particles, because of their intimate contact and interaction, will, in a large measure, be self-sustaining, and therefore less liable to displacement and disintegration than in the usual macadam pavement where the

stone and other mineral constituents are arranged in layers of different sizes. He further claims that in such a pavement the traffic load will be carried for the most part by the mineral aggregate itself instead of by the bituminous binder, and therefore that greater stability and durability will be reached than is possible in sheet asphalt and similar pavements.

The specifications of the contract in question, the compliance with which it is claimed will be an infringement, are as follows:

"(5) The wearing surface shall have a thickness of two (2) inches after thorough compression with a roller.

"Mineral Aggregate.

"(6) The mineral aggregate shall consist of a mixture of broken stone and sand, to which in some cases may be added a small quantity of stone dust or Portland cement.

"The stone shall be a crusher run varying in size from a maximum of one-half ($\frac{1}{2}$) inch, to the smallest particle retained on the finest mesh screen commonly used on crushing plants. For a two (2) inch wearing surface, the stone would vary in size from that passing a three-quarter ($\frac{3}{4}$) inch screen, to as small as that held on a ten (10) mesh screen.

"The dust or fine screenings should be removed from the stone, as it usually is excessive and irregular in quantity and necessitates the use of a greater amount of cement.

"The sand shall be similar in character to that commonly used in sheet asphalt mixtures. It shall be hard-grained, moderately sharp, free from loam or other foreign material and varying in size from that passing a one-fourth ($\frac{1}{4}$) inch screen to dust passing a 200 mesh screen. There shall not be over 5 per cent. passing the 200 mesh screen and there should not be over 30 per cent. held on the 10 mesh screen.

"The dust which may be added to the mixture shall be either a Portland cement or ground limestone. * * *

"Proportions.

"(11) The proportions of the various ingredients composing the bituminous concrete shall be approximately three (3) parts of stone to two (2) parts of sand, to which shall be added from 7 per cent. to 10 per cent. by weight of the bitumen. If stone dust or Portland cement is added to the mixture, it shall be in such quantities that a screening of the whole aggregate shall not show more than 6 per cent. by weight passing a 200 mesh screen."

The sole question here to be determined is this: Under the evidence and the ruling of the Circuit Court of Appeals of this circuit, will the wearing surface of a pavement constructed in accordance with the above specifications be an infringement of complainant's patent? As said concerning the same patent by the Circuit Court for the Southern District of New York and affirmed by the Court of Appeals of the Second Circuit in the case of Warren Bros. Co. v. City of New York et al., 187 Fed. 831, 109 C. C. A. 591:

"The claims at issue are for a product, not a process. Of course the claims must be read in the light of the description, but it cannot be doubted that any one using the Warren pavement will infringe no matter how the pavement is produced. * * * We are dealing with a pavement, not the method of producing it."

In that case it was also decided that a pavement constructed of a 'crusher run' of stone "passing through a screen with a one-inch mesh" would constitute an infringement.

A somewhat persuasive factor in the determination of the question here presented is the fact that, a few months prior to the making of the present contract, this court, Judge Denison presiding, entered a consent decree in the case of Warren Bros. Co. v. City of Grand Rapids, John Kloots and Harry Vanderveen, declaring that the performance of a paving contract with specifications very similar to the present ones would necessarily be an infringement of the Warren patent. The specifications involved in that controversy were in part as follows:

"This wearing surface shall have a thickness of $2\frac{1}{2}$ inches after thorough compression with a five (5) ton tandem roller.

"(2) The mineral aggregate shall consist of broken stone or broken stone and sand of a fairly uniform grading from the largest to the smallest particles in such proportions as to give the mixture a maximum degree of density and low percentage of voids. The maximum size of stone used may range from that passing a screen having circular openings three-fourths ($\frac{3}{4}$) of an inch in diameter up to one and one-quarter ($1\frac{1}{4}$) inches in diameter. Crusher run of stone between one (1) inch and screenings passing a one-fourth ($\frac{1}{4}$) inch mesh may be used if found to be fairly evenly graded. Coarser stone when used shall be graded and remixed in proper portion. (The screenings passing one-fourth ($\frac{1}{4}$) inch mesh screen may be used when the bitumen is refined coal tar or an asphalt not having a low ductility.) Coarse and fine sand having proper grading shall be added in such proportions as necessary to secure the dense aggregate specified above. Stone dust or hydraulic cement may be added as needed when the character of the bitumen used requires it."

The difference between the specifications last quoted and those involved in this controversy is more of phraseology than of substance. In the one a resultant product is described, while in the other the process of producing and the constituent elements of substantially the same product are described. Both call for substantially the same mineral elements graded in the same way, except that in the one maximum sized stone of $1\frac{1}{4}$ inches are to be used to construct a wearing surface $2\frac{1}{2}$ inches in thickness, while in the other maximum sized stone of $\frac{3}{4}$ inch are to be used to construct a wearing surface 2 inches in thickness. The comparative difference in the maximum sizes of stone to be used thus appears to be slight. Under the evidence, it cannot be doubted that by following the process and complying with the requirements set forth in the one, the mineral aggregate having "a maximum degree of density and low percentage of voids" described in the other will be produced.

In one respect the counsel and witnesses for the respective parties differ radically in their interpretations of the contract specifications under consideration. On the part of the complainant the contention is made that the sizes, percentages, and grades of the mineral constituents of the pavement must be determined by tests with laboratory screens, while on the part of the defendants it is claimed that such determination must be made by tests with screens in actual operation in a stone-crushing plant. Defendants contend that their interpretation is both usual and feasible, while complainant contends that the specifications thus interpreted call for a product which is not only unusual, but commercially and practically impossible to obtain. The great weight of the evidence seems to sustain complainant's contention. However, it is unnecessary to decide this side issue. For, as-

suming defendants' contention to be correct and viewing the evidence most favorably to them, the mineral aggregate produced by them, and which they claim will be used in the construction of the pavement, fairly falls within the claims of the patent. The tests made show conclusively that such a mineral aggregate, when thoroughly mixed and properly compacted, will have less than 21 per cent. of voids or the required density of the patented product. While such a mineral aggregate will not contain the inventor's preferred maximum sizes of stone, yet the evidence, which is at most but feebly contradicted, shows that it will contain the preferred proportions and the essential grades of sizes, and that it will have an useful degree of stability. Having the required elements of density and stability, the product must necessarily possess the "inherent stability" which is the broad and fundamental idea embodied in the invention and embraced in the patent.

A decree will be entered enjoining the defendants from carrying out their contract for the construction of the Barclay street pavement. Complainant will recover its costs to be taxed.

FRANK HOLTON & CO. v. PEPPER et al.

(District Court, E. D. Pennsylvania. July 7, 1914.)

No. 939.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CORNETS.

The Holton patent, No. 1,005,972, for an improvement in cornets was not anticipated in the prior art, and discloses novelty and invention; also *held* infringed.

2. PATENTS (§ 72*)—ANTICIPATION—DEVICES DESIGNED FOR OTHER PURPOSES.

A patent is not anticipated by a prior device because the latter might, by modification, be made to perform the functions of the patented device, where it was not designed nor adapted nor actually used for the performance of those functions.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 86-91; Dec. Dig. § 72.*]

3. PATENTS (§ 167*)—CONSTRUCTION AND SCOPE—ADVANTAGES NOT CLAIMED.

A patentee is entitled to all of the advantages and new results flowing from his invention, whether stated in his specification or not.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

4. PATENTS (§ 26*)—INVENTION—NEW COMBINATION OF OLD ELEMENTS.

That a new combination and arrangement of elements that are old produces new and beneficial results is evidence of invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. § 26.*]

5. PATENTS (§ 35*)—EVIDENCE OF UTILITY—COMMERCIAL SUCCESS.

While large sales and general use of a patented invention are not conclusive evidence of its utility, they are facts to be taken into consideration in a doubtful case.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 39; Dec. Dig. § 35.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by Frank Holton & Co., a corporation, against J. W. Pepper and H. E. Pepper, doing business as J. W. Pepper & Son. On final hearing. Decree for complainant.

Brown, Hopkins, Nissen & Sprinkle, of Chicago, Ill., for plaintiffs.
John P. Croasdale, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. [1] This is a suit for infringement of patent No. 1,005,972, for improvements in cornets, granted October 17, 1911, upon an application filed March 8, 1908. As stated in the application, the invention has for its objects to provide an improved cornet, the scale of which may be quickly and accurately changed from one key to another, such as from B flat to A and vice versa, and in which the tuning slide and the quick-change slide are located entirely to one side of the valve chambers, whereby the cornet will be compact and at the same time permit the bell to be constructed of a length somewhat greater than the length of the bell in the ordinary cornet, thereby improving the resonance of the instrument and the intensity and qualities in general of the notes emitted therefrom, and the further object to provide improved means whereby a portion of the mouth pipe and the connection tube may be cut out to decrease the length to change the instrument to still another key, such as the key of C, for vocal accompaniment. There are two groups of claims involved in the present suit. The ninth and eleventh, forming one group, are claimed to constitute a new combination of which the eleventh may be quoted as an example:

"Claim 11.

"In a wind instrument, the combination of a valve casing, a bell member connected therewith, the extremity of which member projects beyond the valve casing and on one side thereof, a mouth pipe comprising a plurality of sections adjacently disposed, two of said sections being arranged on parallel axes, said axes lying in substantially the same horizontal plane when the instrument is in position for use, others of said sections being disposed above and below the latter, and removable slides connecting each of the two sections which are arranged in the said plane respectively, with the sections above and below the last recited sections, said sections and slides being all disposed in the space between the plane of the outer edge of the bell member and the adjacent valve casing."

Analyzed, the elements of this claim may be enumerated as follows: (1) A valve casing; (2) a bell member; (3) a mouth pipe comprising a plurality of sections adjacently disposed, with two of said sections being arranged on parallel axes lying in substantially the same horizontal plane; (4) other sections being disposed above and below the horizontal sections; (5) removable slides connecting each of the two sections, which are arranged above and below the horizontal sections and all being arranged between the outer edge of the bell member and the valve casing.

The other group of claims comprises 3, 4, 5, and 8, and is distinguished from the first group by reason of the fact that they do not mention the horizontally arranged sections, but do mention an additional connection or substitute slide for use as a C attachment when it is desired to raise the key of the instrument from its normal B flat key to the key of C. Claim 5 illustrates this group and is as follows:

"Claim 5.

"A valved wind instrument including a bell member and a valve casing, a mouth pipe leading to the valve casing and being shaped to form a plurality of pairs of spaced sections, adjustable and detachable connecting slides joining the extremities of the respective sections of each pair to form a continuous passage for the air through the entire length of the mouth pipe to the valve casing, said slides being located beyond and on the side of the valve casing toward the outlet of the bell, and an additional connection adapted to join one of the sections of one pair with one of the sections of another pair when the first said slides are detached whereby a portion of the mouth pipe intermediate its extremities will be rendered inactive."

This claim may be analyzed as follows: (1) A bell member; (2) a valve casing; (3) a mouth pipe leading to the valve casing and being shaped to form a plurality of pairs of spaced sections; (4) adjustable and detachable connecting slides joining the extremities of the respective sections of each pair, and said slides being located on the side of the valve casing toward the outlet of the bell; (5) an additional connection adapted to join one of the sections of one pair with one of the sections of another pair when the first said slides are detached, whereby a portion of the mouth pipe intermediate its extremities will be rendered inoperative.

All the claims in issue are based, according to the complainant, upon a combination of elements which admittedly are old, but by which it is claimed certain new results and advantages are obtained; that is to say, a cornet is not new, and to provide a cornet with a bell, a mouth pipe, valves, quick-change slides, and tuning slide are not new. A C attachment to raise the key of a B flat instrument to C is not new. What is claimed to be new is the arrangement whereby the four sections of the mouth pipe containing the quick change to A slide and the tuning slide are disposed upon that side of the instrument between the valve piece and the extremity of the bell, whereby the total length of the mouth piece is decreased in length and the length of the pipe thus saved is added to the bell member, thereby improving the tone of the instrument; the arrangement whereby the lower section of the first pair of sections and the upper section of the second pair of sections are upon the same horizontal plane when the instrument is in use by which the instrument is made more compact and easy to handle; and the arrangement embodying the above features by which the quick-change slide and the tuning slide may be detached from their respective bends or crooks, and a C attachment in the form of a bow of definite length may be inserted as a slide in place of these two slides, rendering inactive a portion of the mouth pipe, shortening its length, and raising the instrument to the key of C. The cornets sold by the defendants, American Favorite, No. 1, and American Favorite, No. 2, are infringements if the claims upon which the complainant relies are valid, as they are exact reproductions, or, as stated by complainant's experts, "Chinese copies" of the complainant's patented cornet. The distinction is that the defendants' cornet No. 2 answers every feature in all of the claims sued upon, including those with the C attachment or supplemental slide, while defendants' cornet No. 1 answers all the features of claims 9 and 11 of the patent in suit. The defense is that the sub-

ject-matter of the claims is totally lacking in patentable novelty in view of the prior art, and that therefore the claims are invalid.

In order to sustain the defense of prior art, the defendants have introduced in evidence as an exhibit a cornet which, it is claimed, was made for Herman F. Beyer in July, 1905, and was used by him publicly from July, 1905, to the time of his death in October, 1907. The complainant contends that the Beyer cornet is not an anticipation of the claims of the patent in suit, but, in view of the conclusions reached as to the sufficiency of proof of prior making and use of the instrument, it is not essential to consider that question. The testimony to establish a prior use in the Beyer invention must be discarded as not being of that character to establish it in the mind of the court beyond a reasonable doubt. The proof of its use by Beyer depends upon uncertain and contradictory oral testimony which is based entirely upon the inaccurate memory of witnesses both as to the date of Beyer's use of the instrument and as to what the instrument consisted of that was in existence at any particular date. The circumstances attending the discovery of the instrument years after Beyer's death and the identification of the parts of the instrument, including the copy of the C attachment slide, cannot be said to be evidence so clear, satisfactory, and potent as to leave no reasonable doubt in the mind of the court. At its best it can only be said to constitute an unsuccessful and abandoned experiment and the evidence as a whole is not sufficient to overcome the presumption of the validity of the Holton patent. *Washburn & Moen Mfg. Co. v. Barbed Wire Co.*, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154; *Deering v. Winona Harvester Works*, 155 U. S. 300, 15 Sup. Ct. 118, 39 L. Ed. 153.

The defendants further rely upon the Lyon & Healy duplex trumpet as evidence of prior art embodying the claims in suit, and have offered in evidence a catalogue issued by Lyon & Healy in 1905, containing an advertisement of the duplex trumpet to establish its use prior to the date of the application for complainant's patent. It is undisputed that this trumpet was known more than two years prior to the application date of the patent in suit. The instrument in question is an A-B flat trumpet. After a careful examination of the exhibits and of the testimony, it must be concluded that the Lyon & Healy trumpet is substantially dissimilar to the Holton cornet, and that it does not anticipate the claims of the Holton patent. It is shown that a trumpet is musically and mechanically a different instrument from a cornet, intended for different uses and constructed to serve different purposes. The bell member is constructed longer and of smaller bore, and the instrument is used where shriller tones are required than in the case of a cornet. The mouth pipe is constructed with fewer convolutions or bends between the mouth piece and the valve piece than is the cornet. In the Lyon & Healy trumpet, an additional valve is provided, which is operated by a lever to change the key of the instrument from B flat to A and vice versa; and, although the bends or crooks are upon the same side of the valve casing as in the Holton cornet, it does not in its construction come within the claims in suit. Claims 9 and 11 of the Holton patent describe an arrangement of the mouth pipe whereby

two intermediate sections are horizontal and the other two sections respectively above and below these horizontal sections connect directly with the horizontal sections in order to provide connections for the quick-change slide and tuning slide, which are immediately adjacent. This arrangement is entirely absent from the Lyon & Healy duplex trumpet. It has no intermediate horizontal sections, but all the sections are arranged in a vertical plane. Moreover the Lyon & Healy trumpet does not meet claims 3, 4, 5, and 8 in which it is provided that, in addition to the two ordinary slides, the quick change to A slide and the tuning slide, there is an additional or supplemental slide designated in the specifications as the C attachment. Neither are there slides in the Lyon & Healy trumpet which are detachable from the sections into which they are fitted by which arrangement in the Holton patent the C attachment may be substituted for these two slides and the key of the instrument raised from B flat to the key of C. It is clearly shown that the Lyon & Healy patent utterly lacks the essential features upon which these claims are based. The most that can be said for the similarity between the Lyon & Healy trumpet and the Holton cornet is that the Lyon & Healy instrument has between the valve piece and the bell a contrivance for changing the key of the instrument from B flat to A and vice versa. This is not accomplished, however, by a detachable quick change to A slide as in the Holton instrument, but by a key slide comprising a fixed member composed of two parallel tubes interposed between portions of the main tube and connected by a short intermediate tube, and a sliding member having short transverse ports adapted to register with the intermediate tube and main tube when the sliding member is in one position, and having an extended passage the ends of which register with the ends of the main tube when said sliding member is in its other position. In other words, it accomplishes the change between A and B flat by means of the U-shaped sliding section which fits into a fixed section set transversely upon the tubing of the mouthpiece and provided with valves, whereby the air is permitted to pass directly through the transverse section for the higher key of B flat, and whereby, upon the further insertion of the sliding member, the direct connection of the tubing is cut off and the air passes through the curve or U-shaped portion of the sliding member. In other words, it accomplishes in a different manner the result obtained by the quick change to A slide of the complainant's cornet. There is no evidence to show that the arrangement in the Lyon & Healy device adds to the bell member of the trumpet in length beyond that of the ordinary trumpet, and it is obvious from an examination of the trumpet that no such result is contemplated or obtained. It is contended on the part of the defendants that the Lyon & Healy instrument contains every element recited in claims 1, 2, 7, 10, and 12, which are not in suit, and that if those claims are invalid the remaining claims with their additional limitations are likewise invalid because these additional limitations are lacking either in novelty or utility.

As to the argument based upon lack of novelty of the additional features, if the combination of the additional limitations in the claims relied upon with the features of the claims not in suit presents a new

combination, then the sustaining of the defendants' contention would strike down every combination patent where the elements are old but the combination and result are new.

[2] As to the argument based upon lack of utility, I think the evidence clearly sustains the useful results set out in the specifications, namely, a compact arrangement of the mouth pipe whereby additional length is added to the bell member, thereby improving the tone of the instrument, and a compact arrangement whereby the quick change to A slide and the tuning slide may be quickly detached and the C slide attached, all upon the same side of the instrument. It will be seen, therefore, that the invention in the Lyon & Healy trumpet is not sufficient to constitute an anticipation of the Holton patent because it might, by modification, be made to accomplish the functions performed by the Holton patent, inasmuch as it was not designed by its maker, nor adapted, nor actually used, for the performance of these functions. *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658; *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 422, 22 Sup. Ct. 698, 46 L. Ed. 968.

Moreover, in the Holton patented cornet, it has been shown that the ingenious arrangement, whereby the lower of the first pair of sections and the upper of the second pair of sections are arranged upon the same horizontal plane, furnishes convenient space for holding the instrument in the musician's hand and convenience in packing, which is not present in the older cornets.

[3] It is well settled that the inventor is entitled to all the advantages and new results flowing from his invention, whether stated in his specifications or not. *Diamond Rubber Co. v. Consolidated Rubber Tire Co.*, 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527.

[4] In conclusion as to the merits of the controversy, while it is sometimes difficult to draw the line between what is a mere result of mechanical skill and what is invention, it is quite clear in the present case that the new combination and arrangement of elements which were old did produce new and beneficial results never, so far as the evidence shows, attained before, and that is evidence of invention. *Barbed Wire Patent*, 143 U. S. 283, 12 Sup. Ct. 443, 36 L. Ed. 154; *Diamond Rubber Co. v. Consolidated Tire Co.*, 220 U. S. 435, 31 Sup. Ct. 444, 55 L. Ed. 327.

[5] While the evidence of the large sales and general use of the Holton cornet is not conclusive evidence of its utility, yet it is evidence to be taken into consideration in a doubtful case. *McGowan v. New York Belting Co.*, 141 U. S. 332, 12 Sup. Ct. 71, 35 L. Ed. 781.

The answer raises an issue as to the title to the patent in suit. It is alleged in the bill (section 2) that Frank Holton applied for the patent, and that the letters patent, on October 17, 1911, were granted and delivered to Frank Holton. It is alleged in paragraph 3 of the bill that, on the 9th day of March, 1908, Frank Holton, being then the sole owner of the letters patent and all rights and privileges thereunder, assigned and transferred the letters patent to Frank Holton & Co., the complainant, which is a corporation of the state of Illinois. The answer avers that the letters patent were issued in the name of

Frank Holton Company, assignee of Frank Holton, and that Frank Holton Company is not a party to this suit, and that its interest in the letters patent is not shown by the bill of complaint to have passed to Frank Holton & Co. In the absence of proof to the contrary, it is sufficiently established by the evidence that the patent is owned by the complainant, Frank Holton & Co., and by a clerical mistake the "&" was omitted in the grant, and that the correct name of the owner of the patent is Frank Holton & Co. This is not a case of misnomer of a party, and the clerical error in the name of the assignee of the patent is sufficiently established by the evidence.

A decree may be entered in favor of the complainant.

UNITED STATES v. HART et al.

(District Court, N. D. New York. August 13, 1914.)

CRIMINAL LAW (§ 393*)—SEARCHES AND SEIZURES (§ 7*)—WITNESSES—OBTAINING EVIDENCE FROM ACCUSED—DEPRIVATION OF PROPERTY—"UNREASONABLE SEARCHES AND SEIZURES."

Where accused, with knowledge that a proposed prosecution for conspiracy, etc., was being investigated by the United States attorney, in an endeavor to establish his own innocence to such officer, voluntarily produced and delivered to him certain letters, checks, etc., which the attorney offered to return, but on finding that they contained valuable evidence against accused and others refused to return them, and submitted them to the grand jury, on which, with other evidence, an indictment was returned, there was no unreasonable search or seizure, or deprivation of property, and hence the United States was entitled to use the papers in evidence against accused, subject only to his right to examine and have copies of them and to have them surrendered to him when the purpose of the government had been subserved; nor was accused thereby compelled to produce evidence against himself.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 871-874; Dec. Dig. § 393; * Searches and Seizures, Cent. Dig. § 5; Dec. Dig. § 7.*]

Proceeding by the United States against Max M. Hart and others. Question as to the right of the United States to use on the trial of an indictment for conspiracy, etc., and to introduce in evidence against the defendant, certain papers, letters, checks, and notes paid and unpaid belonging to the defendant, Hart. Objection to use of such papers overruled.

See, also, 214 Fed. 655.

John H. Gleason, U. S. Atty., of Albany, N. Y., and Thos. H. Dowd, Asst. U. S. Atty., of Cortland, N. Y.

Henry A. Wise, of New York City, for defendant Hart.

RAY, District Judge. Just prior to the finding of the indictment in this case against the defendants for a conspiracy to commit certain crimes against the United States, and to use the mails to execute same, etc., and after witnesses had been summoned to give evidence in investigating the matter before the grand jury then in session, the now

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

defendant Max M. Hart, not then named as a defendant, voluntarily appeared at the term of court where said grand jury was in session and volunteered to make a full and a complete statement and disclosure to the United States attorney; he (Hart) knowing that such investigation was being made and that the matter was about to be presented to the grand jury. Hart voluntarily disclosed that he had in his possession certain papers which would throw light on the matter and asked to be allowed to go before that body as a witness. He proclaimed his innocence of all wrongdoing. There was no promise or suggestion of immunity, and the United States attorney on full investigation declined to call Hart or permit him to go before the grand jury. He was asked if he was willing to produce the papers in his possession, and, answering in the affirmative, he went from Syracuse, N. Y., to the city of New York and returned with such papers and turned them over to the United States attorney and his assistant for their examination and use in the investigation. It does not appear that they were used before the grand jury. During the examination before the matter went to the grand jury, Hart was told that the papers would be returned, and at the same time was informed in effect that such return would be made when the United States attorney had completed his investigation, which clearly contemplated the determination whether or not a crime had been committed; if so, when and by whom, and also the prosecution of the guilty party or parties. No time was fixed for the return of the papers and no limitation was placed on their use.

The investigation before the grand jury resulted in the finding and presentation of an indictment against Hart and other parties, and the materiality of the papers as evidence on the trial is apparent. Prior to the commencement of the trial, Hart moved for an order directing the United States attorney to return the papers to him. The United States attorney had declined to make return prior to or during the trial unless directed so to do by the court. He had also informed Hart's attorney after the indictment that he would return the papers, but no specific time was named. The court declined to direct their return, but ordered that they be kept in the custody of the court open to inspection by both parties prior to and during the trial and that copies be furnished the defendant. All this has been done.

On the trial one or more of these papers has been offered in evidence by the United States, and the objection is made that it is wrongfully in the possession of the United States attorney and is being used under such circumstances that its admission and use in evidence against Hart is or will be to deprive him of his constitutional rights and privileges and violate such rights and privileges. It appears on the trial that the papers, or some of them, were used in aid of the conspiracy charged, some in forming and some in executing the same, and most if not all proposed to be used and offered in evidence are competent against all the defendants, unless it be Hart for the reasons stated.

It cannot be successfully contended that Hart has been or is being compelled to produce evidence against himself. The production and delivery of these papers by Hart was voluntary and was not accompanied by any express promise to return them or not use them. Hart

is not deprived of their use. The court at the request of the United States attorney now has them for the purpose of administering justice.

Did the retention of these papers by the United States attorney, or does their present retention by order of the court, in view of the facts above stated, amount to an unreasonable search and seizure, or to an unreasonable seizure? If so, the papers cannot be received in evidence against Hart. I can see no unwarranted act or wrongful or unlawful seizure. There was no search and no seizure in the sense in which those words were used when written into the Constitution of the United States. At most, the United States attorney broke his promise to return the papers, and in that he was sustained by the court when the value of the same for the purpose of administering justice and as evidence against the other defendants became known. Hart has not been deprived of his property, or of its use. He will not be. An important question, and, so far as this court is informed, a new question, is presented. The recent case of *Weeks v. United States*, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, dealt with a case where there was plainly both an unreasonable and an unlawful search of defendant's premises and seizure of his papers there found. That case in no aspect dealt with a voluntary delivery of papers for the purpose of making an investigation before the grand jury in session, whether or not a crime had been committed, and, if so, fixing the responsibility, and which investigation resulted in the indictment with others of the one so delivering the papers and where the United States attorney stated during the investigation and also subsequent to the indictment that he would return such papers, presumably when done with them. In the *Weeks Case* the Supreme Court held that the trial court has power to deal with papers and documents in the possession of the United States attorney and other officers of the court, and to direct their return to the accused if wrongfully seized.

It seems to me in view of the history of our Constitution that its inhibition against unreasonable searches and seizures is not aimed at the use of papers and documents voluntarily turned over by a subsequently indicted person to the prosecuting officer for use in the investigation before a grand jury of which investigation he has knowledge and in which he is seeking to exculpate himself and retained for use by such officer on the trial; their relevancy and importance having become apparent on full examination. In the absence of threats, force, and coercion, and of promises of immunity, it seems to me that when a person voluntarily turns over papers to the prosecuting officer for examination for the purpose of determining whether or not a crime has been committed, and if so the guilty party, the expectation of such person being that he will be wholly exonerated, he may not, if such papers with other evidence disclose his guilt, prevent the use of such papers, on the claim that there has been an unwarranted search and seizure, or a deprivation of property without due process of law, or that he is being compelled to produce evidence against himself. The breach of an agreeable search and seizure, or to a deprivation of property when the court sanctions the detention of the papers for use on the trial only, or to

compelling the defendant to produce evidence against himself. Hart exacted no promise, express or implied, that the papers should not be used against himself. They were to be used for or against any one who might be implicated.

I think the papers may be used in evidence against Hart, and the objections are overruled.

BANK OF NORTH AMERICA et al. v. PENNSYLVANIA OIL REFINING CO.

(District Court, E. D. Pennsylvania. 1914.)

No. 947.

CORPORATIONS (§ 565*)—INSOLVENCY—CREDITOR OR STOCKHOLDER.

Claimant purchased preferred stock in defendant company on misrepresentations of value made by F., being further induced to buy by promises of large dividends, high-salaried employment, and a block of common stock, for which he paid nothing. Whether the money paid by claimant was paid to the company or to F. did not clearly appear, and he proclaimed his status as a stockholder up to and subsequent to the time of the appointment of a receiver for the company. *Held*, that he was not then entitled to rescind because of the fraud and to be regarded as a creditor instead of a stockholder.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2281, 2282; Dec. Dig. § 565.*]

In Equity. Suit by the Bank of North America and others against the Pennsylvania Oil Refining Company, otherwise called the Petroleum Products Company. On exceptions to the report of an auditor, finding that exceptant was a stockholder and not a creditor of defendant company. Exceptions dismissed, and report confirmed.

J. Addison Abrams, of Philadelphia, Pa., for exceptants. Junkin & Newbourg, of Philadelphia, Pa., opposed.

DICKINSON, District Judge. The Pennsylvania Oil Company, the defendant, was placed in the hands of receivers October 30, 1912, for the purposes of liquidation. Aside from the claim of exceptant, the assets were about sufficient to meet the total indebtedness. The exceptant is either a stockholder or a creditor. If he cannot participate in the distribution as a creditor, he gets nothing. If he can, the creditors get a dividend, not payment of their claims. The auditor excluded the exceptant from the creditor class. To this finding he has filed 14 exceptions, of which 11 are to specific findings of fact, one is to a conclusion drawn from the facts as found, and the two remaining exceptions are to the refusal of the auditor to do what, under his findings of facts, he clearly could not have done. The whole complaint of the exceptant against the auditor is therefore aimed at the view the latter has taken of the facts.

The real case of the plaintiff is one which is only too common. Lured by the thought of large gains or overborne by some persuasive personality, men and women are every day exchanging good money for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

worthless pieces of paper in the form of stock certificates. The ventures into which the money goes run the gamut from the most impudent and barefaced frauds to business efforts which have failed without the fault of any one. The methods by which the investor is separated from his money are, of course, as varied as the display of human ingenuity makes possible. Ordinarily no great degree of ingenuity is required. The glare of large profits so blinds the eyes that nothing else can be seen. The victim usually does not know the means by which he was defrauded. Not infrequently the mere show of the Eldorado was enough.

In determining the legal rights of the victim and the legal remedies of which he may avail himself, a broad inquiry is necessary. Assuming, as is commonly the case, that a part of the machinery was a corporation, was the fraud participated in by the corporation, or was it confined to independent individuals? In illustration of this distinction, let us suppose two cases. In one the victims are induced to subscribe to the stock of the corporation and pay their money into its treasury. The fraud is committed by those for whom the corporation is responsible. In the other, an individual is possessed of stock in a corporation but not otherwise identified with it. The victims are induced to buy this stock by its then individual owner. The legal distinction between these two cases and the result that because of this the legal remedies are different is obvious. Sometimes, however, often indeed, the distinction is lost sight of or purposely obscured so that no human investigation can disclose what was done beyond the ultimate fact that the money of the victim has gone somewhere. The rights of creditors and innocent stockholders soon come to be intermingled with those of the complaining victim, and this fact may limit the remedies which he might otherwise successfully invoke.

These general observations have a direct bearing on the present case. The exceptant plants himself on the legal proposition that, if fraudulently induced to enter into a contract, he may on discovery rescind, offer to restore, and demand back any money paid. As a statement of a general principle of law, this may be conceded, but it has its limitations and exceptions. The case for the exceptant stands, therefore, upon the averments of fact that he was defrauded; that the corporation is answerable for the consequences of the fraud; that he rescinded; and that the recession was made so promptly that no rights or equities of other parties have been interposed between him and the return of his money out of the proceeds of sale of the assets of the company. In his way stands the findings of fact by the auditor against him. Ordinarily it would be a sufficient disposition of this case to stand by the rule which is invoked against the exceptant that findings of fact by an auditor or other trier of facts will not be disturbed. The findings of the auditor are moreover vindicated and well supported by the reasons given by him in his clear and convincing report.

The inducement to this exceptant was the expectation of receiving \$2 for every dollar invested, and his profits further increased by large dividends and a fat salaried employment. The common stock he was to get for nothing. That he could have thought the common stock

represented actual cash paid in is unbelievable. If he was subscribing for this stock and getting the original stock issue, he knew the common stock was so-called bonus stock. The bait which lured him was dangled by Fleming. If he was buying the stock of Fleming, he knew the common stock had no basis of value other than the business prospects of the company. Whether the money the exceptant paid for his stock was paid to the corporation or to Fleming in purchase of his stock is not clear. It is spoken of in such a way as that either might be the fact. Whether the exceptant had ever any definite thought of rescinding his contract of subscription, if it was one, is doubtful. That he did not in fact rescind is almost certain. On the face of things, at least he was a stockholder. He himself proclaimed his status as a stockholder beyond the time of the appointment of the receiver. The fact that he was defrauded, the fact that he rescinded, and the further fact that the rights of other innocent parties have intervened between him and the recovery of his money are all found against him by the auditor, and no justification for the court to interfere with these findings is shown. There is no finding in his favor of any fact which makes clear that the claim of the exceptant is not wholly against Fleming. The refusal of the auditor to find the exceptant to be a creditor of the corporation and his further refusal to withhold distribution awaiting the result of the action for deceit brought by the exceptant are both upheld.

The exceptions are accordingly dismissed, and the report of the auditor confirmed.

THE VIOLET BLOSSOM.

(District Court, D. New Jersey. July 28, 1914.)

SALVAGE (§ 27*)—COMPENSATION—PUMPING OUT LEAKING BARGE.

A barge loaded with copper ore lying in a slip on Sunday was leaking so that the water gained on the four men who were pumping when libellant's tug was called to assist, and in about three hours the water was pumped out and was thereafter kept down by the hand pumps. The barge was not believed to be in immediate danger, and was not in fact, as there were additional men available for pumping and also means for moving her 75 feet to one side, where she would have rested on a mud bank. *Held*, that the service, if regarded as a salvage service, was not of high order, and that an award of \$133 was sufficient compensation.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 65, 66; Dec. Dig. § 27.*]

In Admiralty. Suit by Daniel Hunter and others, owners of the tug Florence, against the barge Violet Blossom. Decree for libellant.

Foley & Martin, of New York City, for libellant.

James J. Macklin, of New York City, for claimant.

Harrington, Bigham & Englar, of New York City, for claimant of cargo of ore.

HUNT, Circuit Judge. A sufficient recital of the facts is as follows: Alongside of the dock owned by the United States Metal Refining Company at its plant in Chrome, N. J., and extending out about

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

325 feet in length and for 50 feet in width, there are 19 or 20 feet of water at low tide. There is also another slip for the accommodation of barges. From the steamship dock over to a certain cribbing there is a distance of 150 feet; adjacent to this crib the bank is mud and soft; at places in the bank the descent is precipitous, at others gradual. Barges have rested on the mud bank at different times. On August 25, 1912, the flat bottom coal barge Violet Blossom, loaded with 810 tons of copper ore, was lying low in about 50 feet from the edge of the steamship dock. It was Sunday. The weather was fair and the wind very moderate. The barge was lying approximately 75 feet from the mud bank in 19 feet of water. She had been leaking when brought in on Saturday night. On Sunday morning four men were pumping. I gather from the evidence that before 12 o'clock on Sunday there were about 3 feet 6 inches of water on the starboard side stern of the barge, and, because of a list, more on the port side. Toward the stern the water was upon the deck, even with the deck on the port side, and at one time the water extended about 10 inches across the deck and in places had a depth of about 2 inches at the rail. The men pumping were not able to keep the water down, whereupon two additional men were put to the pumps and kept even with the incoming water. The pumping by six men seems to have continued from 11 until 12 o'clock. At that time, the yardmaster of the United States Metal Refining Company, concerned evidently for the safety of the barge, ordered that the Florence, which was passing up the sound, be hailed. He says that she was hailed in order to assist in the pumping, as is the usual practice. The master of the Florence says that the man who hailed him asked him if he could pump water out of the barge; that when he started in to pump he thought it was going to be a hard matter, but after working three hours he got most of the water out and left. No bargain was made. Witnesses for the owners of the cargo testify that they did not think the Violet Blossom was going to sink while the six men were pumping the water. After the 2½ hours of pumping by the Florence, 75 tons of cargo were discharged by using mechanical means available for such purposes. It then became comparatively easy to keep the barge free from water, so the number of men kept on the pumps was reduced. There were a good many employes connected with the United States Metal Refining Company, the owner of the copper ore loaded on the barge, and the yardmaster says that he could have called these men out to aid in moving the barge to the mud bank if he had believed that she was really in immediate danger of sinking. It was about 12 o'clock, too, that measures were first taken to get the mechanical crane to lighten the cargo, but it was not until the time that the Florence left that discharging cargo commenced. The foreman says that by pumping he was able to keep up with the incoming water, but in order to obviate holding so many men at work in the night he sent out for the craneman in order to lighten the cargo. At the time the Florence left the water was reduced to about four inches on the starboard side, yet the hand pumps were kept working on the barge. All serious danger had passed, but after the Florence had gone the tug Robinson came up and endeavored to

help. The master of the Violet Blossom was not called as witness, and it appears that at the time of the arrival of the Florence he was of no assistance. Taking the barge over to the mud bank in the event of imminent danger was contemplated, but it was not thought necessary to take such a course, and, as I understand the evidence, there would have been no serious difficulty in moving the barge from where she was at the steamship dock over to the mud flats near the crib. At about 2 o'clock, the tug boat Robinson went to Chrome and passed the Florence, which had left about that time. When the Robinson reached the Violet Blossom they were unloading her and had taken 40 or 50 tons off. The master of the Robinson says that the Violet Blossom then had about 18 inches of water in the stern and had a pump at work. As the pump was gaining on the water, the Robinson left.

Salvage has been defined to be the compensation due to persons by whose voluntary assistance a ship or its load has been saved to the owner from impending peril or recovered after actual loss. It consists of an adequate compensation for the actual outlay of labor and expense used in the enterprise, and of the reward as bounty allowed from motives of public policy as a means of encouraging extraordinary exertions in the saving of life and property in peril at sea. The Egypt (D. C.) 17 Fed. 359.

In *Murphy v. Ship Sulite* (C. C.) 5 Fed. 99, Justice Bradley said:

"Salvage should be regarded in the light of compensation and reward, and not in the light of prize. The latter is more like a gift of fortune conferred without regard to the loss or sufferings of the owner, who is a public enemy, whilst salvage is the reward granted for saving the property of the unfortunate, and should not exceed what is necessary to insure the most prompt, energetic, and daring effort of those who have it in their power to furnish aid and succor. Anything beyond that would be foreign to the principles and purposes of salvage; anything short of it would not secure its objects. The courts should be liberal, but not extravagant; otherwise that which is intended as an encouragement to rescue property from destruction may become a temptation to subject it to peril."

The assistance rendered by the Florence did not involve the doing of any of those unusual acts which generally characterize claims founded upon the law of salvage. The court would not detract from the credit due to the Florence for promptness and efficiency in rendering service while she remained pumping, but it was merely pumping. I doubt whether those in charge of the Violet Blossom believed that she was in most imminent peril, or whether in fact she was, when we consider that with the added number of men put to the pumps before the Florence arrived, any gain of the water was prevented, and that mechanical appliances were available which could have been employed to keep her from sinking. On the other hand, there was no danger to the Florence and no risk incurred by her. The skill, therefore, was but that ordinarily required in pumping, and no unusual risk was taken.

Under all the circumstances there ought not to be a large award in the case. My best judgment is that a just allowance is \$133. Decree for that sum, with costs ordered.

GOLDSCHMIDT THERMIT CO. v. PRIMOS CHEMICAL CO.

(District Court, E. D. Pennsylvania. August 17, 1914.)

No. 1221.

1. EQUITY (§ 43*)—JURISDICTION—ADEQUATE REMEDY AT LAW.

Equity will refuse to entertain jurisdiction, where the averments of the bill conferring jurisdiction and the equitable relief sought is for the mere purpose of giving jurisdiction in order to obtain other relief which may be obtained at law.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 121-140, 164-166; Dec. Dig. § 43.*]

2. COURTS (§ 352*)—ADEQUACY OF LEGAL REMEDY—DISMISSAL.

Under United States equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv), providing that if at any time it appear that a suit, commenced in equity, should have been brought on the law side of the court, it shall be transferred to the law side and be there proceeded with, and rule 23 (198 Fed. xxiv, 115 C. C. A. xxiv), providing that, if in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court, a bill in equity cannot be dismissed on the ground that there is an adequate remedy at law, and a want of equity.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 926-932; Dec. Dig. § 352.*]

In Equity. Suit by the Goldschmidt Thermit Company against the Primos Chemical Company. On motion to dismiss bill. Motion denied.

J. Addison Abrams, of Philadelphia, Pa., and Charles F. Dane and Livingston Gifford, both of New York City, for plaintiff.

Synnestvedt, Bradley, Lechner & Fowkes, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This motion is based upon the three grounds of the existence of an adequate remedy at law, want of equity, and laches. The first two blend into one, and the last is not seriously pressed.

The positions taken and arguments advanced on the respective sides are alike in this: That they ignore the existence of the rules of practice in the courts of equity in the United States, which were called to the attention of counsel at the oral argument at bar as having a controlling bearing upon the main point involved. If the equity rules are to be ignored, as the printed briefs submitted presuppose, the argument for the defendant proceeds upon these propositions: The provision of the seventh amendment to the Constitution of the United States preserves the right of trial by jury. A defendant, to whom this right belongs, cannot be deprived of it by the subterfuge of avoiding a "suit at common law," when such is the proper remedy. This right is buttressed and recourse to such a subterfuge forbidden by section 723 of the Revised Statutes (U. S. Comp. St. 1901, p. 583), which forbids the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

courts to entertain a suit in equity "where a plain, adequate, and complete remedy may be had at law." This would seem to restrict the inquiry to this one question. At the most a bill should not be sustained where, "according to the course and principles of courts of equity," a chancellor should not entertain jurisdiction. Jurisdiction in equity does not attach where the real purpose is simply to recover for the profits and damages in the case of infringement of a patent. Jurisdiction is conferred by the fact that an equitable remedy, such as injunction, is really incidental to the case. *Root v. Railway Co.*, 105 U. S. 189, 26 L. Ed. 975; *Clark v. Wooster*, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 392.

By section 4921 of the Revised Statutes (U. S. Comp. St. 1901, p. 3395) the courts are given power to grant injunctions in patent cases. Numbers of cases are to be found in which the courts have dismissed bills under circumstances in which they would not grant injunctions. On the other hand, the argument for the plaintiff proceeds upon these grounds: The plaintiff, at the time of the filing of his bill, being entitled to an injunction and being entitled also to an accounting, jurisdiction attaches, and, having once attached, it is not taken away because his right to an injunction is lost by lapse of time, if his claim to other relief continues. All the cases recognize that there may be in a case elements calling for equitable relief which will save the bill even if the right to an injunction be gone. One of these is that the remedy at law may not be "plain, adequate, and complete" or full. Hence we find numbers of cases in which jurisdiction has both been entertained and retained, and the courts have refused to dismiss bills.

[1] The true rule which reconciles these seemingly conflicting rulings appears to be that as the decree of a chancellor is always of grace, and is never the absolute right of a litigant, the courts will refuse to entertain jurisdiction, where the averments which confer it are wholly colorable, and relief is vainly asked through a purely equitable remedy for the mere purpose of giving jurisdiction, in order to grant other relief which may be obtained at law. In other words, it is not that the courts do not have jurisdiction, but that they refuse to exercise it. The strength of the plaintiff's appeal to have its bill entertained is in its contention that a suit for damages would not enable it to get that to which it is entitled.

[2] This feature of the case of the plaintiff was recognized in *Tompkins v. International Paper Co.*, 183 Fed. 773, 106 C. C. A. 529, and it there saved the bill from dismissal. It cannot at this stage of the case be found that this is not the situation of the present plaintiff. This seems to stand the case without reference to the equity rules. By what token, however, can these rules be ignored? They are directly applicable to the question now raised and dispose of it. Rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv) expressly provides what shall be done "at any time it appears" that the suit should have been brought at law. More than this, Rule 23 commands us not to dismiss a bill on this ground. The case may be proceeded with, and when it appears, if it does develop, that this case should be tried at law and the amount of damages assessed by the verdict of a jury, this may be done.

The motion to dismiss the bill is therefore denied and overruled; costs to abide the final decree. We have not been able to find the paper, but, assuming this motion to have been set down for hearing under rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), the defendant has leave to apply for an extension of time in which to file its answer.

In re METROPOLITAN JEWELRY CO.

In re MEYROWITZ.

(District Court, S. D. New York. January, 1914.)

BANKRUPTCY (§ 345*)—CLAIMS—PRIORITY.

Claimant, who had charge of the affairs of the bankrupt corporation in the absence of the general manager, who represented his wife, who was a stockholder and creditor, and who was substantially a partner of the general manager, was not entitled to priority under Bankr. Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563 (U. S. Comp. St. 1901, p. 3448).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. § 345.*]

In Bankruptcy. In the matter of the bankruptcy of the Metropolitan Jewelry Company. Claim of one Meyrowitz for priority under Bankr. Act, § 64b (4), disallowed.

See, also, 216 Fed. 385.

Thomas Fleming Walsh, of New York City, for trustee.
William J. Miller, of New York City, for claimants.

On Claim for Priority.

MAYER, District Judge. The testimony in this case discloses that Meyrowitz was so situated in regard to the bankrupt corporation that he was really in charge of the New York office during the absence of the claimant Magid, and bought and sold the goods of the corporation and had full charge of its affairs in Magid's absence. It is perfectly apparent that Meyrowitz was really the representative of his wife, who, according to her testimony, had advanced \$1,500 to the company. Claimant's wife testified that she had been a stockholder in the bankrupt corporation since August, 1910, but that she never got any stock. Her testimony indicates that she knew nothing about the business, and it is entirely clear that this corporation was to all intents and purposes a partnership so far as the participants themselves were concerned, although the business was conducted under the familiar and convenient form of corporate entity.

The testimony, in my view, does not warrant the conclusion that the claim falls within subdivision 4 of section 64b of the Bankruptcy Act. The amount claimed does not represent wages due to a workman or a clerk, or a traveling or city salesman, or a servant. This beneficent provision of the statute should not be stretched to cover the claims of principals in disguise.

On all the evidence I find myself unable to agree with the referee, and the claim will be disallowed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On Reconsideration of Claim for Priority.

I have reconsidered this motion, in view of the argument of earnest counsel for claimant that I had misapprehended the testimony, and also in view of his statement that the claimant was in very poor health and in poor circumstances. I am confirmed in my view that my decision is right. I did not, of course, mean that Magid and Meyrowitz were members of a partnership as a matter of law, but what I meant was that each had sufficient control and direction, so that he would not come under the privileged class covered by subdivision 4 of section 64b of the Bankruptcy Act. Apparently Magid was the more important man of the two, but nevertheless the duties of Meyrowitz and the whole relationship were such that he cannot be regarded as a privileged clerk.

The status of Meyrowitz is not to be determined by the size of the business. A man in charge of a very small business may be a principal, while, on the other hand, a clerk receiving a substantial salary in a large concern may be none the less a clerk protected by the section in question. I may say, further, that there is nothing which in any way reflects upon Meyrowitz. There is nothing in this record which shows that these men should not have conducted the business in corporate form, and I am dealing solely with the character of the duties of Meyrowitz.

Finally, it must be remembered that the burden of satisfying the court is on a claimant, and I am by no means satisfied that the evidence warrants the conclusion that Meyrowitz is entitled to the priority allowed under the section 64b.

In re METROPOLITAN JEWELRY CO.

In re MAGID.

(District Court, S. D. New York. January, 1914.)

BANKRUPTCY (§ 345*)—CLAIMS—PREFERENCES.

Claimant, who was general manager and treasurer of the bankrupt corporation, and who represented his wife, who owned the majority of the stock, was not entitled to priority under Bankr. Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. § 345.*]

In Bankruptcy. In the matter of the bankruptcy of the Metropolitan Jewelry Company. Claim of one Magid for priority under Bankr. Act, § 64b (4). Disallowed.

See, also, 216 Fed. 384.

Thomas Fleming Walsh, of New York City, for trustee.

William J. Miller, of New York City, for claimant.

MAYER, District Judge. The claimant, Magid, was the treasurer and general manager of the bankrupt corporation. The corporation

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
216 F.—25

was composed of his father, who was president and owned \$500 in stock, the claimant's wife, who held \$1,500 in stock, and one Smidrod, who held \$100 in stock, which shortly after the incorporation was sold to claimant, so that during practically the entire life of the corporation claimant was general manager, treasurer, and stockholder of the corporation, and represented his wife, who owned the majority of the capital stock of the corporation, in the management of the corporation.

It is apparent that Magid and Meyrowitz (whose claim has also been considered) were really partners so far as the management of the business was concerned. It is academic to say that they were in any sense such employés as are contemplated under subdivision 4, § 64b, of the Bankruptcy Act. The testimony demonstrates that Magid was to all intents and purposes the manager of the corporation, that the traveling which he did was of that incidental character, which is often done by a member of a firm, and that his efforts as salesman were the efforts, in effect, of a principal and not of an employé. I have already indicated my views upon this question in my memorandum in the Meyrowitz Case (D. C.) 216 Fed. 384, which will be filed contemporaneously herewith.

There are, of course, many instances where a man is really an employé, and for some purpose of convenience holds a share of stock, or is asked to act upon a board of directors; but there are a good many other instances, of which this is an example, where the corporation is really a family or friendly affair, and the so-called salesman, clerk, or manager participates in the active management of the corporation, and holds his position because, for some reason, it is deemed wise that the stock of the corporation be held by a relative or friend, instead of by himself. While, of course, in proper cases the priority contemplated by the statute should be enforced, yet, on the other hand, it is important that the court should look through mere forms, to the end that the claims of general creditors should not be subordinated to so-called priority claims which are asserted by persons who really are principals.

The claim of Magid is disallowed.

ARTHUR v. MARYLAND CASUALTY CO.

(District Court, D. Massachusetts. July 31, 1914.)

No. 508.

REMOVAL OF CAUSES (§ 84*) — REMOVAL PROCEEDINGS — NOTICE — OMISSION — REMAND.

Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1095 [U. S. Comp. St. Supp. 1911, p. 142]) § 29, providing that written notice of intent to file a petition and bond for removal shall be given to the adverse party prior to filing the same, is mandatory, so that an unexcused failure to give such notice is ground for remand.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 164; Dec. Dig. § 84.*]

At Law. Action by Rachel Arthur against the Maryland Casualty Company. On motion to remand. Granted.

Sullivan Bros., of Lawrence, Mass., for plaintiff.

Edward I. Taylor, of Boston, Mass., and J. W. Britton, of Hartford, Conn., for defendant.

DODGE, Circuit Judge. It is not disputed that the transcript of record filed here affirmatively shows the necessary jurisdictional facts to warrant removal. The plaintiff is a citizen of Massachusetts, the defendant a citizen of Maryland, and the amount involved more than \$3,000, exclusive of interest and costs. The necessary bond has been filed and accepted by the state court. But the defendant did not give the plaintiff "written notice of said petition and bond for removal * * * prior to filing the same," as required by section 29 of the Judicial Code. There is nothing to excuse the omission; and the plaintiff, who cannot be said to have waived the requirement, now insists upon the failure to comply with it as a ground for her motion to remand.

Under such circumstances it has been held in *Goins v. Southern Pacific Co.*, 198 Fed. 432, *Loland v. Northwest Stevedore Co.*, 209 Fed. 626, and *Wanner v. Bissinger & Co.*, 210 Fed. 96, that the requirement is mandatory, and failure to comply with it ground for remanding the case. These are District Court decisions. In *United States v. Sessions*, 205 Fed. 502, 123 C. C. A. 570, the Court of Appeals for the Sixth Circuit evidently took the same view, though it denied an application for mandamus to a District Court which had refused to remand for want of written notice. In *Potter v. General Baking Co.* (D. C.) 213 Fed. 697, there had been a written notice, and the only question was as to its sufficiency. Even if I did not agree, as I do, with the view that a case cannot be retained in the federal court unless the written notice has been duly given or waived, there can be no question that the doubt as to the right to retain it is substantial and must be resolved against the jurisdiction here. *Goins v. Southern Pacific Co.* (D. C.) 198 Fed. 432, 436.

The motion to remand is granted.

HELLER v. TEALE, Public Adm'r, et al.

(District Court, E. D. New York. June 27, 1914.)

1. BASTARDS (§ 104*)—INHERITANCE THROUGH ILLEGITIMATE DECEDENT—CONSTRUCTION OF NEW YORK STATUTE—"RELATIVES."

New York Real Property Law 1896 (Laws 1896, c. 547) § 289, relating to descent, provides that "if an intestate, who shall have been illegitimate, die without lawful issue * * * the inheritance shall descend to his mother; if she be dead, to his relatives on her part as if he had been legitimate." Code Civ. Proc. N. Y. § 2732, in force in 1908, relating to distribution, provides that "if the deceased was illegitimate, and leave a mother, and no child, or descendant, or widow, such mother shall take the whole. * * * If the mother of such deceased be dead the rela-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tives of the deceased on the part of the mother shall take in the same manner as if the deceased had been legitimate." *Held*, that the effect of such provisions is to make all those who could, in case of a legitimate decedent, inherit or receive property through the lines of descent and distribution, by a relationship established on the part of the mother, in case of an illegitimate decedent, competent and entitled to receive the property to the same extent and by the same channels of inheritance as if the deceased had been legitimate; that, failing direct descendants of the mother, or brothers, or sisters, of the mother living, descendants of her deceased brothers and sisters are "relatives of the deceased on the part of the mother," and as such entitled to inherit both real and personal property under the statute.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 251, 257-262; Dec. Dig. § 104.*

For other definitions, see Words and Phrases, vol. 7, pp. 6054-6058; vol. 8, p. 7783.]

2. DESCENT AND DISTRIBUTION (§ 21*)—PERSONS ENTITLED—"NEXT OF KIN."

As used in the law governing descent and distribution of personal property, the phrase "next of kin" (the husband or widow not being included within those words) includes collaterals and their representatives or descendants.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 57-62; Dec. Dig. § 21.*

For other definitions, see Words and Phrases, vol. 5, pp. 4798-4804; vol. 8, p. 7732.]

Suit by Marie Heller on her own behalf, etc., against Charles E. Teale, individually and as public administrator of the county of Kings, upon the goods, etc., of Eleonore K. Bader, deceased, and others. Decree in favor of one of the several groups of claimants.

William P. Maloney, of New York City, for plaintiff Heller.

Henry F. Cochrane, of Brooklyn, N. Y., for defendant Teale and another.

Rounds, Schurman & Dwight, of New York City (Carl A. Hansmann, of New York City, of counsel), for defendants Vasseux and others.

M. E. Finnigan, of Brooklyn, N. Y., for Eleanor A. Monahan.

John M. Zurn, of Brooklyn, N. Y., for Lulu and Frank E. Bader.

Wilson R. Yard, of Pleasantville, N. Y., for Katherine F. Bader.

Coudert Brothers, of New York City, for Marie Yersin and another.

Thomas Carmody, Atty. Gen., and Joseph W. Keller, Deputy Atty. Gen., for the People of the State of New York.

Ralph Underhill, guardian ad litem, of Brooklyn, N. Y., for Georgette Bader.

CHATFIELD, District Judge. This action arises from opposing claims to certain property left by one Eleonore F. Bader, who died in Brooklyn, December 27, 1908. Letters of administration were issued to Charles E. Teale, as public administrator of Kings county, upon the 29th day of December, 1908, and a general statement of the personal property left by the decedent has been reported to the court in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

this action by the said administrator. Mr. Teale was also appointed receiver of the realty and is in possession thereof.

It appears from the report and from the testimony that the personal estate of the decedent consisted of savings bank accounts established in the name of herself individually or jointly with her first husband; but it will not be necessary to consider at this time, specifically, the source from which, and the date at which, these various items were accumulated or earned.

The time of acquisition and the method of acquirement of the decedent's interest in the real estate also need not be considered until its course of devolution by statute is settled.

The first questions which must be disposed of have to do with the family history and the rights of the various parties to the suit, with respect generally to the personality and real estate of which the decedent died possessed and seized.

At the time of her death, Mrs. Bader had been a widow since the death of her second husband, Ernest G. Bader, upon the 5th day of April, 1882. No children of *this marriage* survived Mrs. Bader's death, but the said Ernest G. Bader left a last will and testament, duly probated in Kings county upon the 24th of April, 1882, by which all of *his* property was left to his children by a *previous* marriage. Mrs. Bader was survived by two children of his deceased son (George D. Bader), viz., Frank E. and Georgette Bader (a minor who is represented by Ralph Underhill as guardian ad litem), Lulu Bader (widow of George D. and later wife of Charles A. Bader), a second son, George B. Bader and his wife, Katherine F. Bader (George B. Bader has since deceased), and a third son, Charles A. Bader. Charles A. Bader has also died since December 27, 1908, and left him surviving, his widow (said Lulu Bader) and a daughter, Eleanor A. (Bader) Monahan, who was born prior to said December 27, 1908. Lulu Bader has appeared in this action as administratrix, etc., of both George D. and Charles A. Bader, and Eleanor A. Monahan has therefore not been made a party to the action.

It is unnecessary to discuss at this time the individual shares or rights of the Bader claimants as against each other. They as a whole represent the claims of the devisees, next of kin, and heirs at law of Ernest G. Bader, deceased, to the extent that his children by the former marriage might be interested, as next of kin, devisees, or heirs at law in the estate left by his second wife. None of the real estate standing in the name of Mrs. Bader at her decease was purchased by Ernest G. Bader, deceased, nor by Mrs. Bader during his lifetime, and whatever real property Mrs. Bader had before her marriage with Ernest G. Bader had been retained by her as her separate estate, having been in her possession at the time of her marriage with Ernest G. Bader in the month of December, 1877.

Mrs. Bader executed papers under the name of Eleonore Bader and Eleonore F. Bader. She is described in the death certificate as Eleonore Belleville Bader, and in the administration papers relating to the estate of Ernest G. Bader as Eleonore B. Bader. In certain other instruments executed during Mr. Bader's lifetime, she was described as Eleonore K. Bader. It appears from the testimony in this case that

Mrs. Bader's baptismal name was Françoise Eleonore Bonneville, and that she was born on the 10th of October, 1830, at Paris, France. The name Eleonore F. Bader is apparently a transposition of her maiden names, while the word "Belleville," used by the Bader family, would seem to be a mistake or inadvertent reference to the family name Bonneville, for which the initial "B" in Mrs. Bader's name must have stood. The "K" shown in some of the papers came from the name Kress. As to this name the facts and dates appear to be as follows: Françoise Eleonore Bonneville came to the United States when she was about 25 years of age, and married upon the 10th day of July, 1856, in Brooklyn, a German naturalized citizen of the United States by the name of Theodore Kress, who died upon the 7th of March, 1870, and was buried in a plot purchased by his widow in Brooklyn. Theodore Kress had boarded in Paris with the mother of Françoise Eleonore Bonneville, and came to the United States shortly before her coming to this country. During his lifetime certain real estate was purchased and title taken in their joint names, but with a provision that it was to be held to them and their heirs forever. They also made deposits in at least two savings banks in the joint name of both depositors, and at the time of Mr. Kress' death he left a will by which he devised all of his property of every nature to his widow, the probate papers showing that it was less than \$10,000 in amount. No children were born of the marriage of Theodore Kress and Françoise Eleonore Bonneville.

From 1870 to 1877 Mrs. Kress continued her work as a dressmaker (which occupation she had previously followed); and her estate seems to have increased until and after the period during which she married, and lived as the wife of, Ernest G. Bader.

Theodore Kress was a child by the second wife of a resident and citizen of the German Empire, who had three sons by his first wife, viz., Edward, Ferdinand, and Charles, but all of whom were dead before the death of Eleonore F. Bader, upon December 27, 1908. Theodore Kress' father had also by his second wife four other children. One of these, a daughter Fannie, died prior to the death of Mrs. Bader. A second daughter, Frederica, married one Simonet. She died prior to the death of Mrs. Bader, leaving a son, Thomas (living in Paris), a daughter Elisabeth, married to one Fischer (living in Liverpool, England), and a daughter Marie, married to one Heller and living at Strasburg, Germany). These children were all living at the death of Mrs. Bader, and presumably are still living. Marie Heller is the plaintiff in the present action. A second son, Emile, married and died before the death of Mrs. Bader, leaving a daughter, Marie Kress, who has lived much of the time in the United States, and is the principal witness in this case, with respect to the relationship of the members of the Kress family. She is a citizen of the United States, and lives part of the time in France. Another daughter, Henriette, married one Yersin, and died before the death of Mrs. Bader, leaving three children, Paul, Marie, and Jeanne, all of whom were living at the time of the death of Mrs. Bader, and presumably are still living.

It further appears from the testimony that Françoise Eleonore Bonneville was the daughter of one Marguerite Bonneville, who died Jan-

uary 25, 1864, in Paris, and to whom a monument was erected by her daughter, Françoise Eleonore, while she was the widow of Theodore Kress. At that time a perpetual right to the lot in the cemetery was paid for and taken in the name of Mrs. Kress. A birth certificate of the daughter Françoise Eleonore was kept in her possession, but the particulars as to the parents have been torn therefrom. The original birth and baptismal record shows that she was the daughter of Marguerite Bonneville, barterer, but no father is mentioned. The death record of this Marguerite Bonneville states her to have been the widow of Jean Gilles Mury, and the testimony shows the marriage on October 15, 1815, of Marguerite Bonneville with Jean Gilles Murie, the birth of a child, Françoise, on the 22d of July, 1817, a child, Toussaint Augustin, on the 27th of December, 1818, and a child Rose, upon the 28th of April, 1820. Murie (or Mury) died upon the 17th of July, 1828, and the records of his estate show that the part not going to his widow went to a sister married to one Jeux, residing in Normandy, and showing by exclusion or by the omission, and from the provisions of the French law at that time, that no living heirs of the body of Jean G. Murie were then in being. It is also shown that the records of deaths prior to 1830 in the city of Paris were destroyed by fire. There is therefore no evidence that the three children above referred to as the result of the union of Marguerite Bonneville and Jean G. Murie were living at the time of his death. On the contrary, the presumption is that they were known to have died prior to that date. His widow was living and continued to live in the same house in which she had been living with her husband, and where more than two years later the child Françoise Eleonore Bonneville was born, whose estate is now in process of litigation.

It is thus apparent upon the testimony that Françoise Eleonore Bonneville was not the child of Jean G. Murie, was apparently born out of wedlock, and was illegitimate under the French law. Her mother was the fourth child of Pierre Bonneville by his second wife, Jeanne Breton (or Beurton). Other children of this marriage were Marie Jeanne, who died in 1783, Anne, who died in 1853 (part of whose estate went to her sister Marguerite Murie), and Catherine, who married one Thiellement. Catherine Thiellement had four sons and daughters, who were married and who had children, all of whom died prior to the death of Mrs. Bader, except Louise Françoise Vasseux, a party to this action.

Pierre Bonneville, by his first wife, Marguerite Grenon, had five children, Nicolas, who died February 11, 1773, Marie, who died November 5, 1775, another Nicolas, who died January 5, 1777, a son Didier (who married and had children), and a daughter Marie Madeleine (who married one Nicolas Manivert, and had children). The children and grandchildren of Didier Bonneville were all deceased prior to the death of Mrs. Bader. Marie Madeleine Manivert had two sons and two daughters, none of whom were living on December 27, 1908. Each of these four children, however, had been married. The oldest child (Jean Baptiste Manivert) was the father of three children: (1) Marie Eugénie (who married Nicolas H. Barbaras); (2) Marie Madeleine (who married Alphonse M. Royer), and who has a daugh-

ter, Elisa Amanda Hyacinthe (the wife of Emile Doise), and a son, Camille Elysic Adrian; and (3) Elize Stanislas, who died November 4, 1844. The Marie Madeleine Royer above named died in 1911, and Frank V. Kelly was appointed in Kings county administrator of her estate. The oldest daughter of Marie Madeleine Manivert was also named Marie Madeleine, and married Claude Toulouse, having one son, Alexandre Jean Baptiste, who died prior to December 27, 1908. The second daughter of Marie Madeleine Manivert was named Marie Elisabeth, and married one Nicolas Vinot. She had a son, Jean Baptiste Vinot, who married one Leonie A. Le Bar, and had one son, Nicolas Du Paul Vinot, who is still living. Jean Baptiste Vinot has died since December 27, 1908, and Frank V. Kelly has been appointed administrator in Kings county of his estate. The fourth child and second son of Marie Madeline Manivert was named Nicolas Antoine Manivert. He married and had four children, one of whom (Marie Madeleine Aurelie, the wife of Felix Frederic Clement) is still living. The other three children of said Nicolas A. Manivert died prior to December 27, 1908. Hence Marie Eugenie Barbaras, Elisa Amanda Hyacinthe Doise, Camille Elysic Adrian Royer, Elize Stanislas Manivert, Nicolas Du Paul Vinot, Marie Madeleine Aurelie Clement, and Louise Francoise Vasseux, of the descendants of Pierre Bonneville, are collateral relatives by the whole or half blood of Marguerite Bonneville, mother of Francoise Eleonore Bader, were living at the time of taking testimony in this action, and are citizens and residents of France.

One of the descendants of the Kress family, viz., Elizabeth M. Fischer, is a resident of Great Britain, while Marie Heller resides in Strasburg, Germany, Thomas Simonet and the three Yersin children reside in France. Marie Kress has been a citizen and resident of the United States for many years but is now apparently living in France. The Baders are all citizens and residents of the United States.

Some query was raised by the certificate of birth of one Alexandrine, child of Margaret Bonneville, a domestic, but living at a different address than that of Marguerite Bonneville, the wife of Jean G. Murie, said Murie being then living. This child was born at a lying-in hospital, upon the 20th of February, 1818, and no further record as to this child or her mother has been presented. It is evident that the mother is not the same individual as the widow Murie, and no further attention need be paid to the apparently illegitimate child, Alexandrine.

The plaintiff filed her bill on behalf of any other person similarly situated who might choose to join in the action, and named as defendants (including those who have since been brought in) all parties then in being who could be found (either heirs or next of kin or statutory recipients) who might present any claim to either the real or personal property of Mrs. Bader upon the face of the testimony, or even after a possible determination against the claim of any of the other parties.

The state of New York is entitled, under any aspect of the case, to receive payment of an inheritance tax, which must be determined in accordance with the disposition of the estate. But the state of New

York claims further title through escheat of parties capable of taking title to the real estate. Section 10, Real Property Law of New York (Consol. Laws, c. 50), and section 1977, Code of Civil Procedure. It is evident that the Bader family would be subject to no such disqualification, and that the law of escheat could not apply to them.

In the case of the Kress family, all but Marie Kress seem to be citizens and residents of foreign states. The plaintiff resides in Alsace-Lorraine, which is not included in the Kingdom of Prussia or any of the German states with which this country has a treaty with reference to the rights of aliens to inherit. There is no treaty of this sort with the German Empire and no statutes of that country have been proven. Others reside in Paris, and one of them is said to reside in England, with rights under Stat. 33 Vict. ch. 14. This has been held to comply with the New York statute above cited. *Haley v. Sheridan*, 190 N. Y. 331, 83 N. E. 296. In the case of the descendants of Pierre Bonneville, the testimony shows that a treaty with France is in existence and in force, under which alien citizens of France are assured of the legal rights accorded by the statute of New York to citizens of those countries who allow inheritance by aliens of lands within that country, and therefore there would be no disability on the part of the Bonneville descendants to inherit the realty, so far as any claim on the part of the state of New York to the right thereto by the doctrine of the statute of escheat is concerned.

If there should be a determination that the Kress family have some interest in the realty, then the shares of the respective parties, or the question of which one might take, would require further hearings at the foot of the decree herein.

As to the personality, there is at present no disability on the part of a foreigner, citizen either of France, Germany, or England, to inherit by statute or bequest; and, as the parties are all properly represented in this action, the state of New York would seem to have no interest beyond that of the transfer tax above mentioned.

Some of the Bader family did not appear on the trial or put in a formal answer, and in general the attorneys for the Bader family have relied upon the propositions presented on behalf of Mrs. Heller and the Kress family. We shall therefore take up the general question as to whether the property should go to the Bonneville descendants as a class, or should go to the collateral heirs and next of kin of the deceased husbands of Mrs. Bader.

It is evident, if the property belongs to either the Kress or the Bader families, or both, that any further inquiry as to the specific portions of the property coming from the estate of either husband, or from that husband during his life, and the effects thereof upon the disposition of the entire property, can be left either for later consideration or for further disposition upon a reference or at the foot of the decree.

In the same way, there is no need of now discussing the proposition that Ernest G. Bader died leaving direct descendants, while Theodore Kress left only collateral descendants, and that if the two sets of claimants were being considered from the standpoint of their degree of relationship to the individual through whom they claim, the Bader

claimants are less remote. Nor need we discuss the proposition that the Bader claimants can more easily prove the right in opposition to a claim of escheat than can claimants who are citizens of foreign countries.

Another question which may be postponed to depend upon the determination of the main issue is the title which Mr. and Mrs. Kress, respectively, had to the savings bank deposits standing in their joint names and to the real estate to which title was taken in their joint names. In the case of a savings bank deposit, the survivor, in the absence of any express direction, would be entitled to the deposit. But even then, it might well be considered property of which the source was to some extent at least the efforts or industry of the other party to the account. In the case of the real estate, the language of the deed by which one parcel was conveyed to Theodore Kress and his wife would indicate that, while they took title jointly (and in the case of husband and wife this would create an estate by the entirety), nevertheless the instrument might be construed as creating interests in common, and, if so, Mrs. Kress (subsequently Mrs. Bader) received her husband's share of this property under his will and not by the original grant. But, again, the consideration of this question will depend upon the determination of the main issue, and, if necessary, can be taken up at the foot of the decree or on accounting.

The provisions of the New York law with respect to the inheritance of real estate, in modification of the common law of descent and the statutes of distribution with respect to personal property, also in modification of the common law, together with the statutes defining the relatives or representatives of the deceased and the next of kin, control the determination of the issue in this case, and substantially the entire controversy between the several sets of parties is based upon interpretation of these statutes.

At present the Consolidated Law of 1909, c. 13, in the chapter known as the Decedent Estate Law, provides, in sections 80 to 97, for the devolution of real property of an intestate, and in sections 98, 99, and 100 as to the distribution of personal property. These sections are a re-enactment of sections 2732 and 2734 of the Code of Civil Procedure, and of sections 281 to 291 of the Real Property Law of October 1, 1896; all previous laws being repealed. But the Consolidated Law went into effect upon the 17th of February, 1909, and the provisions of the New York Code and the statutes with relation to the descent of real estate, as they existed in the year 1908, control the rights of the parties and their interests in the estate at the time of the death of Mrs. Bader. As a matter of fact, so far as all questions herein concerned are involved, the law of inheritance or distribution of real or personal property, in effect at the present time, is no different from that in effect at Mrs. Bader's death, and no question can arise as to the method of distribution on that basis.

The sections (the language of which must be considered) are as follows (with respect to real estate):

Section 281, which provides for the descent of real estate: (1) to lineal descendants; (2) to father; (3) to mother; (4) to collateral relatives.

Section 286: "If there be no father or mother capable of inheriting the estate, it shall descend in the cases hereinafter specified to the collateral relatives of the intestate."

Section 287: "If all the brothers and sisters of the intestate be living, the inheritance shall descend to them."

Section 288: "If there be no heir entitled to take, under either of the preceding sections, the inheritance, if it shall have come to the intestate on the part of either father or mother, shall descend to the brothers and sisters (or to their descendants) of the father and mother of the intestate."

Section 289: "If an intestate who shall have been illegitimate die without lawful issue, * * * the inheritance shall descend to his mother; if she be dead, to his relatives on her part, as if he had been legitimate."

Section 291: "In all cases not provided for by the preceding sections, the inheritance shall descend according to common law."

Section 294: "A person capable of inheriting under the provisions of this article, shall not be precluded from such inheritance by reason of the alienism of an ancestor." Chapter 481, Laws of 1901, added a section (290a):

"When the inheritance shall have come to the intestate from a deceased husband or wife, as the case may be, and there be no person entitled to inherit under any of the preceding sections, then such real property of such intestate shall descend to the heirs of such deceased husband or wife, as the case may be, and the persons entitled, under the provisions of this section, to inherit such real property, shall be deemed to be the heirs of such intestate."

As Mrs. Bader died long after both husbands, no question of title by courtesy is involved, and as Ernest G. Bader left no real estate, no dower rights entered into the matter through the marriage with him. The will of Theodore Kress, leaving his entire property to his widow, takes out of the case any dower rights on her part in his estate, and if he and she were tenants by the entirety of the piece of real estate purchased during their joint lives, title thereto vested in her at his death. Inasmuch as they left no children, and as the law relating to real property makes no provision (except by section 290a) for collateral relatives of a husband, with respect to real estate of the wife, the title to the real estate in this case would seem to rest between the ostensible heirs of Mrs. Bader and the state of New York, except for any property received by her from Theodore Kress, and as to that the question is similar to the proposition as to personal property. The relatives of Theodore Kress and the sons of Mr. Bader by his first wife would be entitled to the property only which had been inherited by Eleonore F. Bader from their father in any case, and in which his wife would have had a life or dower interest. But where the property is the wife's in fee, by purchase or by survivorship, and where the husband predeceases the wife, the relatives of the husband can have no interest, under the express terms of the Real Estate Law, and the provisions, applying the rules of common law in cases not provided for, help neither the Bader nor Kress claimants; for at common law the rule with respect to the real estate in question would be no different. Inasmuch, therefore, as the state of New York is ready to

take some or all the real property by escheat, if there are no persons entitled, the objection presented is twofold: (1) With respect to the alienism of the various claimants, which in general has been previously disposed of; and (2) the claim that the illegitimacy of Francoise Eleonore (otherwise called Eleonore F.) Bonneville left her with no statutory heirs or next of kin at the time of her death, her mother having predeceased her, leaving no other children.

Again, it is evident that at common law, no one could claim relationship, heirship, or kinship to or through an illegitimate, and we must construe the statutes above referred to with respect to the descent of the real property. See *Miller v. Miller*, 91 N. Y. 315, 43 Am. Rep. 669.

The statute of distribution in force at the time of Mrs. Bader's death provided that personal property not bequeathed by will—

"must be distributed to his widow, children, or next of kin, in manner following:

"1. One-third part to the widow, and the residue in equal portions among the children, and such persons as legally represent the children if any of them have died before the deceased.

"2. If there be no children, nor any legal representatives of them, then * * *

"3. If the deceased leaves a widow, and no descendant, parent, brother or sister. * * *

"4. If there be no widow, the whole surplus shall be distributed equally to and among the children, and such as legally represent them.

"5. If there be no widow, and no children, and no representatives of a child, the whole surplus shall be distributed to the next of kin, in equal degree to the deceased. * * *

"6. If the deceased leave no children and no representative of them, and no father, and leave a widow and a mother. * * *

"7. If the deceased leave a father and no child or descendant. * * *

"8. If the deceased leave a mother, and no child, or descendant. * * *

"9. If the deceased was illegitimate and leave a mother, and no child, or descendant, or widow, such mother shall take the whole and shall be entitled to letters of administration in exclusion of all other persons. If the mother of such deceased be dead, the relatives of the deceased on the part of the mother shall take in the same manner as if the deceased had been legitimate, and be entitled to letters of administration in the same order.

"10. Where the descendants, or next of kin of the deceased, entitled to share in his estate, are all in equal degree to the deceased, their shares shall be equal.

"11. When such descendants or next of kin are of unequal degrees of kindred, the surplus shall be apportioned among those entitled thereto, according to their respective stocks; * * *

"12. No representation shall be admitted among collaterals after brothers and sisters descendants. * * *

"13. Relatives of the half-blood shall take equally with those of the whole blood in the same degree; and the representatives of such relatives shall take in the same manner as the representatives of the whole blood.

"14. Descendants and next of kin of the deceased, begotten before his death, but born thereafter. * * *

"15. If a woman die, leaving illegitimate children, and no lawful issue, such children inherit her personal property as if legitimate.

"16. If there be no husband or wife surviving and no children, and no representatives of a child, and no next of kin, then the whole surplus shall be distributed equally to and among the next of kin of the husband or wife of the deceased, as the case may be, and such next of kin shall be deemed next of kin of the deceased for all the purposes specified in * * * this chapter; but such surplus shall not, and shall not be construed to, embrace any per-

sonal property except such as was received by the deceased from such husband or wife, as the case may be, by will or by virtue of the laws relating to the distribution of the personal property of the deceased person."

Section 2732 of the Code of Civil Procedure of New York.

By section 2734, the same provisions were made applicable to the personal property of married women dying leaving descendants them surviving, and the husband of any such deceased married woman was made entitled to the same distributive share in the personal property of his wife as that to which a widow was entitled in the personal property of her husband.

If Mrs. Bader had been a legitimate child, her personal property could not have passed to either the Bader or Kress heirs. She left no husband and no children, no parents, and no brothers and sisters, at which point "representation" would stop under section 2732, paragraph 12. But she did leave "next of kin," viz., descendants of brothers and sisters of her mother who, if she had been legitimate, would have been relatives of the whole blood, and the line of descent would never have reached the provision which was added September 1, 1901, by chapter 410 of the Laws of 1901, by which if there be no husband or children or representatives of a child, and no next of kin,

"then the whole surplus shall be distributed equally to and among the next of kin of the husband or wife of the deceased, as the case may be, and such next of kin shall be deemed next of kin of the deceased for all the purposes specified in this chapter."

This provision is further limited to personal property received by the deceased from a husband or wife by will or by virtue of the laws of distribution. Under the latter provisions, all of the personalty could not have been distributed to the Kress or Bader claimants, respectively, but some parts thereof might have been traced to those sources.

As there is no disability on the part of aliens with respect to sharing in the personalty of a decedent, we have therefore the single question raised by the illegitimacy of Mrs. Bader, upon which the entire contention of the Kress and Bader claimants is made to rest.

It should be remarked, in passing, that the allegation by some of the Bader claimants of a lost will or a trust fund has been supported by no appearance on the trial and no evidence whatever, and therefore need not be taken up.

As has been said, no substantial difference is shown whether we are considering the right of the Bonneville family to the real estate or to the personal property, for if entitled, they are entitled to both, as the issue now stands. Further, unless it is apparent that they are not entitled, none of the other parties to this action have any claim, except, as has been already stated, a transfer tax is due to the state of New York.

The objection on the part of the Kress and Bader claimants to the claims of the Bonneville family must be considered in two ways. They allege that, as relatives and next of kin of the deceased husbands, they are entitled to such share as they would be entitled to if they were the next of kin of the decedent, Eleonore F. Bader, and also they contend that there are no such next of kin, and that therefore the provi-

sions relating to the relatives or next of kin of the deceased husbands become of some effect. Both of these propositions depend upon the interpretation of the statutes with respect to the meaning of the words, "the relatives of the deceased on the part of the mother shall take in the same manner as if the deceased had been legitimate" (section 2732, subdivision 9), or "if she be dead, to his relatives on her part, as if he had been legitimate" (section 289, Real Property Law). The word "relatives" is broader than the term "next of kin," and may include a husband or wife. *Public Administrator v. Peters*, 1 Bradf. Sur. (N. Y.) 100; *Lathrop v. Smith*, 24 N. Y. 417.

Emphasis is laid upon the phrases "next of kin of the deceased" and "*his* relatives on her part." It is urged by the Kress and Bader claimants and by the state of New York that relationship or kinship with the deceased is limited to those persons who are named as relatives or next of kin in the inheritance and distribution statutes, and that it does not include all collaterals or persons who might be deemed related or next of kin to the mother. *McCool v. Smith*, 66 U. S. (1 Black) 459, 17 L. Ed. 218. In other words, that an illegitimate child has no relatives or next of kin lawfully related, but that certain named parties may receive the estate "in the same manner as if the deceased had been legitimate," but without thereby being made relatives. They cite *St. John v. Northrup*, 23 Barb. (N. Y.) 25, *Bollerman v. Blake*, 24 Hun (N. Y.) 187, and *Stevenson v. Sullivant*, 18 U. S. (5 Wheat.) 206, 5 L. Ed. 70, as proving that brothers and sisters of the deceased illegitimate are the only relatives left by the deceased "on the part of his mother." It is said that this phrase "on the part of his mother" means a relative descended from the mother who is the beginning of the illegitimate chain of relatives.

Stevenson v. Sullivant, *supra*, was a case arising from a claim by illegitimate children of the mother to property of a legitimate child dying intestate. It was held that the capacity of bastards to inherit and to transmit inheritance "on the part of their mother" as if they had been lawfully begotten meant that they would inherit from their mother and transmit it to *their line* as descendants. It is said that the property of the deceased never vested in the mother, so that it could not be transmitted from her to the bastard, or from the bastard through the mother to those who might thereafter inherit from her. This is said to be the meaning of "transmit inheritance on the part of the mother." But the case at bar is much different. Here the phrase defines "relatives on her part," if and in case she be dead.

The Virginia statute was really equivalent only to the New York statute, giving the mother of the illegitimate the right to receive property, if living, or to transmit it to the illegitimate at her death. The *Stevenson Case* says that the bastard, even under the Virginia statute, could have no *father*, *brother*, or *sister*. To the same effect is *Croan v. Phelps*, 94 Ky. 213, 21 S. W. 874, 23 L. R. A. 753.

Inheritance by illegitimates from collaterals is impossible. *Croan v. Phelps*, *supra*; *Matter of Mericlo*, 63 How. Prac. (N. Y.) 62. But the converse does not follow. The doctrine of reciprocal treatment as to illegitimates is unsound. The statutes providing for the descent of property from illegitimates were passed long after the other general

provision of descent and distribution, but before the law making the descendants of a deceased husband next of kin or heirs for certain property, and are to be taken strictly, not as being based upon any doctrine of thereby enlarging the rights of an illegitimate to receive property from any one but the mother. In *re Belcher*, 149 N. Y. Supp. 479, Surrogate's Court, Kings County, 1909; *Bacon v. McBride*, 32 Vt. 582.

But even if the natural or blood relation to the mother is made a connecting step for the naming of certain relatives or next of kin of the mother as persons entitled to the property of the illegitimate, then the Kress and Bader claimants urge that strict interpretation limits the descent of the property to the "relatives" of the illegitimate, on the part of the mother; that is, to persons "descended" from her. As has been seen, the ones who were her descendants died before the illegitimate in this case. They say that the words, "shall take in the same manner as if the deceased had been legitimate," refer merely to the proportionate shares or the method of taking, and that the provision allowing letters of administration relates back to the same individuals as those who are named as relatives or next of kin. The Bonneville claimants, on the other hand, assert that no difference under the New York statutes is created by the use of the word "relatives of the illegitimate on the part of the mother." They cite the case of *Kiah v. Grenier*, 56 N. Y. 220, and *Matter of Lutz*, 43 Misc. Rep. 230, 88 N. Y. Supp. 556, as authority for the proposition that if a relationship or kinship is established to legitimate children or brothers or sisters or father or mother of the female parent of the illegitimate person, then the words "take in the same manner as if the deceased had been legitimate," and the words "relatives on the part of the mother," or "relatives of the deceased on the part of the mother," include all those who under the law of descent or distribution can receive property. The plaintiff cites the case of *Jackson v. Jackson*, 78 Ky. 390, 39 Am. Rep. 246, to the effect that "relatives of the illegitimate on the part of the mother" is not as broad a phrase as "relatives through the mother," and they cite the case of *Little v. Lake*, 8 Ohio, 290, to the same effect.

[1] But the law of New York seems to make no distinction, and the Ohio case recognizes that fact. Under the language of the statutes, and considering the gradual recognition of the rights of illegimates as individuals (or the gradual attempt to relieve them from the harsh penalties imposed by the common law, for that as to which they and the mother's *relatives* are not responsible), the provisions of the statutes as interpreted by the courts of New York make all those who would inherit or receive property, through the lines of descent and distribution, by a relationship established on the part of the mother of the decedent, competent and entitled to receive the property to the same extent and by the same channels of inheritance as if the deceased had been a legitimate child.

It is evident that the father (not being recognized as a relative, even though known, and in the eyes of the law being unknown so far as the right to inherit is concerned, because of his wrongdoing) cannot, without special legislation, be considered in the category of a relative or next of kin for the purpose of receiving property in spite of his wrong.

But, as has been said, the innocent persons who are recognized by the law as relatives through the mother, should not be penalized in a mere attempt to preserve the common-law idea that an illegitimate person could be related to no one. If the relationship is recognized for the purpose of allowing certain relatives to inherit, no public policy and no advantage from a moral standpoint will be achieved by increasing the stigma upon the illegitimate, with the collateral members of the family, while softening the feelings of those near enough to inherit a portion of the property. In fact, the opposite method of distribution might have more influence upon those who are directly responsible for the existence of the illegitimate person.

[2] The provisions of the law relating to distribution and descent in general have been in effect many years and were adopted long before the provisions allowing those related to an illegitimate to take the property. In the case of personal property, the distribution has thus, for a long time, been to the widow, husband, children, or next of kin, and "next of kin" (the husband or widow not being included within those words) included collaterals and their representatives or descendants. In the case of real property, after the father and mother, all collateral relatives are made heirs, and the words "relatives of the deceased on the part of the mother," when added to a statute by which all the collaterals are relatives or next of kin, would seem to mean simply relatives of all degrees on the side of the mother.

Chapter 489 of the Laws of 1913 of New York extends the law of descent by preventing escheat where stepchildren are in being. This shows the tendency of the law, but also indicates that before this statute escheat might have resulted, and does not help the Kress or Bader claimants.

Nor is there any merit in the contention that this use of the word "relatives" would be enlarging the term "relatives" so as to include all of the next of kin within the provisions of the New York statutes when referring to those who may be entitled. When it is considered that the husband and wife are expressly added, there would seem to be no point in the difference between the words "relatives" and "next of kin" in determining the persons that are referred to by these various provisions.

If, therefore, the collateral members of the Bonneville family and their descendants were within the terms of the New York statutes of descent and distribution, at the time of the death of Mrs. Bader, and if all of those individuals were to be considered relatives of Mrs. Bader on the part of her mother, and if the living relatives could inherit and take as next of kin, then the provisions of section 2732, subdivision 16, which would distribute some part of the surplus equally between the next of kin of the prior deceased husbands of the deceased, would never be called into application, either with respect to the property received through the deceased husband or otherwise. This section adds the relatives of the deceased husband to the next of kin of the decedent, by the provision that "such next of kin shall be deemed next of kin of the deceased," which of course does not make them relatives; but, on the other hand, they are not made "next of kin." They are merely to be *deemed* next of kin for the purposes of

the statutes, with respect to the property received from that prior deceased husband. They cannot receive other property in any event, and cannot be considered "next of kin" so as to prevent the happening of the contingency which must occur before they can even receive the share which came from their relative. This disposes of the only claim of the Kress and Bader families to the *entire personal* property. Inasmuch, therefore, as under the statute of descent the Bonneville claimants took as relatives, and under the laws of distribution as next of kin or relatives of the decedent (Matter of Davenport, 172 N. Y. 454, 65 N. E. 275), there was no failure of persons entitled to take.

The Kress and Bader claimants can never be "deemed next of kin," so as to share in the surplus, and they are not to be called in to prevent an escheat upon the failure of other persons entitled. In fact, they could only partially defeat escheat, if they were right in their contention that the Bonneville claimants should be excluded.

It is evident that Mrs. Bader kept the mutilated birth certificate (having years after her arrival in this country erected a monument to her mother, while concealing from her husbands' relatives the exact relationship existing between herself and the Bonneville family) from a realization of her position. The chance remark credited to her that her mother had ten children would seem to be a mistaken repetition of some enumeration or statement as to the branches of the Bonneville family. It all goes to show that Mrs. Bader lived throughout the years of her life in full appreciation of the situation, and yet made no testamentary provision for the Kress or Bader families. She must be presumed to have known that as between the Kress and Bader relatives, or as between those families and the Bonneville family, a designation by will would transmit her property as she might wish. Her failure to make such disposition may indicate that she desired them to receive nothing, or may indicate that she realized that the relationship through her mother could be traced, and did not wish to interfere with the rights of those who might be entitled by law to whatever property she might leave.

The state of New York will be paid the legal tax, and the balance of the property will be decreed to belong to the "Bonneville" claimants as they may be included or as their interests may be made to appear in the decree to be entered or proceedings at the foot thereof.

HAMILTON MFG. CO. v. TUBBS MFG. CO. et al.

(Circuit Court, W. D. Michigan, S. D. October 20, 1908.)

No. 1577.

1. INJUNCTION (§ 56*)—SUBJECTS OF PROTECTION—TRADE SECRETS.

To entitle a complainant manufacturer to protection against the use of its unpatented machines and methods by others, it must appear that they are in fact secret, and it is not entitled to an injunction to restrain the use of machines copied from its own by another manufacturer, which obtained its information respecting the same from former employes of complainant, who were not informed and had no knowledge that the same were secret.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 110; Dec. Dig. § 56.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexer
216 F.—26

2. TRADE-MARKS AND TRADE-NAMES (§ 93*)—UNFAIR COMPETITION—SUIT FOR INJUNCTION.

Evidence *held* insufficient to establish the charge of unfair competition by a defendant by making, advertising, and selling articles which were imitations, except in minor details, of those made and sold by complainant and to entitle complainant to an injunction.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104-106; Dec. Dig. § 93.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNFAIR COMPETITION—USE OF SIMILAR TRADE-NAME.

The use by defendant of the name "New Idea" for a type case made and sold by it *held* not so similar to the name "New Departure," used by complainant for a similar article as to constitute unfair competition, the cases themselves being different in several respects, and each bearing the maker's name.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

Imitation or simulation of trade-mark or trade-name as unfair competition, see note to John H. Rice & Co. v. Redlich Mfg. Co., 122 C. C. A. 447.]

4. TRADE-MARKS AND TRADE-NAMES (§ 68*)—UNFAIR COMPETITION—COPYING FROM COMPETITOR'S CATALOGUE.

The fact that defendant, a competing manufacturer, in making its catalogue copied cuts and descriptive matter, relating to articles which it might sell as well as complainant, from complainant's catalogue as well as from those of other manufacturers, *held* not an invasion of complainant's rights which entitled it to an injunction.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 79; Dec. Dig. § 68.*]

In Equity. Suit by the Hamilton Manufacturing Company against the Tubbs Manufacturing Company and others. On final hearing. Decree for defendants.

Taggart, Denison & Wilson, of Grand Rapids, Mich. (L. J. Nash, of Manitowoc, Wis., and Geo. E. Waldo, of Chicago, Ill., of counsel), for complainant. Knappen, Kleinhans & Knappen, of Grand Rapids, Mich. (M. B. Danaher, of Ludington, Mich., and Burke & Craite, of Manitowoc, Wis., of counsel), for defendants.

SATER, District Judge (sitting by designation). The court is indebted to counsel for their painstaking abstracts of the voluminous record. They have discussed the case with ability. The conflict of evidence, however, as to many points, is so sharp, and the interest of many witnesses is such, that I read the entire record to enable me the better to determine the questions of fact.

Whether the complainant's machines and processes of manufacture were secret or not is the first question which I shall consider.

J. E. Hamilton testified that strangers were always prevented from going through the complainant's factory, that they might not see its special machines and methods of work. He says there were shop secrets which he did not wish to give to the public; that he further wished to avoid interference with his workmen; that every foreman in the factory talked to him a good many times about the admission of strangers; and that it was thoroughly understood between him and them that the principal reason for the exclusion of strangers was to prevent disclosures as to special machines and methods of manufac-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ture. De Lill, one of the complainant's foremen, testified: "A. I was told to keep strangers out without a pass. Q. Told by whom? A. By Mr. Hamilton, and also our people without a pass, because they interfered with the workmen." He admitted strangers, as well as residents of the vicinity, on passes, with a warning to the latter not to interfere with employes too long. In the instructions given him non-interference with the workmen was alone impressed upon him. The conclusion is deducible from his testimony as a whole that both strangers and residents were sometimes admitted to the factory without passes. He is credited, however, by the defendant Kurtz with having excluded from the factory Hamilton's former partner. Wiese, another of complainant's foremen, understood the purpose of the pass system, which was introduced in 1893, to be to keep men from talking to the workmen and seeing certain machines. Johannes, another foreman, understood the purpose of the pass system to be to keep people from seeing how things were made and what was done, and says that Hamilton instructed the foremen to enforce the rule requiring visitors to have passes. His source of knowledge upon this point is not stated. He excluded from the factory Nash, a stockholder in the complainant company, because he was without a pass and unknown to him. Frank Kaufman, the complainant's superintendent, understood the purpose of the pass system to be to avoid the disclosure of ways of work and secret machines and to prevent any interference with the workmen.

Objection was interposed to Wiese and Kaufman giving their understanding, on the ground that it was the statement of a conclusion. None of the last three witnesses testified when or from whom he obtained his understanding of the purpose of the pass system, or on what facts it rested. None of the last four witnesses testified that Hamilton instructed him that the exclusion of visitors or the purpose of the pass system was to hold secret any of the complainant's machines or methods of manufacture. Wiese and Kaufman make no mention of having received from him any instructions whatsoever.

Considering now the defendant's witnesses, Gagnon, the complainant's former draftsman and designer, testified that all he knew about the pass system, and the only reason known to him for its existence, was that the employes should not be diverted from their work by visitors. Anton Kaufman, a former foreman of the complainant, testified that the object of the pass system was to avoid interference with workmen. Neither of these witnesses was interrogated as to the source of his knowledge regarding the purpose of the system. Kaufman never heard it said by Hamilton, or the superintendent, or any foreman, that the special machines were to be kept from the eye of strangers, nor did he ever hear such idea expressed. Kurtz, also a former foreman of complainant, testified that the pattern room was not kept secret, that both workmen and strangers were admitted to it, some having passes and some not, and that the public was sometimes excluded and sometimes not. His testimony does not consist with the complainant's position.

The conflict in the testimony of the above-named witnesses is such that the consideration of other facts and circumstances disclosed by the record becomes important.

The eight machines named in the bill, excepting the slat rounding machine, which was installed in 1899, were all put into operation from one to six years prior to the inauguration of the pass system. The case boring machine was introduced in 1887; the case frame routing machine in 1888; the slat slotting machine in 1888 or 1889; the disc joiner and endwood machine in 1892; the reglet machine and the machine for sizing and smoothing slats not earlier than 1890 or later than 1892. These machines were principally made in Hamilton's shops. There is no evidence that any secrecy was enjoined on any person employed in drafting designs, making patterns for the construction, or assisting in the construction of any of the last-named seven machines. When completed, the machines were all located as desired in the factory, were used by workmen without any communication made to them as to their secret nature, and were exposed to the gaze, not only of the employes operating the machines or workmen in the factory, but of visiting strangers and residents of the city. All that any one needed to do to acquaint himself with the machines, in so far as knowledge could be acquired by the sense of sight, was to enter the complainant's service. This statement, however, is subject to the modification arising from the fact that over each reglet, slat rounding, and endwood machine used by the complainant was a hood which concealed from view such machines' interior working and arrangement, but Hamilton himself testified that there was no other purpose in placing the hoods over those machines than to take care of sawdust. Concealment was an incident and not the design, because he says he does not claim that the hoods were to cover the machines to keep them secret. It is not shown or claimed that any notices or rules were posted, warning would-be sight-seers against intrusion, or enjoining employes against their admission, or that subordinates were informed by the management or foremen that any machine or method was deemed secret. It seems that the factory, during a portion of the time at least, was so insecurely guarded at night that the curious might, without great difficulty, have entered and gained access to the machines and other property now claimed to be secret. Visitors, whether strangers or residents of the vicinity, were supplied with passes, to which coupons were attached, admitting them to any floor of the factory. Some persons were allowed to go through the plant without passes. Employes, as well as visitors, were admitted to the pattern room, and the former would at times watch the work of drafting in the drafting department, and in some instances witness the preparation of blueprints. It is in evidence that such employes would move on as foremen appeared, but it is not affirmatively shown whether or not that was due to their knowledge of a system of secrecy or to a desire to avoid the appearance or consequences of loitering.

Although where an idea, or trade secret or system, cannot be sold or negotiated or used without a disclosure, it would seem proper that some contract should guard or regulate the disclosure, otherwise it must follow the law of ideas and become the acquisition of whoever receives it (*Bristol v. Equitable Life Assurance Society*, 132 N. Y. 264, 267, 30 N. E. 506, 28 Am. St. Rep. 568, citing *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664), it is not claimed that there was any

express contract made at any time with the defendants Gagnon, Kaufman, and Kurtz, or with any other employé in the complainant's factory to hold secret the machines used by complainant or its methods of operating the same, nor is it suggested by the record that either before or after the pass system was introduced any of the individual defendants or any other person in complainant's employ, unless it be Deitrick, was taken into or retained in the complainant's service or promoted to a higher position on condition of nondivulgence of any secrets, real or alleged, theretofore known or that might thereafter be acquired. Hamilton, it is true, testified that he had a "general understanding" with Deitrick, who aided in constructing one of the machines some five or six years before his testimony was given, not to build such a machine for another, and that he stipulated with a party at Coshocton, Ohio, for whom he built one of his machines, that such party should keep such machine away from the public and allow no one to see it as far as he was able, and should return the machine if he ceased to use it. Some such arrangement existed as to another machine furnished to another concern. But it is not shown that the existence of such "general understanding" with Deitrick, or the making or existence of any such contract or contracts as to the machines built for the use of others, was made known to the individual defendants or to any employé, subordinate or otherwise. It is affirmed on the one side, and denied on the other, that Kaufman assisted in making the patterns of the first reglet machine, and that he not only made the patterns for the new endwood machine, but that the idea of the machine itself originated with him, and was suggested by him to Hamilton. Whatever the fact may be in that respect, it is not claimed or shown by the record that there was any stipulation with any employé other than Deitrick that any ideas which Hamilton or such employé might advance should become the exclusive property of the complainant company. Kaufman, soon after entering the complainant's employ, began to make patterns, and continued in that capacity until the time of his resignation. He necessarily acquired an intimate knowledge of all the machines. One cannot read the record without conceding that the machines in question were well adapted to the use to which they were put; but, in view of the claim now made of their excellent and money-getting qualities, and of the inventive genius displayed in developing them, it is remarkable that those easily proved precautions which are ordinarily exercised to surround, with an air of secrecy, devices, formulæ, and the like, of a secret nature, were not invoked and maintained by the complainant to safeguard its property, if its machines and methods of manufacture were in fact deemed novel and secret. There is force in the contention that the failure of the complainant to avail itself of the ordinary safeguards employed in factories having trade secrets is attributable to its having adapted old ideas and well known and extensively used woodworking machines to the requirements of its particular needs. The number of factories providing goods of the kind manufactured by the complainant was so limited as not to meet the wants of manufacturers of such goods, and yet machines doing the same character of work and involving the same principles found in the complainant's machines were in common use in

woodworking establishments. For instance, the center boring machine was a well-known device, and used for different purposes by woodworkers. Complainant adapted it to its use by reducing it in size and devising the centering device. The disc joiner is a double disc sander, but the use of disc sanders long antedated complainant's employment of the same. The endwood machine is a combination and adaptation of two ordinary machines, the Berlin sander and the Daniels planer. The reglet machine is a double drum sander, with such modifications and additions as suited it to complainant's purposes, but double drum sanders were not novel.

Frank Kaufman, on cross-examination, after testifying as to the endwood, reglet, disc joiner, edge rounding, slat slotting, case boring, and case framing machines, stated that the only devices connected with any of those machines that he had not seen used on some kind of a machine for some purpose were the putting of sandpaper on a hard surface instead of a yielding one, and the use of the centering device in the boring machine.

Hamilton testified regarding the endwood machine that the one feature more than any other essential to its success is "the cementing or gluing of paper directly onto a hard and unyielding roll." Regarding the reglet machine he said, "the principal feature of this machine is in the unyielding surface of the drum, the same as in the endwood machine," and again he testified, regarding the endwood, disc joining, reglet and slat sizing and smoothing machines, that their principal feature is the use of sandpaper upon a hard, unyielding surface, which permits the cutting away of the stock instead of its mere smoothing. Again he testified, "The germ of the machines, of all these machines, our special machines, is the sandpaper."

The application, however, of sandpaper directly to the surface of a machine for cutting as well as smoothing purposes was practiced before any of the complainant's machines were devised or placed in service, and was superseded by the later method of interposing a cushion between the sandpaper and the machine's metallic surface. The principal feature of these machines was not novel, but well known. The testimony of Spencer, whom I believe to be a witness that is fair-minded, intelligent, and of large experience, places this question of want of novelty beyond the realm of doubt. If it be conceded that the peculiar adaptations devised by the complainant, such for instance, as the centering device on the center boring machine, or the iron block used as a chip breaker in the case frame routing machine, cannot be lawfully used by others who did not originally invent or devise the same, it is clear that the machines, stripped of complainant's respective peculiar devices, may be used by others, and the evidence shows that other effective devices, accomplishing the same purposes, readily suggest themselves to a mechanic of ordinary skill. Eliminating such peculiar devices, none of which appear to have been the principal feature of the particular machine to which it was attached, Gagnon, Kaufman, and Kurtz might have acquired knowledge of the principal features of the machines in question in the employ of any wood manufacturer doing a considerable business.

[1] In *Cincinnati Bell Foundry Co. v. Dodds*, 19 Wkly. Law Bul. (Ohio) 84, Judge Taft said:

"The property in a secret process is the power to make use of it to the exclusion of the world. If the world knows the process, then the property disappears. There can be no property in a process, and no right of protection, if knowledge of it is common to the world. It would be a violation of every right of an employé of a manufacturer to prevent the former from using, in a business of his own, knowledge which he acquired in the employ of the latter when he might have acquired such knowledge in the employ of other manufacturers. Indeed, a contract not to do so would probably fail of enforcement because in restraint of trade."

To grant to the complainant the exclusive use of a form of machine in common use, like, for instance, the disc joiner, the center boring machine, or any machine used for cutting or smoothing by means of gluing sandpaper to a metallic surface, would foster monopoly and exclude others from the use of well-known and much-used prior devices. To entitle it to protection against the use of its machines and methods of manufacture by others, it must appear that they are in fact secret, for, as said in *Hopkins on Trade-Marks*, 226:

"In every case where the plaintiff seeks protection for a trade secret, it must appear that it really is a secret. If a so-called secret process is lawfully known to others in the trade, no one will be enjoined from disclosing or using it."

See, also, *Cincinnati Bell Foundry Co. v. Dodds*.

So, too, to enforce on the individual defendants the duty of preserving the secrets, if any, pertaining to the complainant's business, it must be shown that they knew that its methods of manufacture and machines were in fact secret.

In the *Cincinnati Bell Foundry Co. Case*, supra, the rule is thus stated:

"If there was a secret * * * and he came to know it because he was foreman and had to know it that it might be used, and *knew that it was a secret*, then I am inclined to think that his obligation to preserve such secret as the property of his employer must be implied, even though nothing was said to him on the subject."

In *Westervelt v. National Paper, etc., Co.*, 154 Ind. 673, 678, 57 N. E. 552, it was said:

"If a person employs another to work for him in a business in which he makes use of a secret process, or of machinery invented by himself, or by others for him, but the nature and particulars of which he desires to keep a secret, and of which desire on the part of the employer the employé has *notice* at the time of his employment, even if there is no express contract on the part of the employé not to divulge said secret process or machinery, the law will imply a promise to keep the employer's secret thus intrusted to him."

Considering all the facts and circumstances developed by the record, the complainant has not, within the rules of evidence, established that its machines and methods of work were in fact secret, or that the individual defendants knew or had cause to believe that they were secret or intended to be held as such.

The Tubbs reglet machine is in such an exact similitude to the complainant's that it is strongly urged that the blueprint from which the

defendant company's machine was constructed was abstracted from the complainant's files. Anton Kaufman had long been a pattern maker for complainant. Shortly prior to the withdrawal of himself and Gagnon from the complainant's employ, the complainant constructed a new reglet machine, for which Kaufman made the patterns. He testified that after his resignation he noted down such of the dimensions of that machine as he could recall, and that from such notes and his recollection, the blueprint was made which he produced as a witness, and which was offered in evidence. In view of his experience, he would have been a dull man had he not been able to recall a considerable number of the machine's dimensions. Some of the patterns which he made for the Tubbs machine, he said, were not correct, but that with the assistance of the builder, the portions concerning which his patterns were at fault were wrought out and adapted to those which were correct. The machine is, in fact, a simple one. The chain of gear wheels gives it the appearance of being complicated, but the problem of the gear wheels would not be difficult for an ordinarily skilled mechanic. Kaufman knew the size of the drums. If, in addition, he knew the speed with which they were to move, the size and location of the gear wheels became an easy problem. As a pattern maker he could not make patterns from the blueprint without supplementing what is shown on it by other knowledge, for the blueprint gives no dimensions. It is not the work of a skillful draftsman. It is not correct in all its parts, as appears from the screws shown in the rear of each gear wheel. As Gagnon made a blueprint for the complainant company after its machine was partly built and while having access to it and complainant's other reglet machines of earlier construction, it is remarkable that he should have made such an error. If the complainant's theory be accepted, Kaufman was so dishonest as to pilfer the blueprint and so untruthful as to testify falsely, and yet so honest as to admit freely his possession of the blueprint and produce it in court, and thereby supply the evidence to establish his dishonesty and untruthfulness. This is more improbable than his version of the construction of the machine. I am not prepared to say that the reglet machine of the Tubbs Company was not constructed as Kaufman has stated.

[2] Considering next the charge that the defendant company is wrongfully manufacturing, advertising, and offering for sale certain articles which are mere imitations and reproductions of those of the complainant, whereby unfair competition in trade results, it will be noted that in many respects the evidence introduced by the contending parties as to the Tubbs New Idea case and the complainant's New Departure case does not conflict. Prior to the introduction of the New Departure case, cases consisted of a frame to which was nailed an ordinary single-piece basswood or poplar bottom, about three-eighths of an inch thick. Some cases were made by Morgan & Wilcox with such a bottom covered by manila paper. The cases, when shoved into the cabinet, slid crosswise of the grain on their bottoms. The bottom of each rested on the slide, whether wooden or steel, that supported it in the cavity. The slats in the cases were put in grooves cut upward from the bottom inner edge of the frame. The type compartments and

internal arrangement of the old cases were precisely the same as in the two cases in question. What the Hamilton company did in the way of modifying the old style of case was to substitute a three-ply veneer bottom about three-sixteenths of an inch thick, instead of a single-piece bottom. A groove was made in the frame to receive the bottom, extending upward, from which were other grooves to receive the slats, which were to be locked in the case by the bottom. The bottom was also tacked to the frame. The groove in which the bottom was inserted being somewhat above the lower edge of the frame, that portion of the frame constitutes a slide on which the case moves when being shoved into or drawn from the cabinet. The grain of the under layer of the veneer bottom is so arranged that the case slides with, instead of across, the grain of the bottom. The paper covering on the bottom and the other features of the old cases are retained. The New Idea case differs from the old style case in the use of the three-ply veneer bottom, which is held in position, not by a groove, but by being nailed to the frame. The reduction in the thickness of the bottom permits the lower portion of the frame to serve as a slide, and, as I understand, the grain of the lower layer of the veneer bottom runs with that of the case. The paper covering of the bottom was omitted. One manufacturer, Simonds, now out of business, formerly made the same sort of case as the Tubbs Company manufactures, excepting that he retained the paper covering of the bottom. The old style case was manifestly standard. "Departure" is defined in the Century Dictionary, "Deviation or divergence, as from a standard rule or measurement." The Hamilton company in fact made a deviation or divergence in the manner above indicated from the standard form of goods. "Idea," as defined by the same authority is: "A conception of what is desirable or ought to be, different from what has been observed." The Tubbs Company case expresses the originator's conception of what he deemed desirable, different from what had been observed. Every element embodied in it had been utilized in previously manufactured cases, but in no one style had all the elements found in it been combined. The complainant cannot successfully claim an exclusive right to the use of a three-ply veneer bottom. Neither can it deprive another of the privilege of nailing the bottoms of his cases to the frames, if he so desires.

[3] As regards the names of the two cases, a trade-name appeals to the ear rather than to the eye. *N. K. Fairbank Co. v. Luckel, King & Cake Soap Co.*, 102 Fed. 327, 42 C. C. A. 376. The names are not so similar as to confuse or deceive the ordinary purchaser giving such attention as such purchaser usually gives in the purchase of goods. The case made by each party bears the maker's name. The bottom of the one is covered with manila paper. In the other such covering is wanting. No effort has been made to sell the defendant's case as that of the complainant. The ordinary purchaser buying with ordinary caution will not, I think, be deceived into mistaking the manufactured article of the one for that of the other.

It is conceded that a considerable part of the goods manufactured by both corporations are standard goods, but it is urged that the defendant company not only needlessly imitated the New Departure

cases, but other articles manufactured by the complainant, and to such an extent as to render the two makes of goods indistinguishable to the purchaser of ordinary intelligence. It is admitted that the complainant copied standard goods made by others, and in working out its designs bought the goods of other manufacturers to ascertain how they were made, and "usually improved upon them before putting them on the market." For instance, a steel-run stand made by another manufacturer was purchased, improved upon, and made the basis of complainant's article. So the plow and press manufactured by another was adopted without any very material alteration. This seems to be not unusual in the case of unpatented articles. The bottoms of the steel-run cabinet and printer's cases manufactured by the complainant are covered with manila paper. Those made by the defendant company are not so covered, and the cases are cut away a trifle from the lower part of the frame. The cases made by the complainant bear its name. Those manufactured by the defendant company bear its name. The pulls on the goods made by the Tubbs Company are different from those made by the complainant, and the name of the Tubbs Company is found on each pull. In some instances the beading on the defendant company's goods differs somewhat from that on the complainant's goods, and the finish is somewhat more glossy. It is not claimed or shown that the Tubbs Company has ever sold or offered for sale any of its goods as the product of the complainant. In general appearance and finish the goods of the one company are very similar to those of the other, but the articles made by each are so stamped as to clearly indicate their origin, and only the careless or ignorant purchaser can be deceived. *Diamond Match Co. v. Match Co.*, 142 Fed. 727, 74 C. C. A. 59. Each party has adopted a distinguishing mark to denote the origin of the production of its own goods, and thus to obtain the benefit of any good reputation which they may have or may acquire, but neither of them may distinguish its goods by such universal characteristics as belong to other goods of the kind which the general public have the undoubted right to use. From the necessities of the case, the goods of the parties must resemble each other in form, dimensions, and appearance. Neither can enforce an exclusive right as to the interior arrangements of its cases, nor as to the kind of wood or material of which they may be made, nor as to their style of finish, unless it be peculiar and out of the ordinary. Neither of the parties may appropriate to its own purposes any common and general characteristics of its goods—none of them being patented—to such an extent that the other may not freely use such characteristics in its own cases. *Globe-Wernicke Co. v. Fred Macey Co.*, 119 Fed. 696, 56 C. C. A. 304; *Marvel v. Pearl*, 133 Fed. 160, 161, 66 C. C. A. 226. From the testimony as a whole I am of the opinion that the defendant has not so demeaned itself as to justify enjoining it for too close an imitation of the complainant's goods.

[4] Regarding the cuts and pictures in complainant's catalogue and its circulars and advertising matter, which it is claimed the defendant company copied, it appears that the catalogue was not copyrightable. As a proper and necessary means of advertising, it was distributed to complainant's customers and used in soliciting trade, and was design-

ed to reach an indefinite number of dealers, who, in transacting their business, were at liberty to exhibit it to a still larger but indefinite number of purchasers. No implied contract, as charged in the bill, was shown with customers to whom the catalogue was sent, retaining ownership thereof in the complainant and prohibiting its gift by consumers to complainant's competitors. Representatives of the defendant company and of Binner, Wells & Co., of Chicago, who prepared the engravings for the defendant's catalogue, testified at length as to the various steps leading up to the production of the cuts from which the engravings were made. A great volume of testimony was introduced, on the one hand to show, and on the other hand to disprove, that the complainant's catalogue was, to a considerable extent, copied by the defendant company. Hammersmith made photographs of about 30 corresponding cuts in the complainant's catalogue, reduced them to the same size, and stripped them on gelatine films for comparison. There were found in some instances some minor differences in the cuts, but the sameness is too striking to be a mere coincidence. There is no denial of the use of the catalogue of the complainant and of other manufacturers in preparing that of the defendant company, but this seems to be a familiar practice to a considerable extent in the building of catalogues. The point on which the parties differ is the extent of such use. Whatever the extent and method pursued may have been, I am of the opinion that the defendant company drew considerably from the complainant's catalogue in the preparation of its own. Even errors found in some of the cuts of the complainant's catalogue appear in the cuts of the defendant. The Tubbs Company's catalogue was issued for the purpose of advertising its goods for sale and promoting its trade by the sale of its manufactured articles, and, such being the fact, if it did copy from complainant's catalogue cuts of articles which it might sell as well as the complainant, it committed no offense of which the court can take cognizance. *Baker v. Selden*, 101 U. S. 106, 25 L. Ed. 841; *Lamb v. Grand Rapids School Furniture Co.* (C. C.) 39 Fed. 474; *Mott Iron Works v. Clow*, 82 Fed. 319, 27 C. C. A. 250; *Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co.*, 155 N. Y. 241, 49 N. E. 872, 41 L. R. A. 846, 63 Am. St. Rep. 666.

Without enumerating the differences between the two catalogues, suffice it to say that they are so apparent as to preclude belief on the part of the customer of ordinary intelligence that the defendant's catalogue is an advertisement of the complainant's wares, and there was consequently no invasion in this respect of complainant's rights, nor was there any such invasion, on the facts of this case, by the defendant, by its copying from the complainant's catalogue and circulars descriptive matter, weights, dimensions, and the like, in so far as that was done. *Potter Drug & Chemical Corp. v. Pasfield Soap Co.* (C. C.) 102 Fed. 490.

Nor is the complainant entitled to relief because its catalogue was used by the defendant's traveling salesmen, as there is no evidence that such use was fraudulent or illegitimate. *Lamb v. Evans* (1892) 3 Ch. 462, 469, 470.

I do not deem it necessary to discuss the discount sheet gotten out by the defendant company under date of December 14, 1904, or the publications charged to be libelous, for, as the issuance and use of such sheet and of the matters charged to have been libelous were discontinued prior to the commencement of this action, and a disclaimer of further practices in those directions has been entered, injunction will not lie. *National Tube Co. v. Eastern Tube Co.*, 3 Ohio Cir. Ct. R. (N. S.) 459, affirmed by the Supreme Court without report, 69 Ohio St. 560, 70 N. E. 1127.

There are other charges of unfairness, even of dishonesty, a detailed discussion of which would unduly prolong this already lengthy opinion. Lomack's conduct in obtaining bits through another from complainant's factory was done at his own instance. Knowledge of his conduct has not been brought home to any of the defendants, and they should not be held responsible therefor. Although the bartender, Kurtz, did not know the contents of the paper package which he delivered to the defendant Kurtz, the evidence is strongly suggestive that such defendant sought and obtained routing bits from the complainant's factory through connivance with one of complainant's employes. It is not shown, however, that the defendant company ever used them or is using them now. If such bits were so obtained, the remedy, under the facts of the case seems to be in damages. *National Tube Co. v. Eastern Tube Co.*, *supra*.

As to the charge made concerning other bits, spying and trespassing on complainant's factory, the purloining of drawings, detail books, blueprints, Hebrew type patterns, dimension books, page specimen books, the effort to secure slide patterns, steel runs and moldings, and the inciting of strikes, the evidence is conflicting. The complainant's case rests on the charge of fraud. The presumption is in favor of the fairness of the conduct of the defendants and of the innocence of the accused, and the burden of proof is upon the party asserting the fraud to establish it. As regards the matters above mentioned and other charges concerning which testimony was offered, the proof is not sufficiently clear to justify the granting of the relief requested.

The parties to this action have waged a needlessly bitter rivalry. Persons connected with the defendant company have pressed close to the line of demarcation between fair and unfair competition. Some of their conduct is not commendable, but I do not believe the situation justifies the granting of an injunction. Some explanation for their conduct may be found in the threat of the complainant's chief officer—a threat which he would not say he did not make—that he would destroy the defendant company or bankrupt himself. Such a threat and action taken to render it effective cannot be approved.

An order may be entered dismissing the bill, at complainant's costs.

DAVIS v. BERRY et al.

(District Court, S. D. Iowa, E. D. June 24, 1914.)

No. 9-A.

1. CONSTITUTIONAL LAW (§ 203*)—EX POST FACTO LAW.

Acts 35th Gen. Assem. Iowa, c. 187, requiring performance of the operation of vasectomy on criminals who have been twice convicted of a felony, is not unconstitutional as an ex post facto law, though applicative to criminals convicted one or more times for a felony prior to the enactment of the statute.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 584-590; Dec. Dig. § 203.*]

2. INJUNCTION (§ 21*)—STATE LAW—INVALIDITY—INTENT NOT TO ENFORCE.

Where suit was instituted to restrain state officers from enforcing Acts 35th Gen. Assem. Iowa, c. 187, requiring the performance of vasectomy on criminals twice convicted of a felony on the ground that the act was unconstitutional, the fact that the order subjecting complainant to the operation had been rescinded on the advice of the Attorney General was not ground for refusal of the writ, since the Attorney General's opinion was advisory only, and not binding on the defendants or their successors in office, who might, in the absence of injunction, proceed to the enforcement of the law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 19; Dec. Dig. § 21.*]

3. INJUNCTION (§ 85*)—INVALID STATUTES—ENFORCEMENT—PRESUMPTIONS.

Though every officer acts at his peril under a statute which another claims is unconstitutional and void, where a person will suffer irreparable injury if the statute is enforced, it will be presumed that it will be observed, and an injunction should issue to enjoin its enforcement if invalid.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. § 85.*]

4. CRIMINAL LAW (§ 1213*)—CRUEL AND UNUSUAL PUNISHMENT.

Acts 35th Gen. Assem. Iowa, c. 187, providing for the performance of the operation of vasectomy on criminals twice convicted of a felony, is unconstitutional as providing a cruel and unusual punishment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3304-3309; Dec. Dig. § 1213.*]

5. CONSTITUTIONAL LAW (§ 318*)—"DUE PROCESS OF LAW"—HEARING.

Acts 35th Gen. Assem. Iowa, c. 187, providing for the performance of the operation of vasectomy on criminals twice convicted of a felony on an order of the state board of parole after a private hearing before the board not open to the public, and of which the prisoner is not advised until ordered to submit to the operation, is unconstitutional as a deprivation of due process of law, which means that every person must have his day in court, must be confronted by his accuser, and given a public hearing according to law in the regular course of its administration through courts of justice.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 949; Dec. Dig. § 318.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2227-2256; vol. 8, p. 7644.]

6. CONSTITUTIONAL LAW (§ 203*)—"BILL OF ATTAINDER"—PUNISHMENT FOR CRIME—VASECTOMY.

Acts 35th Gen. Assem. Iowa, c. 187, requiring performance of the operation of vasectomy on criminals twice convicted of a felony, is unconstitu-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tional as a "bill of attainder," in that it provides for the infliction of a punishment for past offenses by legislative act without a jury trial.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 584-590; Dec. Dig. § 203.*

For other definitions, see Words and Phrases, vol. 1, pp. 779, 780.]

In Equity. Suit by Adolph Davis against William H. Berry and others, constituting the Iowa State Board of Parole, Austin F. Philpott, the Iowa Penitentiary physician, and James C. Sanders, warden of said penitentiary, to restrain the enforcement of Acts 35th Gen. Assem. Iowa, c. 187, requiring the performance of vasectomy on criminals twice convicted of a felony. Decree for complainant.

George B. Stewart, of Fort Madison, Iowa, for complainant.

George Cosson, Atty. Gen., of Des Moines, Iowa, for defendants.

Before SMITH, Circuit Judge, and POLLOCK and SMITH McPHERSON, District Judges.

SMITH McPHERSON, District Judge. The complainant is a prisoner in the Iowa penitentiary. Defendants Berry, Howe, and Mott constitute the Iowa board of parole, Sanders is the warden, and Philpott is the physician of the penitentiary. The case is one of diversity of citizenship, with federal questions presented by a bill in equity with an application for a temporary injunction to restrain defendants as state officers from enforcing chapter 187 of the Acts of the Thirty-Fifth General Assembly 1913, authorizing a surgical operation called vasectomy on idiots, feeble-minded, drunkards, drug fiends, epileptics, syphilitics, moral and sexual perverts, and mandatory as to criminals who have been twice convicted of a felony.

[1] Complainant has been twice convicted of a felony, one of which was prior to the enactment of the statute in question (and in another state), and the other since (in this state), and for the latter he is now imprisoned. The defendant board of parole in February, 1914, made an order that the operation should be performed upon certain designated prisoners, including the complainant. This action was brought by the complainant for the purpose of enjoining each and every of the defendants from subjecting him to the operation. Since the action was instituted the board of parole, under a written opinion of the Attorney General of the state, has rescinded its order, and they and the prison physician say they will observe such opinion. The opinion of the Attorney General is based upon the proposition that the statute is *ex post facto* if either of the convictions was for an offense committed prior to the enactment of the statute. Complainant's counsel in argument conceded the statute is not an *ex post facto* one.

[1] The Attorney General was in error when he advised the board of parole that the statute in question is void by reason of it being *ex post facto*, except only as to prisoners who have been twice convicted for felonies committed since the enactment of the statute. The statute under any construction is not an *ex post facto* one. *State of Iowa ex rel. Gregory v. Jones* (D. C.) 128 Fed. 626; *Kelly v. People*, 115 Ill. 583, 4 N. E. 644, 56 Am. Rep. 184; *Commonwealth v. Graves*, 155

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Mass. 163, 29 N. E. 579, 16 L. R. A. 256; *Sturtevant v. Commonwealth*, 158 Mass. 598, 33 N. E. 648; *In re Miller*, 110 Mich. 676, 68 N. W. 990, 34 L. R. A. 398, 64 Am. St. Rep. 376; *Blackburn v. State*, 50 Ohio St. 428, 36 N. E. 18; *Moore v. State of Missouri*, 159 U. S. 673, 16 Sup. Ct. 179, 40 L. Ed. 301; *Cooley's Constitutional Limitations* (7th Ed.) 382; *State v. Dowden*, 137 Iowa, 573, 115 N. W. 211; *Graham v. West Virginia*, 224 U. S. 616, 32 Sup. Ct. 583, 56 L. Ed. 917. He is not being subjected to the operation for that which was by him done prior to the enactment of the statute, but because he voluntarily brings himself within a class covered by the statute, and he does this subsequent to the enactment of the statute.

The Attorney General also advised the board of parole that the statute should be so construed as to be applicable only to prisoners who have been twice convicted of felonies committed since the enactment of the statute. Section 26, article 3, of the Iowa Constitution provides that a statute shall take effect July 4th following its enactment, or, if enacted at a special session, then at the expiration of 90 days after adjournment, or, in case of a declared emergency, by the publication thereof. But the Attorney General, to maintain the proposition that the law is *ex post facto* as applied to one who was convicted the one time prior to the statute, is doing violence to the state Constitution by contending that the statute would be effective only as to any prisoner many years after its enactment.

[2] The defendant board of parole by rescinding the order subjecting complainant to the surgical operation, and the defendant warden and physician through the Attorney General, now insist that an injunction should not issue because it will serve no purpose. There are two answers to this: Death, resignation, and expiration of terms of office will bring other men into the positions now held by the defendants, who may not entertain the same views as these defendants. The opinion of the Attorney General is advisory only, and is not at all binding on either these defendants or their successors in office.

[3] Again, the statute in question provides that certain persons may be subjected to the surgical operation; but the latter part of section 1 provides that such operations *shall* be performed upon prisoners who have been twice convicted of a felony, such as the complainant. It is the duty of an officer to follow the mandates of the statute. Of course every officer must act at his peril under a statute that another party claims to be unconstitutional and void; but where a person will suffer an irreparable injury if the statute is carried out, the presumption is that such statute will be observed, and that an injunction should issue to enjoin the enforcement of a void statute. *Williams v. Boynton*, 147 N. Y. 426, 42 N. E. 184; *Osborn v. Bank*, 9 Wheat. 739, 840, 6 L. Ed. 204; 2 *High on Injunctions* (4th Ed.) § 310.

Complainant in his verified bill alleges that the statute is in violation of the United States Constitution in that it is in effect a bill of attainder, in that there is to be no indictment or trial; that the statute abridges his privileges, and that he is denied the equal protection of the laws; that he is denied due process of law; that the statute is in conflict with the Iowa Constitution in that the statute denies the inalienable right to enjoy life, liberty, and to pursue and obtain safety

and happiness, and that there is no jury trial awarded him; and that the statute provides cruel and unusual punishment.

[4] The case presents important questions. Statutes like this are of recent years, the first one upon the subject enacted less than 15 years ago. The question has been before appellate courts but twice. In one case, that of *State of Washington v. Feilen*, 70 Wash. 65, 126 Pac. 75, 41 L. R. A. (N. S.) 418, the statute was upheld. The court held that the punishment was not cruel or unusual in the constitutional sense. That case involved a most heinous offense, that of the ravishment of a female child, and the statute provided that in addition to life imprisonment the jury and the court might determine whether he should be subjected to the operation of vasectomy. So that on the question now presented there was due process of law in that the matter was judicially determined. The other case, by the Supreme Court of New Jersey, was that of *Smith v. Board of Examiners*, 88 Atl. 963. In that case the operation was to be performed upon a woman who was an epileptic, an inmate of a state charitable institution, and that court held that the statute was based upon an unreasonable police regulation, and denied to her and persons of her class the equal protection of the laws as guaranteed by the fourteenth amendment.

The sole purpose of the operation is to destroy the power of procreation. The operation as originally performed was that of castration. In the twelfth century Henry II declared it treason for any person to bring over any mandate from the pope or any one in authority in church affairs. This he made punishable as to secular clergymen by the loss of their eyes and by castration. Goldsmith's *History of England*, volume 1, page 88. In *Weems v. United States*, 217 U. S. 349, 377, 30 Sup. Ct. 544, 54 L. Ed. 793, 19 Ann. Cas. 705, the fact that castration was once inflicted is recognized, and see the case of *Whitten v. State*, 47 Ga. 301. There is a difference between the operation of castration and vasectomy: castration being physically more severe than the other. But vasectomy in its results is much the coarser and more vulgar. But the purpose and result of the two operations are one and the same. When Blackstone wrote his *Commentaries* he did not mention castration as one of the cruel punishments, quite likely for the reason that with the advance of civilization the operation was looked upon as too cruel, and was no longer performed. But each operation is to destroy the power of procreation. It is, of course, to follow the man during the balance of his life. The physical suffering may not be so great, but that is not the only test of cruel punishment; the humiliation, the degradation, the mental suffering are always present and known by all the public, and will follow him wheresoever he may go. This belongs to the Dark Ages.

As of course all persons concede that it would be better for society if some men did not beget children; diseased, deformed, mentally weak children, and criminally inclined, are brought into the world, oftentimes to their own shame and against the interest of the public. But are they not at the minimum? And must the marriage relation be formed, under these newly-conceived laws, based upon the brutalities of many centuries since, and be allowed to take the place of the marriage relation formed along the true lines? Must the marriage rela-

tion be based and enforced by statute according to the teachings of the farmer in selecting his male animals to be mated with certain female animals only?

It is somewhat difficult to define with precision what is cruel and unusual punishment in the constitutional sense. Usually the length of imprisonment following a conviction is within the discretion of the legislative body, and we have an extreme case in *O'Neil v. Vermont*, 144 U. S. 323, 12 Sup. Ct. 693, 36 L. Ed. 450, in which the judgment of the lower court was affirmed and the statute upheld. But quite a per cent. of the bar of the country are of the opinion that the dissenting opinion by Justice Field (concurring in by Justices Brewer and Harlan) was the stronger.

No doubt delegates to the conventions, in providing against cruel punishment, had largely in mind what Blackstone had then recently written, in volume 4, page 376, such as being drawn or dragged to the place of execution, emboweling alive, cutting off the hands or ears, branding on the face or hand, slitting the nostrils, placing the prisoner in the pillory, the ducking, the rack, and the torture, and, as in Spanish countries, crucifying. In a very few states of the Union the whipping post has been retained as a constitutional mode of punishment. But it will be found that the courts in those states have construed the statute thus imposing such punishment in the light of their history, and what has been done and was being done at the time of the adoption of their Constitution. No one can doubt but that under our present civilization if castration were to be adopted as a mode of punishment for any crime, all minds would so revolt that all courts without hesitation would declare it to be a cruel and unusual punishment. As we understand it, castration was never inflicted after the revolution of 1688. So that if, as some now contend, it is now competent for a Legislature to impose such punishment as existed by the common law, the validity of the statute providing for castration could not be upheld because that punishment was one imposed back of the time of the common law as, generally speaking, it comes down to us. In *O'Neil v. Vermont*, 144 U. S. 323, 12 Sup. Ct. 693, 36 L. Ed. 450, and *Weems v. United States*, 217 U. S. 349, 30 Sup. Ct. 544, 54 L. Ed. 793, 19 Ann. Cas. 705, and *In re Kemmler*, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519, all phases of the question are so presented as to leave nothing further to be said.

While it is true that there are differences between the two operations of castration and vasectomy, and while it is true that the effect upon the man would be different in several respects, yet the fact remains that the purpose and the same shame and humiliation and degradation and mental torture are the same in one case as in the other. And our conclusion is that the infliction of this penalty is in violation of the Constitution, which provides that cruel and unusual punishment shall not be inflicted.

This statute not only allows, but commands, the operation of vasectomy to be performed upon all twice convicted of a felony. A felony in Iowa is not only murder, arson, rape, counterfeiting, and other serious crimes known as felonies at the common law, but they have been much extended under the Iowa statute, and some things are

now felonies which until recently were misdemeanors, with trials before a justice of the peace, or else no crime at all, wife abandonment, cutting electric light wires, breaking an electric globe, obstructing highway, unfastening a strap in a harness, and other things. So that if a person commits two or more of these, he is to be subjected to the operation if this statute is enforced.

[5] And it is of no importance in argument whether the prison physician does this on his own motion or under an order of the state board of parole. The hearing is by an administrative board or officer. There is no actual hearing. There is no evidence. The proceedings are private. The public does not know what is being done until it is done. Witnesses are not produced, or, if produced, they are not cross-examined. What records are examined is not known. The prisoner is not advised of the proceedings until ordered to submit to the operation. And yet in many cases there will be involved a serious controverted question of fact. The records of two convictions may show the same name of the party or parties convicted; but there are many men of the same name, but which is no proof that the person in the one case is the same person convicted in the other case. It is common knowledge that many prisoners take assumed names. Who is to determine whether the various names represent one and the same person? And if one of the convictions was in another state, the question will arise whether it was for a felony. These are inquiries that must be held in the open with full opportunities to present evidence and argument for and against. To uphold this statute it must be affirmed that the board of parole or prison physician must hear the evidence and examine laws of other states without notice, and in the prisoner's absence, and determine these questions. And if determined adversely, the prisoner has no remedy, but must submit to the operation.

In the case at bar the hearing was a private hearing, and the prisoner first knew of it when advised of the order. Due process of law means that every person must have his day in court, and this is as old as Magna Charta; that some time in the proceedings he must be confronted by his accuser and given a public hearing. Or as was stated in *Leeper v. Texas*, 139 U. S. 462, 11 Sup. Ct. 577, 35 L. Ed. 225:

"Law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied."

Under the habitual criminal laws of the state, if a prior conviction is relied on, the same must be pleaded and established by the evidence. But we have cases, this one included, in which the prior conviction has not been judicially established. But in *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. Ed. 578, it was said that due process of law and the equal protection of the laws was secured if the laws operated on all alike, and that all persons subject to the laws are treated alike under the limitations imposed. And the same holding was made in *Duncan v. Missouri*, 152 U. S. 377, 14 Sup. Ct. 570, 38 L. Ed. 485. And see *Lowe v. Kansas*, 163 U. S. 88, 16 Sup. Ct. 1031, 41 L. Ed. 78; *Jones v. Brim*, 165 U. S. 184, 17 Sup. Ct. 282, 41 L. Ed. 677;

Magoun v. Illinois Trust, 170 U. S. 294, 18 Sup. Ct. 594, 42 L. Ed. 1037; *Railroad v. Matthews*, 174 U. S. 105, 19 Sup. Ct. 609, 43 L. Ed. 909. The cases are numerous and without conflict as to such holdings, and further citations need not be made.

[5] But assuming that the prior convictions all appear of record, and assuming there is no conflict in the testimony and no difficulty in reaching the conclusion, but little or no advance is made in determining the question. If it be said that the statute automatically decides the question and nothing remains for the prison physician to do but to execute that which is already of record, then the statute becomes a bill of attainder. One of the rights of every man of sound mind is to enter into the marriage relation. Such is one of his civil rights, and deprivation or suspension of any civil right for past conduct is punishment for such conduct, and this fulfills the definition of a bill of attainder, because a bill of attainder is a legislative act which inflicts punishment without a jury trial, as is fully discussed and held in the case of *Cummings v. Missouri*, 71 U. S. (4 Wall.) 277, 18 L. Ed. 356; *The Federalist*, No. 44, by Madison; Justice Samuel F. Miller on the Constitution, 584; *Watson on the Constitution*, 733-738.

We hold the statute to be void, and unite in holding that a temporary writ of injunction should be issued as prayed.

SMITH, Circuit Judge (concurring). The foregoing opinion is supported by a wealth of historical and other references, and I do not wish to dissent from any portion of it. But the Iowa law does not provide for a judicial investigation of the identity of the prisoner with the one previously convicted of a felony, as did the law in Washington, construed in *State v. Feilen*, referred to in the foregoing opinion. The fourteenth amendment to the federal Constitution provides that no state shall deprive any person of life, liberty, or property without due process of law. It seems so manifest to me that the law which provides that such operation (vasectomy or ligation of the Fallopian tubes) shall be performed by the physician of the institution or one selected by him upon any convict or inmate who has twice been convicted of a felony deprives the party in question of due process of law that it can scarcely be discussed. Suppose a person had been twice convicted of a felony and has served his entire time, and should subsequently be an inmate of the penitentiary unconvicted of any crime, but simply held there for safe-keeping, this law in its strictness would require the prison physician to perform the operation upon him in person, or by some person selected by such physician. It seems to me that the victim of this operation is so clearly deprived under this statute of due process of law that an injunction must issue, and I, therefore, express no opinion upon the other interesting questions presented.

UNITED STATES v. SALEN.

(District Court, S. D. New York. June 30, 1914. On Further Motion to Quash, July 9, 1914.) Nos. 6185, 6186.

1. PERJURY (§ 12*)—ELEMENTS—AFFIDAVIT AS TO KNOWLEDGE.

To make an importer guilty of perjury in making an affidavit that nothing had been to his knowledge concealed or suppressed, whereby the United States might be defrauded, it was only necessary that he should have knowledge of some document which, if known, would have led the United States to fix the customs duties higher than if the entry went through at the values fixed in the consular invoice, and it was not necessary that the suppression be in the entry or invoice, or that it be of a document which would, in the usual course, come to the authorities.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 55-61; Dec. Dig. § 12.*]

On Further Motion to Quash.

2. PERJURY (§ 25*)—INDICTMENT—MATERIALITY OF TESTIMONY.

In common-law prosecutions for perjury, the indictment must allege that the perjurious statement was material to the inquiry, which may be done by a simple allegation, or by pleading the facts, from which the court may determine its materiality.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 82-89; Dec. Dig. § 25.*]

3. PERJURY (§ 29*)—TRIAL—BURDEN OF PROOF.

In prosecutions for perjury, it is only necessary to plead and prove that the alleged perjurious statement was consciously false, and it is not necessary to plead or prove the true facts to which the false statement referred.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 97-106; Dec. Dig. § 29.*]

4. PERJURY (§ 11*)—ELEMENTS—MATERIALITY OF FALSE STATEMENT.

Within a statute making criminal any false statement in a customs declaration as to any matter material thereto, a statement as to the absence of any suppressed facts by which the United States might be defrauded was material.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 38-54; Dec. Dig. § 11.*]

5. PERJURY (§ 26*)—INDICTMENT—SETTING FORTH FALSE STATEMENT.

While an allegation, in an indictment for perjury, that accused made a willfully false statement without expressly indicating the false statement, is not ordinarily sufficient, where this allegation was preceded by allegations making it perfectly clear what the statement was, the indictment was not insufficient.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 90-94; Dec. Dig. § 26.*]

Herman A. Salen was indicted for perjury. On motions to quash the indictment. Denied.

H. Snowden Marshall, U. S. Atty., of New York City (Frank E. Carstarphen, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Erwin, Fried & Czaki, of New York City, for defendant.

HAND, District Judge. [1] I shall consider only the second question raised, i. e., whether it now appears that the indictment is defective in alleging that the defendant swore falsely in saying:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Nothing has been on my part, nor to my knowledge on the part of any other person, concealed or suppressed whereby the United States may be defrauded."

The clause must refer, I think, to information which, if known, would enable the United States to get larger duties than it would if the entry went through at the values fixed in the consular invoice. Knowledge of a suppressed invoice which in fact stated other values at the place of export, all would agree, would come within the clause. I can see no reason to limit the words to such an invoice; on the contrary, the fair meaning appears to me to include any document which, if known, would have led the United States to fix the duties at a higher figure. Of course, the United States must prove that the defendant knew that the document, if discovered, would have so resulted, and it may be hard to show that a document, designed only as the basis of sale values, would, if known, have resulted in such action by the United States. That, however, is not raised by this motion. The sole question here is whether the United States by any possibility could show that documents, like those here in question, would inevitably have set the authorities upon an inquiry which would have resulted in larger duties. If, as is suggested, it had appeared that there were, to the defendant's knowledge, continuous and parallel invoices setting out selling prices five times as great as the consular invoices, I should at once have regarded the consular invoices as fraudulent, had I been an appraiser. Were I a juror I should have no difficulty, I think in concluding that any man who knew of such invoices knew very well that they would provoke such action by the appraiser, and that their suppression, therefore, would defraud the United States of duty otherwise collectible. At least, I should ask for a very full explanation.

However, it is asserted that forms 3 and 4 show that the suppression must be in the entry or invoice. I am not prepared to assent to the proposition that, even if this were so, and the case arose under either form 3 or 4, it would not be a crime to swear to the declaration with such knowledge as is here alleged, but it is not necessary to go so far, because the phrase in forms 1 and 2 is purposely different. Under forms 1 and 2 the declarant must swear that neither he nor any one else has suppressed anything. Obviously this includes also matters which could not be included in the invoice, and refers to information which would not naturally be in the invoice. To interpose the words "in such entry or invoice" into forms 1 and 2 makes nonsense if only the declarant is to swear to it. Nor can I agree that the suppression must be of a document which would in usual course come to the authorities, as such invoices as these would not. If the declaration includes, as it does, matters extraneous to the invoice itself, it cannot be limited to other documents which usually come to the authorities, because usually no other documents do come, and the entry is made upon the consular invoice. The general purpose indeed of the declaration clearly is to search the conscience of the declarant and to require him to state all that he knows which any one is keeping from the authorities and which would result in higher duties. It would be narrow to seek to give it less than its natural scope. If a distinction is sought between failure to disclose and suppression or concealment, it is enough

for this purpose to refer to the fact that the United States here asserts that the figures corresponded between consular invoices and these documents, but that the correspondence was colorable and intended to deceive.

I am satisfied that the counts are sufficient on this point, and the motion is denied.

On Further Motion to Quash.

[2] The objection to the indictment is that there is no allegation that the Goetz invoice was material to the "purposes of the declaration." This indictment falls within subsection 6, which makes criminal any false statement in the declaration "as to any matter material thereto." In common-law prosecutions for perjury the indictment must allege that the perjurious statement is material to the inquiry, which may be done, either by an allegation simply (*Markham v. United States*, 160 U. S. 325, 16 Sup. Ct. 288, 40 L. Ed. 441), or by pleading the setting from which the court may determine the materiality (*Reg. v. Harvey*, 8 Cox's Cr. Cases, 99, *Ammerman v. United States*, 185 Fed. 1, 108 C. C. A. 1).

[3] I understand the argument to be that, not only must the contents of the statement be material to the entry, but that the truth must be so likewise. It is, of course, scarcely possible that the contents of the statement should be relevant and the truth be irrelevant, but the case might be proved without showing any facts relevant to the entry, except in so far as the declarant's knowledge itself were relevant. For example, it might abundantly appear from the defendant's speech, and conduct that his statement was false, without its appearing what were the true facts to which his false statement referred, and this would be quite enough to convict him. In this district at least, we never require the United States, in prosecutions for perjury, to commit itself to the truth about the subject of the statement, but allow it to allege merely that the statement was consciously false, and prove that fact in any way it can. *United States v. Freed* (C. C.) 179 Fed. 236. Many things might disprove the statement which would not prove the truth about its contents at all. Under this rule the United States need have said nothing at all about the Goetz invoice, or more than that the statement was consciously false. Other proof than the invoice no doubt will be produced upon the trial to show that Salen knew that its suppression might defraud the United States, but that need not be pleaded any more than the invoice need have been.

[4] Coming, then, to the real question, that is, the materiality of the content of the statement, there can be no doubt that the absence of any suppressed facts by which the United States might be defrauded was material to the action of the authorities. It gave them added assurance of the truth of the invoice, and enabled them to assume that it was a complete statement of the truth. It may be urged that the phrase used in this statute puts it out of the usual rule relating to perjury, and imposes a further duty. I cannot see the least reason for this; the "matter material" means, I think, the subject-matter or contents of the statement, not the facts to which the statement refers. It is no more than a provision that the statement shall itself be material. I do not mean that it cannot be made grammatically to refer to both

the statement and the true facts which the statement purported to cover, but one should interpret the law according to the custom in prosecutions for perjury, and not as though it created a new crime. Nor is there the least reason for compelling the United States in this case to expose its theory of the truth or its evidence upon the assignment of perjury, which does not apply in any other case.

[5] The assignment of perjury is not formally laid till the last paragraph of the indictment. There it is alleged that the defendant made a willfully false statement. Ordinarily this would not be enough, the false statement must be expressly indicated. However, the foregoing allegations in the indictment make it perfectly clear what the statement is. Indeed, in view of the allegations regarding the Goetz invoice, though they are evidentiary in character and so argumentative, I might have held the assignment of perjury good without the last paragraph. It is not necessary to hold that, because the indictment as a whole leaves not the slightest doubt that the defendant is charged with a consciously false statement in respect of the absence of any suppression. It makes no difference just where the allegations occur; I am not disposed to chop logic where the intent is apparent.

Motion to quash denied.

THE PERRY G. WALKER.

In re GILCHRIST TRANSP. CO. et al.

(District Court, W. D. New York. June 5, 1914.)

1. ADMIRALTY (§ 85*)—FINDINGS OF COMMISSIONER—REVIEW.

The rule that findings of fact made by a commissioner in an admiralty suit are presumptively correct, and that the burden rests on one attacking them to show error, applies not only where the witnesses appear before him and the testimony is conflicting, but also in cases wherein his conclusions are based on documentary evidence, and where the reviewing court has an equal opportunity for the exercise of individual judgment.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 619, 620; Dec. Dig. § 85.*]

2. SHIPPING (§ 210*)—PROCEEDINGS FOR LIMITATION OF LIABILITY—INTEREST.

Where the insurers of a vessel are the real petitioners in a proceeding for limitation of liability, the appointment of receivers in insolvency for the owner is not ground for disallowance of interest on the stipulated value, but when there has been undue delay in the proceedings, due largely to the fault of claimants, such fact may properly be taken into consideration in the allowance of interest.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 660; Dec. Dig. § 210.*]

In Admiralty. Petition by the Gilchrist Transportation Company, as owner of the Steamship Perry G. Walker, and by George A. Garretson and Samuel P. Shane, as receivers of said company, for limitation of liability. On exceptions to report of commissioner. Confirmed.

Convers & Kirlin, of New York City, and Charles B. Sears, of Buffalo, N. Y. (J. Parker Kirlin and Charles R. Hickox, both of New York City, of counsel), for petitioners.

Hermion A. Kelley, of Cleveland, Ohio (Hoyt, Dustin, Kelley, Mc-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Keehan & Andrews and George W. Cottrell, all of Cleveland, Ohio, of counsel) for Pittsburgh S. S. Co.

Clinton & Clinton, of Buffalo, N. Y. (George Clinton, Jr., of Buffalo, N. Y., of counsel), for Canadian Pac. Ry. Co.

Kenefick, Cooke, Mitchell & Bass, of Buffalo, N. Y. (Edw. H. Letchworth, of Buffalo, N. Y., of counsel), for His Britannic Majesty, as represented by the Government of the Dominion of Canada.

HAZEL, District Judge. This case comes before me upon exceptions filed by the petitioners to the report of the commissioner as to the amounts awarded by him to the Pittsburgh Steamship Company, owner of the steamship Crescent City, the Canadian Pacific Railway Company, owner of the steamship Assinoboia, and His Britannic Majesty, as represented by the government of the Dominion of Canada, owner of locks at Sault Ste. Marie, and as to the estimate made by him of the sound value of the steamer Perry G. Walker. In the brief submitted by proctors for the Pittsburgh Steamship Company, there is a suggestion that the latter is entitled to a preferential lien on the limitation fund as against the dominion government, and at the first hearing proctors for the dominion government contended on various grounds that the dominion government was entitled to a paramount lien on the fund. These contentions, however, were not pressed at the rehearing, and therefore, without dwelling at length upon the question of priority of claim, I hold that all the claimants are entitled to share pro rata in the fund, and that none of them is entitled to preferential payment, but that each is on a parity with the others.

According to the report of the commissioner, the steamship Crescent City was damaged to the amount of \$146,843.14, the Assinoboia to the amount of \$35,965.47, and the Canadian locks at Sault Ste. Marie to the amount of \$51,824.15; and the petitioner, the Gilchrist Transportation Company, owner of the steamer Perry G. Walker, was entitled to limit its liability to \$204,109.35, the damaged value of the Walker on June 7, 1909, including pending freight, amounting to \$1,831.26.

By agreement of the parties, as evidenced by a stipulation filed herein, it appears that on June 7, 1909, the steamer Walker, a large freight carrier, collided with the lower Canadian lock gates at Sault Ste. Marie, while the steamers Assinoboia and Crescent City were in the lock, or entering it, and, as the lock gates were broken by the violence of the contact, the downward rush of the water brought together with great force, first the Assinoboia and the Walker, and then the Crescent City and the Assinoboia; all three vessels being greatly injured, as were also the lock, lock gates, and banks. The collision concededly resulted entirely from the negligent navigation of the steamer Walker, although the resultant damage was without the knowledge or privity of her owner.

The contention of the petitioners is that the commissioner erred in refusing to find that the sound value of the Walker did not exceed the amount of \$185,000, and that the so-called damaged value did not exceed the sum of \$147,278.09. After careful consideration I have reached the conclusion that the exceptions to the report are untenable,

and that the sound value and damaged value of the steamer were correctly ascertained. The findings of fact of the commissioner are presumptively correct, even though the witnesses did not personally appear before him and give testimony.

[1] The general rule puts upon the petitioners the burden of proof that the commissioner was mistaken in his conclusions, and this rule I conceive applies, not only where the witnesses appear before him and the testimony is conflicting, but also in cases wherein his conclusions are based upon documentary evidence, and where the reviewing court has an equal opportunity for the exercise of individual judgment. I think that this presumption is not overcome by the testimony of the petitioners, and that there was sufficient proof to sustain the report. It may be that, if the evidence had been before me in the first instance, I might have found the sound value of the Walker to have been somewhat less, and perhaps have differently supported my conclusions (as to this I am unable to state positively); still in the record I discover no sufficient ground for modifying the findings or for differently chancering the items.

The petitioners criticize the commissioner for wholly disregarding the estimates of their witnesses as to the value of the steamer owned by them, but the criticism is not warranted by the proofs, and I am unpersuaded that he erred in that respect. His estimates were primarily based on the ordinary cost of constructing a vessel of the dimensions, burden, and type of the Walker at the time she was prepared for navigation. The testimony of the claimants clearly shows that her fair value at such time in fact exceeded the cost of her construction, since, according to the unequivocal testimony of the expert witnesses Calder and Logan for claimants, there was a saving of \$7,500 in the cost of building the Walker, because she was built under a contract for the building of eight vessels of similar dimensions and type, and that such saving was possible owing to the use of one set of drawings, patterns, molds, etc. The testimony of a contrary import is not entitled to as much weight as is the foregoing testimony, inasmuch as the witnesses for petitioners omitted from their calculations various items of expense necessarily incurred in the construction of a solitary vessel of the type, burden, and class in question, and which would have been incurred in the construction of the Walker, had she not been built under the contract already referred to. The commissioner, I think, rightly took into consideration what it would actually have cost to construct the Walker independently of the other seven vessels, and that a single construction would have incurred expenses for inspection, interest on payments, etc., which, under the contract, were distributed among the several boats. I am therefore of the opinion that the value of the Walker at the time of her completion exceeded the actual cost of constructing and fitting her for navigation.

I have also examined into the asserted depreciation in the value of the Walker on account of obsolescence on the ground that, subsequent to her construction, steel vessels were built with supporting arches in place of stanchions, but I do not think that this fact greatly lessened her value, or made her objectionable for transporting purposes or de-

creased her earning capacity. The evidence shows that, at the time she was built, her stanchions were of the latest type and were set back four feet from the hatch openings, thus facilitating loading and unloading, and overcoming the objections to prior vessels, wherein the stanchions were set close to the hatch openings. It is perhaps true that the later arch type of vessels possesses some advantages not possessed by the Walker or stanchion type of boat, but not so many as to appreciably affect the value. As well said by the commissioner in the opinion filed by him with this report:

"It is more theory than fact that a vessel of the arch construction type can be so much more expeditiously unloaded than the Walker, as is claimed by some of the witnesses, and that the dock owners refuse to unload such vessels as the Walker. The uncontradicted testimony of the witnesses having similar boats engaged in carrying bulk freight is to the contrary. Furthermore, as a matter of fact, for the purpose of carrying many mixed cargoes, where temporary bulkheads are needed, a vessel of the Walker construction is better or more convenient than one having an arch construction."

[2] It is next urged, in behalf of the petitioners, that they should not be required to pay interest on the amount of the limitation fund on the grounds that the Gilchrist Transportation Company is insolvent; that the receivers are trustees; and that there was delay by the claimants in taking their testimony. It appears that the receivers were appointed in an equity proceeding to conserve the assets of the company on account of insolvency. But, however that may be, the record suggests that the liability for losses herein will be met by the underwriters of the Walker, who are the real petitioners, and, assuming such to be the case, interest obviously should not be disallowed on the ground of trusteeship or insolvency.

The proceeding, however, should have been expedited. The libel was filed January 15, 1910, six months after the disaster, and the petition for limitation of liability on March 1, 1910. The record shows that both sides at various times accommodated each other in the taking of testimony by continuances, and that there was further delay after the first hearing, owing to the joint acts of the parties. While it is not clear that the case at any time was unduly delayed by claimants, still I think there was such amiable acquiescence in postponements and continuances that to allow interest from the time of the accident would not be fair. But I think that interest should be allowed on the amount unpaid by the petitioners from the time the commissioner filed his report, to wit, on April 2, 1913, and that owing to the early concession by the petitioners of sole fault for the collision, and their willingness from the beginning to stipulate the claim on presentation of bills for repairs and construction, without other proof of claims, and taking into consideration their partial payment of losses on June 10, 1911, in a substantial amount, the interest from the date of the report should be at the rate of 3 per cent. only.

A decree, with cost, will therefore enter, confirming the report of the commissioner, and conforming with this decision as to preferential payments and interest.

THE URKO MENDI.

(District Court, E. D. Pennsylvania. August 5, 1914.)

No. 37.

1. SALVAGE (§ 9*)—NATURE OF SERVICE—RESCUE OF GROUNDLED STEAMSHIP—COMPENSATION.

Respondent steamship, worth, with her cargo, \$112,000, at about dead high water struck head on upon a sunken mud scow off the mouth of the Elizabeth river in Hampton Roads, where she stuck, resting upon the scow for about 20 feet of her length forward. The weather was calm, and she was in no immediate danger, although there was danger of strain as the tide fell. The crew were unable to work her off, and the code signal of distress was given, in response to which libellant's tug, worth \$40,000, came to her assistance, and in less than three hours' work released her and she proceeded on her voyage. The services of the tug were at first declined but afterward accepted and were rendered promptly and with skill, but involved no more than ordinary risk. The tug offered to perform the service for a fixed price, but the offer was declined, and no price was agreed on or offered then or thereafter. *Held*, that the service was one of salvage and that libellant was entitled to an award of \$500 therefor.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. § 17; Dec. Dig. § 9.*]

2. SALVAGE (§ 8*)—NATURE—"DISTRESS"—"DANGER."

The "distress" and "danger" to which a ship needs to be exposed to entitle its rescuer to salvage need not be actual or immediate, or the danger imminent and absolute. It is sufficient if at the time the assistance is rendered the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered, or if a vessel is in a situation of actual apprehension though not of actual danger.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 14, 15; Dec. Dig. § 8.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2132, 2133; vol. 2, p. 1824.]

In Admiralty. Suit by the Southern Towing Company, owner of the tug Virginian, against the steamship Urko Mendi. Decree for libellant.

Findings of Facts.

The court makes the following findings:

(1) The libellant's tug, by which the salvage services claimed were performed, is of the value, with her tackle and equipment, of \$40,000.

(2) The Urko Mendi, the vessel for which the salvage services were performed, is a steamship of the value of \$100,000, and her cargo was of the value of \$12,750. There was no testimony or evidence in the case from which the amount of the freight can be found, and it is therefore not found.

(3) The steamship struck head on and ran upon a sunken mud scow off the mouth of the Elizabeth river in Hampton Roads, near Norfolk, Va., on July 8, 1910. The steamer rested upon the scow for 20 feet of her length forward and stuck fast. The efforts of her pilot master and crew failed to get her off. She ran on the scow at nearly dead high water. The rise and fall of the tide was about three feet. The weather was clear and the sea calm, with every promise of the continuance of these conditions. She was in a position of some risk and danger of damage, however, from being subjected to the certainty of a strain if left on the scow on a falling tide.

(4) The steamer sounded the code signal of distress, and the master and crew of the tug Virginian, belonging to the libellant, went to the rescue. The offer of services was at first declined, but afterwards accepted. A heaving

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

line was thrown to the steamer from the tug, and by means of this a hawser was hauled aboard the steamer and was made fast by authority of the master. The tug then worked to haul the ship free of the scow. In this she was successful, with the aid of the E. V. McCaulley, another tug. No claim is made by the latter for its services. The steamer was in condition to proceed upon her voyage. There was no evidence from which the amount of damage sustained by her can be determined, and the amount of such damage is not found.

(5) The services rendered by the tug *Virginian* were rendered promptly and with skill. They were, however, ordinary and involved merely ordinary risk of damage from the hawser being fouled in the propellor or from the deck housings being side-swiped by the hawser of the other tug and from the hawser being strained or chafed. A part of a new manilla hawser was chafed. The damage from this and her expenses was \$100. The time of service and going and returning was less than three hours.

(6) The master and crew of the *Virginian* offered the service afterwards rendered at an agreed compensation. This was declined by the steamer, and the services were rendered without any agreement on the amount of compensation or price stipulated. The steamer sailed without making compensation or offer thereof and has since neither tendered nor expressed a willingness to tender compensation to libellant.

(7) So far as the same is a question of fact the court finds salvage services to have been rendered by the libellant and that salvage was earned.

(8) So far as the same is a question of fact the court finds the salvage to amount to the sum of \$500.

Conclusions of Law.

The court finds the following conclusions of law:

1. So far as the same is a question of law, the court finds the libellant to be entitled to salvage, and the amount thereof to be the sum of \$500.

2. The libellant is entitled to costs.

Lewis, Adler & Laws, of Philadelphia, Pa., for libellant.

Howard H. Yocum and Biddle, Paul & Jayne, both of Philadelphia, Pa., for respondent.

DICKINSON, District Judge (after stating the facts as above). We have withheld a ruling in this case until we could go over the full and elaborate paper book submitted by the respondent.

Specific findings of facts and conclusions of law are filed herewith.

This case is close to the border land between a claim for compensation for mere services rendered and a genuine claim for salvage. In attempting to find a just measure of the compensation which should be allowed and determine just how it should be applied when found, the mind feels itself to be very much of a derelict in its turn and "to be at sea without rudder or compass." The only measure we have is that in determining "the amount of salvage to be decreed there is no fixed rule nor binding precedent nor practice in admiralty." This is in the very nature of things as it must be but just as surely affords little aid to the tribunal charged with the responsibility of making the admeasurement. We further know that it may be only "a little more than remuneration pro opere et labore," and that we "may give compensation in the nature of salvage for services which fall below those necessary to found a strict salvage claim." A little more aid is given by an enumeration of some of the elements of the problem which may be considered. These observations presuppose the conclusion that in the judgment of the court the real question in this case is one of the amount of compensation. We do so regard it. The mind can, with some degree of satisfying comfort, reach conclusions on all the other questions which arise.

[1] The substantial facts are reasonably clear. The Urko Mendi, the ship concerned, is of the tramp type of steamer, and of Spanish register, and was partly loaded with coal. In leaving the port of Norfolk she "grounded" on a sunken barge or mud scow in Hampton Roads, just outside the mouth of Elizabeth river, on July 8, 1910, and stuck there. She struck on the slack water just as the tide was about to ebb. What damage she might have sustained from striking the barge or might further sustain from being hauled off was problematical. The scow was fitted with iron cleats and nigger heads, any one of which might have punched a hole in the ship's bottom. The tide at that place and at that time of year under the conditions of wind and weather then prevailing had a rise and fall of about $3\frac{1}{2}$ feet. What the effect of the fall of the tide would have had is again problematical. She struck bow on with her engines going full speed ahead, but she had not at the time gained full headway. She ran her nose up over the scow so that she was pivoted at a point possibly twenty feet aft of her stem head. There was plenty of water under her stern to float her at dead low water. As her stern dropped with the tide, the effect might have been to have caused her to slide off the obstruction. If, however, she had stuck, the effect would have been to have greatly increased the strain upon her hull. Just here the court owes the amende honorable to counsel for the libellant and to his expert witnesses. The offer was made to prove by experts that the ship was in a position of danger. This impressed the court as having reference to the condition of things when she struck, and this line of testimony was open in this view of it to the criticism that the opinions of the witnesses would be merely the expression of the obvious (for instance, as one of the witnesses expressed it "it does a ship no good to run her on anything"), or it would be to express an opinion upon unknown conditions because there were no facts known as to conditions under the ship where she was fast. The tonnage of the ship, the weight of her cargo, her size, the depth of water under her forward and aft, the fall of the tide, and other facts bearing upon the amount of strain to which she would be subjected, were known, however, and the effect upon her with respect to the probable damage she would incur when the tide fell was a proper subject for the expression of expert opinion. This feature of the case was not present in the mind of the court when the offer was made. What was in mind was, as has been stated, only conditions when the ship struck.

[2] The libellant is reasonably within the facts and entitled to the finding which we have made in its favor that the ship rescued was in distress and danger. This distress need not "be actual or immediate" or the danger "imminent and absolute." "It is sufficient if at the time the assistance is rendered the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered," or "if a vessel is in a situation of actual apprehension though not of actual danger." Such apprehension as there was, however, and such danger as existed, was allayed and moderated by the facts that the season of the year; the then state of the weather, and what at that time of year it might reasonably be expected to be, were

propitious; the ship was lying fairly comfortably, and she was within easy reach of assistance. Those on the ship, however, appreciated at least the difficulties of her predicament, and, although they had not exhausted all efforts to get her off without assistance, they recognized, if not her helplessness, her need of help, for we have found that she blew distress signals. The testimony raises some question whether the signals were the code signal of distress or a private signal to another tug, but the weight of the evidence is that they were code signals, and we have so found. Another element in the case is whether the ship refused the aid proffered by the libelant.

We do not accept the proposition in its entirety as advanced by counsel for the respondent as to the right of the master of a vessel in distress to deprive salvors of their just claims by a refusal of assistance and a repudiation of their offers of help, nor do we subscribe to the doctrine laid down in some of the cases to which he has referred us.

The right of a master, however, who has a justified confidence in his ability to take care of himself and his vessel, and a well-grounded and reasonable expectation of doing so, to refuse assistance, is undoubted, and this we find to have been the right of the master of this ship. This feature of the case falls out of practical consideration, however, because of the fact which we find in favor of the libelant, that the master here, although at first declining help, finally accepted of it. This acceptance was not the act of the crew without his knowledge or participation, but was that either of himself or his chief officer, done with his full knowledge and acquiescence.

The allegation of fact set up by the defense that the libelant had volunteered the service rendered, and it was accepted under an agreement that it was to be rendered for nothing, is not supported by the evidence, and we refuse to find this as the fact.

As to another of the elements in the case involving the character of the services rendered, we find them to have been of a scarcely more than ordinary and commonplace kind. There was an entire absence of the heroic, and the risks incurred were only those which confront men who follow the water in their every day avocations. They were merely the ordinary and usual risks. This applies also to the libelant's tug and her tackle. There was some possible risk of the housings above deck on the tug being side-swiped and the usual strain on hawsers and danger of chafing. A new manilla hawser was in fact chafed. All that was done was to throw a heaving line aboard the ship by which a hawser was hauled in and made fast, and then the ship pulled off into deep water by a sweeping movement of the tug and pulling from side to side. This work was, however, successful, although it should be added that she had part of the time the aid of another tug which made no claim for her services because of her relations with the ship. The whole time employed, including going and returning, was a matter of less than three hours.

It should be added that the merit of the conduct of the libelant consisted in the promptness of her act in proffering assistance and its success. No skill of seamanship beyond the ordinary was called for, but all that was called for was well performed. The tug was well handled.

The only other element in the case which need be adverted to is the value of the ship, cargo, and freight, which was removed from danger, if not actually saved, and the value of the property involved in whatever risk was incurred in rendering the service. The ship was enabled to complete her voyage and earn the freight to which she was entitled. Of the amount of the latter we have no evidence. The ship and her cargo had an admitted value of \$112,750. The rescuing tug was worth about \$40,000, including her tackle and equipment.

It might be added, to complete the recital of the salient facts, that the tug was kept at some expense in readiness to perform just such services as were rendered, and the further fact should be stated that no offer to compensate her has been made. This invites the observation that the ship might have kept the expense of getting her afloat within very reasonable limits by bargaining for the services of the tug, and, in the absence of any such bargain, that, if the efforts of the tug had been unsuccessful, she would have received no compensation at all. It is evident that we have in the case only the element of value upon which to found a claim for salvage of any considerable amount.

Taking everything into consideration, we have concluded to make an allowance of \$500 to the libelant, together with costs. We are aware that such an award is probably open to the criticism on the part of the respondent of being an excessive allowance for the services rendered and on the part of the libelant as being inadequate salvage considering the value of property involved.

MUNICIPAL WATERWORKS CO. v. CITY OF FT. SMITH.

(District Court, W. D. Arkansas, Ft. Smith Division. May 30, 1914.)

1. WATERS AND WATER COURSES (§ 203*)—WATER COMPANIES—CONTRACT WITH CITY—CONSTRUCTION.

By ordinance defendant city granted a franchise to and entered into a contract with the predecessor of plaintiff water company. By the contract the city was given the right to purchase the plant of the company at stated periods, but by a subsequent agreement such right was postponed for 20 years from October 1, 1887, which was beyond the term of the franchise. By the original and subsequent contracts, water for certain purposes was to be furnished for the use of the city free, and such agreement was to continue in force "during the existence of the franchise and contract." After the expiration of the term of the franchise, both the franchise and contract were treated by both parties as continuing in force; bills for hydrant rentals under the contract being presented and paid as before. On October 1, 1907, the city, having elected to purchase, brought suit to have the value of the plant determined in accordance with a provision of the contract. Shortly afterward plaintiff notified the city that it would thereafter charge for the water previously furnished under the contract free, but to this the city refused to assent. *Held*, that the contract period, during which the prices fixed therein were to continue in force, included the time necessary for the city to complete the purchase, and that plaintiff could not recover for water furnished the city during the pendency of the suit, which under the contract was to be free.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 289, 290-299; Dec. Dig. § 203.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. ASSUMPSIT, ACTION OF (§ 7*)—GROUNDS OF ACTION—IMPLIED PROMISE.

One of the purposes for which plaintiff contracted to furnish water free was the flushing of sewers. After its notice that it would charge for water so furnished, and counter notice by the city that it would not pay for the same, plaintiff continued to furnish it. *Held*, that if not furnished under the contract, plaintiff could not recover therefor on an implied assumpsit, since no promise to pay can be implied, contrary to the express declaration of the party sought to be charged.

[Ed. Note.—For other cases, see Assumpsit, Action of, Cent. Dig. §§ 37-41; Dec. Dig. § 7.*]

At Law. Action by Municipal Waterworks Company against the City of Ft. Smith. Trial to court. Judgment for defendant.

Read & McDonough, of Ft. Smith, Ark., for plaintiff.

Kimpel & Daily, of Ft. Smith, Ark., for defendant.

YOUMANS, District Judge. This is a suit by plaintiff against defendant for the value of water alleged to have been furnished by the former to the latter from January 1, 1908, to April 5, 1911. It has been submitted to the court sitting as a jury. The subject-matter grows out of a suit begun prior to January 1, 1908, and terminated in April, 1911, which the city of Ft. Smith instituted against the plaintiff to enforce an option to purchase the plant, reserved in the franchise granted by ordinance to plaintiff's predecessor, March 31, 1884, being Ordinance No. 35. That ordinance, with amendments thereto, appears in Read & McDonough's Digest of the Ordinances of the City of Ft. Smith as sections 1069 to 1103, both inclusive. Section 1085 is as follows:

"Sec. 1085. Right to Purchase.—The city shall have the right to purchase said waterworks and appurtenances at the expiration of ten years from January 1, 1885, and at the expiration of every five years thereafter, at their fair and equitable value of the works, lands, buildings, machinery and equipments; such value, in case the parties can not agree, to be determined by arbitration, as provided by the state, or, if that method is not satisfactory, by the circuit court of Sebastian county for the Fort Smith district, as other questions of fact—any delays in such proceedings not to forfeit the right of the city to make such purchase, and any incumbrance upon said works and property shall be subject to the right of the city to purchase the same as herein provided."

On February 22, 1887, the city council of the city of Ft. Smith passed a resolution which appears in the Digest as section 1092, as follows:

"Sec. 1092. Extension of Contract and Right of Purchase—Whereas, the Fort Smith Waterworks purpose, as set forth by their letter addressed to the mayor and city council of February 2, 1887, to increase the efficiency of their works by putting up, at great expense, new machinery, with the capacity to insure a sufficient supply of water for all purposes, as required by the terms of Ordinance No. 35 (a), not only for the wants of the present inhabitants, but sufficient to keep pace with the wants of our rapidly increasing population. Therefore, be it resolved, that in consideration of said additions and improvements the city hereby waives the right of purchasing said waterworks, as provided for in section 9 of said Ordinance 35, for the full term of twenty years, from and after the completion of said addition and improvements, as indicated in the letter above referred to; provided, that the said improvements shall be commenced at once and shall be completed on or before the first day of October, A. D. 1887, or sooner if practicable, unless prevented by high water. Resolution February 22, 1887."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Section 7 of the original ordinance appears in the Digest as section 1081, and is as follows:

"Sec. 1081. Hydrants, Number and Kind.—There shall be located at such places (on the lines of mains as laid by said grantees), as the city council may approve, not less than fifty double-tipped, brass-mounted, anti-freezing fire hydrants, with two and one-half inch nozzles for fire hose; said hydrants to be furnished, erected and kept in repair by said grantees, and for the use of each and every of which fire hydrants, from and after the completion of said waterworks and tests as herein provided, during the continuance of this franchise, said city hereby agrees to pay the said grantees, or their assigns, the sum of sixty dollars per annum. The said grantees shall furnish and erect additional hydrants when so ordered by the city council, for the use of each and every additional hydrant, from and after the time when they are ready to supply water, notice thereof to be given in writing to the city recorder, the city hereby agrees, during the continuance of this franchise, to pay the sum of fifty dollars per annum; all hydrant rental to be paid semiannually on the 15th day of January and July of each year."

Part of section 9 of the original ordinance appears in the Digest as section 1087, and is as follows:

"Sec. 1087. Right to Maintain and Operate the Same.—At the expiration of this franchise, if the city is not the owner of said waterworks, the grantees shall continue to have the right to maintain and operate the same, the city having the right to continue the use of the fire hydrants upon such terms as may be then agreed upon, or, if the parties do not agree, then at the minimum rates for water actually used."

In section 1088, being part of the original ordinance fixing annual water rates, appears the following: "City offices and prisons included in hydrant rent."

In January, 1891, a supplementary contract was entered into by plaintiff and defendant, which appears as section 1093 of the Digest, and is as follows:

"Sec. 1093. Supplemental Contract—Standpipe—Hydrants and Other Conditions.—The board of public affairs of the city of Fort Smith be and is hereby authorized to enter into a contract with the Fort Smith Water Company to settle existing difficulties between said city and company, in the following terms: Contract between the city of Fort Smith and the Fort Smith Water Company. It is hereby agreed by and between the city of Fort Smith, Arkansas, party of the first part, and the Fort Smith Water Company, party of the second part, that the party of the second part shall put in its plant for said city, a new set of pumps with a capacity of not less than two and a half million gallons per day; shall erect a stand pipe or water tower, at or near its present reservoir; shall put a filter in said plant; shall put in a twelve-inch supply main from the reservoir along Lexington avenue to Little Rock avenue; thence along Little Rock avenue to Thirteenth street; thence along Thirteenth street to North C street; thence along North C street to North Fourth street; a ten-inch main from South D. street along Wheeler avenue to Carnall avenue; thence across Carnall avenue to and along Garland avenue to South Sixth street; thence along South Sixth street to Parker avenue; thence along Parker avenue to South Fourth street; an eight-inch main along South Fourth street from Parker avenue to North C street; along South B street from Lexington avenue to Little Rock avenue; thence along Little Rock avenue to Eighteenth street, and thence along Eighteenth street to North F street; a six-inch main along North E street from Lexington avenue to South Eighteenth street; thence along South Eighteenth street to Little Rock avenue; on North Thirteenth street from North C street to North J street; thence on North J street to North Twelfth street; thence on North

Twelfth street to North I street: on North Tenth street from North C street to North L street, and from South Fourth on Rogers avenue to Towson avenue; a sixteen-inch main from the present terminus of the force main near the pumphouse to the reservoir or stand pipe, independent of the present distribution pipes running to the reservoir and to the city. The city shall, at the time of laying the above mains, designate the places where city hydrants will be placed when they shall be ordered, so that the water company can put in specials to which said hydrants can afterwards be attached. Said work is to be begun immediately and be completed by September 1, next, any delays by injunction or order of any court, unavoidable accidents or delays from malicious interference, excepted. All dead ends to be connected wherever practicable. When the above work is completed, the party of the first part will dismiss the action now pending between the parties hereto in the Sebastian county circuit court for the Fort Smith district of Sebastian county, Arkansas, until which time said action shall stand continued. In consideration of the performance by the parties hereto of the foregoing agreement, it is further agreed that the said city may have sufficient water without charge to fill properly constructed sewer flush tanks to flush the sewers of said city. The water to be taken from the mains of said water company at points convenient and least expensive to the city. All connections for this purpose to be made under the direction of the water company (as other connections are made) but at the expense of the city. Such flushing shall be done twice in twenty-four hours, and oftener during the prevalence of epidemics, upon the order of the board of health of said city. In addition to the above specified mains to be put in by said company on or before September 1st, next, upon which the city is not compelled to take hydrants until it shall see fit, said water company shall furnish one hundred hydrants, similar to those already in use, on mains to be laid in such streets as the city shall hereafter designate, for which the city shall pay a yearly rental of only thirty dollars per hydrant, payable as the other hydrant rentals, said hydrants to be supplied as follows: The first twenty-five by January 1, 1892; the second twenty-five by January 1, 1893; the third twenty-five by January 1, 1894; and the remainder by January 1, 1895. The city reserves the right to locate said hydrants seven hundred and twenty feet apart, and if any two be placed nearer together than seven hundred and twenty feet, others may be placed enough more than seven hundred and twenty feet apart to maintain the average distance of seven hundred and twenty feet. This agreement shall continue and be in force during the existence of the franchise and contract now existing between the parties hereto provided for by Ordinance No. 35. In witness whereunto the said city has caused this agreement to be signed by its board of public affairs and attested by its seal, and the said water company has caused it to be signed by its president and attested by the common seal of said corporation this ——— day of January, 1891, at Fort Smith, Ark."

As bearing on this controversy, two sentences of the foregoing section are important: "*In consideration of the performance by the parties hereto, of the foregoing agreement, it is further agreed that the said city may have sufficient water without charge to fill properly constructed sewer flush tanks to flush the sewers of said city*"; and "*This agreement shall continue and be in force during the existence of the franchise and contract now existing between the parties hereto provided for by ordinance No. 35.*"

On or before October 1, 1907, the city instituted a suit to enforce its option under sections 1085 and 1092, above quoted. The water company conceded the right of the city to purchase, and the only point at issue between them was the determination of the purchase price of the plant. As stated, the suit was determined in April, 1911. On December 31, 1907, after the bringing of that suit, the plaintiff sent to the defendant the following letter:

"Fort Smith, Ark. December 31st, 1907.

"To the Honorable Mayor and City Council, of Ft. Smith, Arkansas—Gentlemen: When the present owners assumed management of the Municipal Waterworks Company, we found, among other ruinous provisions and practices under the contract, was a service to the city for public buildings, prisons, fountains, flushing tanks and public schools, which had evidently grown from small beginnings to an enormous use and wastage by the city, for which no remuneration whatever was paid to the company.

"This company has faithfully fulfilled all these services to the latest limit of time in said contract, October 1st, 1907. As this service in times past and is now, causing this company a destructive loss, therefore, in the exercise of our undoubted right we hereby give notice with all good will and comity, that from and after January 1st, 1908, we shall be obliged to meter and to charge for said services at our minimum rate for large consumers, of ten cents for each thousand gallons.

"Yours very respectfully, Municipal Waterworks Company,
"By Horace H. Shaw, Manager."

On receipt of that letter, or shortly thereafter, Mr. Shaw, the manager of the plaintiff, was notified by a representative of the city that it would not pay for the water referred to in plaintiff's letter.

Section 1069 of the Digest, which is part of the original ordinance, provided as follows:

"The right is hereby granted to Chas. W. Hill, of Parsons, state of Kansas, his associates and assigns, to construct, maintain and operate in the city of Ft. Smith, state of Arkansas, for the purpose of supplying the city and its citizens with water, a system of waterworks, for the term of twenty years, unless sooner terminated by said city, by purchase or otherwise as herein provided."

[1] I. In 1887, as shown in section 1092, the city, in consideration of certain additions and improvements, waived "the right of purchasing said waterworks as provided in section 9 of said ordinance 35 for the full term of 20 years," from October 1, 1887. This waiver and extension of the right to purchase did not in terms extend the franchise. It had already been provided in section 1087 that if, at the expiration of the franchise, the city had not become the owner of the waterworks the grantee should continue to maintain and operate the same. The testimony shows that both parties treated the franchise as extended, and the contract as to water used by the city as still in force until December 31, 1907, the date of plaintiff's letter, above quoted. By section 1069 the term of the franchise was fixed at 20 years from the passage of the ordinance of March 3, 1884. By section 1085 the city had the right to purchase the water plant at the expiration of 10 years from January 1, 1885, and at the expiration of every five-year period thereafter. The franchise period did not then coincide with the first purchase period. By section 1092 passed February 22, 1887, the purchase period was extended 20 years from March 1, 1887. Nothing was said about a right to purchase at any other time. It is fair to presume that no other was contemplated. By section 1093, passed in January, 1891, provision was made for flush tanks for sewers and additional hydrants. Water for flush tanks was to be free. The price of additional hydrants was fixed. It provided that: "This agreement shall continue and be in force during the existence of the franchise and contract now existing between the parties hereto provided for in Ordinance No. 35." The agreement referred to meant the agreement set out in section 1093;

that is, free water for flush tanks and the amount to be paid for additional hydrants. Under this section the franchise and contract were regarded as identical, or, running concurrently. By the terms of the original ordinance, the franchise expired in March, 1904. By the contract of 1887, and the contract of 1891, and the construction of the parties, evidenced by their acts, the franchise was extended to October, 1907. After March, 1904, the plaintiff continued to render bills and receive payments in the same way as before; that is, for 50 hydrants at the rate of \$60 per annum, 75 hydrants at the rate of \$50 per annum, and the remaining hydrants at \$30 per annum, no charge being made for water used by city offices and prisons. The presumption is conclusive that the rent therefor was, as theretofore, included in the hydrant rent, as provided in section 1088. The hydrants referred to in section 1093 at \$30 per annum were not the same as the hydrants referred to in section 1081 at \$60 and \$50 per annum. The provision in section 1087 referred to hydrants covered by section 1081, and not those covered by section 1093. According to the modifications of the contract and the interpretation of the parties, the price at which water was to be furnished to the city was to remain the same during the existence of the franchise and contract. Therefore plaintiff's contention that the contract period, in so far as it related to the price of water furnished the city, ended with the expiration of the 20-year period in October, 1907, is not correct. The period of time necessary to enforce the right to purchase must be included in the period covered by the contract which gave the right. The finding must be that the plaintiff cannot, under the contract, charge defendant any more for water during the period of the pendency of the suit than it could for the period prior thereto, because it was part of the contract period.

II. If this finding is incorrect and section 1087 stands without modification except as to the extensions of the franchise, as plaintiff contends, then after October 1, 1907, the price of water used by fire hydrants was either to be the amount agreed upon between the parties, or was to be the minimum for water actually used. The testimony of Kuper and Johnston is that after the receipt of the letter above quoted there was an agreement between them, as representatives of the city, and Mr. Shaw, as manager for the plaintiff, that water should be furnished to the city as theretofore, and payment should be made under the contract; that is, that there should be no change during the pendency of the suit. Mr. Shaw denied the conversation with Johnston. He does not deny the statement made by Kuper. It may be that Kuper and Johnston referred to the same conversation with Shaw. Kuper and Johnston are corroborated by the fact that the plaintiff continued to render bills in the same way as they had previously been rendered and for the same amounts. No effort was made to collect "at the minimum rates for water actually used." Only one other rate was contemplated by section 1087, and that was the rate to be agreed upon between the parties. There must have been some agreement between them, for bills were rendered every six months, as provided by contract and were paid by defendant. The prices were the same as had been charged previously; that is, 50 hydrants at the rate of \$60 per annum, 75 hydrants at the rate of \$50 per annum, and 32 hydrants at the rate

of \$30 per annum. If the original contract was terminated, why should the difference in price for hydrants be maintained? Why should \$60 be paid for some hydrants, \$50 for others, and \$30 for still others? The city ordinances provided for a certain number of hydrants at the price of \$60, and certain others at \$50, and still others at \$30. It is a reasonable inference that after the expiration of the contract, in the absence of an agreement, there would be no difference in the price for hydrants. One would be worth as much as another. The preponderance of the testimony is to the effect that after December 31, 1907, the date of the letter to the mayor and the council, the city should have water, and pay therefor under the contract, just as it had done prior to the bringing of the suit.

Testimony was introduced by the plaintiff to the effect that bills for water furnished to flush the sewers were presented to the city. It appears from the testimony that certain bills were handed by Mr. Rosamond, local manager of the plant, in one instance to the city clerk, in another instance to the deputy city clerk. On each occasion he was told that they would not be paid. In the regular course of conducting the city's affairs these bills would have been referred to the board of public affairs. They were never so referred. No member of the board of public affairs had any knowledge of them. They were never presented to the committee of the council called the committee on claims; they were never presented to the mayor or the council. The first time that the city had notice of such claims, other than as stated in the letter of December 31, 1907, and the conversations between Shaw and the representatives of the city, was when the plaintiff filed its amended cross-bill in the suit of the city against it on March 25, 1911, about 10 or 12 days before the final decree was rendered in that case. Why these bills were rendered separately from the bills for hydrant rental, and why they were not pressed and insisted upon, and brought to the attention of the council, is not explained. The manner in which they were presented adds nothing to the testimony tending to contradict the testimony with regard to an agreement relative to what the city should pay after the receipt of the letter of December 31, 1907.

[2] III. As to water used to flush sewers it is clear that it comes under a separate provision from that governing the use of water for fire hydrants. There were no sewers in Ft. Smith at the time of the passage of the original ordinance. Flush tanks for sewers were governed by the contract of January, 1891, and set out in section 1093. If no contract was made with reference to them after December 31, 1907, and if water for their use was not provided for by the original contract and the modifications thereof, then the recovery of the value of the water furnished by the plaintiff for their use subsequent to January 1, 1908, must be based on an implied agreement, or upon the old common-law action of *indebitatus assumpsit*.

The testimony for the plaintiff is that in accordance with the notice given in the letter of December 31, 1907, meters were placed upon the flush tanks, and that the water charged for in its complaint is the amount estimated to have passed through those meters. As stated, plaintiff was notified that the city would not pay for the water. The plaintiff could have turned the water off. It did not do so.

"Upon a promise arising by implication of law *indebitatus assumpsit* lies. The request necessary to support such promise may be inferred from the beneficial nature of the consideration and the circumstances of the transaction. The law, however, will not imply a promise against the express declarations of the party to be charged, made at the time of the supposed undertaking, unless such party is under legal obligation, paramount to his will, to perform some duty." 4 Cyc. 325. 3 Standard Encyclopedia of Procedure 195.

"The law never implies a promise against the expressed will of a party sought to be charged. In *Chitty on Contracts*, it is said: 'The law will not imply a promise against the express declarations of the party to be charged, made at the time of the supposed undertaking.'" *Meaher v. Pomeroy*, 49 Ala. 146.

"As the law will not imply a promise, where there was an express promise, so the law will not imply a promise of any person against his own expressed declaration, because such declaration is repugnant to any implication of a promise." *Whiting v. Sullivan*, 7 Mass. 107; *Earle v. Coburn*, 130 Mass. 596; *Boston Ice Co. v. Porter*, 123 Mass. 28, 25 Am. Rep. 9; *Jewett v. Somerset*, 1 Me. (Greenl.) 125.

"To justify a recovery upon an implied *assumpsit*, it is necessary for the plaintiff to establish facts from which a promise upon the part of the defendant to pay a certain sum of money can reasonably be presumed. But no such promise can possibly be presumed where the act constituting the cause of action is done in defiance of plaintiff's rights, or under a claim of adverse rights." *Carson River Lumber Co. v. Bassett*, 2 Nev. 249; *Ruse v. Williams*, 14 Ariz. 445, 130 Pac. 887, 45 L. R. A. (N. S.) 923; *Anderson v. Caldwell*, 242 Mo. 201, 146 S. W. 444; *Raymond v. Eldridge*, 111 Mass. 390; *Columbus, H. B. & T. Ry. Co. v. Gaffney*, 65 Ohio St. 104, 61 N. E. 152.

It does not meet the proposition to say that plaintiff could have been compelled by the city to turn water into flush tanks. It is a sufficient answer to say that in this instance there was no compulsion. What plaintiff did, it did voluntarily. Therefore it cannot recover on an implied contract for water used in flushing sewers.

IV. Even if the testimony warranted the conclusion that plaintiff is entitled to remuneration for water furnished to the city for use in the city offices and prisons, there is no testimony by which it can be determined what amount of water was so used. It appears that the water going to the county jail and the county offices ran through the same meter as that going to the city jail and the city offices. The city and county use the same jail building. The testimony tends to show that the county paid for all the water used by that building. It would be impossible to say what was used in the city offices.

The objection of the city to the introduction of the meter book by the plaintiff will be overruled.

The complaint of the plaintiff will be dismissed, and the defendant will recover its costs.

CHARLES KILLAM & CO. v. MONAD ENGINEERING CO.

(District Court, E. D. Pennsylvania. August 14, 1914.)

No. 59.

1. SHIPPING (§ 39*)—CHARTERS—DEMISE OF VESSEL—IMPLIED COVENANTS.

In contracts for the demise of vessels, there are implied, if not expressed, covenants on the part of the owner that she is seaworthy and fit for the service for which she is hired, and on the part of the charterer

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

to return her in as good condition as when received, ordinary wear and perils of the sea, etc., excepted.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 141-148; Dec. Dig. § 39.*]

2. SHIPPING (§ 54*)—CHARTERS—NEGLIGENT HANDLING OF DEMISED BOAT BY CHARTERER.

Respondent chartered a lighter from libelant by a charter which amounted to a demise, to be used in carrying stone to a government work which respondent was constructing in Delaware Bay, but instead of using her for such purpose it took her to the work, where she was used as a floating warehouse, which was a more dangerous use owing to the exposed locality, and one for which she was not fitted. Some of the time she was anchored by the stern, her tiller was not lashed, and she was injured by the slashing of her rudder. At other times she was moored to the windward side of a platform, without fenders or other protection, and was injured by bumping against it. During a gale she was anchored and, dragging her anchor, was drifting upon the foundation of an old lighthouse on which she would have been wrecked, when, by libelant's orders, she was taken away by a tug and not returned. *Held*, that her injuries were due to respondent's fault and negligence, and that it was liable for the cost of her repairs, and also for demurrage during the time they were being made; also that respondent's acts justified libelant in taking the boat away, and it could not be held liable for any delay caused to respondent thereby in the performance of its contract.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219-221; Dec. Dig. § 54.*]

In Admiralty. Suit by Charles Killam & Co. against the Monad Engineering Company. Heard on libel, answer, and trial proofs. Decree for libelant.

Findings of Fact.

The court finds the following findings of fact:

(1) Certain findings of fact which arise out of the evidence have not been made because not asked.

(2) On August 20, 1907 the libelant hired or chartered the lighter Roosevelt to the respondent for a period of from 25 to 28 days at \$10 per day. The respondent agreed to deliver the lighter to the libelant at the end of her term of hire, at the port of Philadelphia, in as good condition as when delivered to respondent, wear and tear excepted.

(3) The lighter was hired for the purpose of being used in carrying stone from the Brandywine to a point over Cross Ledge Shoal in Delaware Bay, where the respondent was doing work for the United States.

(4) The libelant warranted the lighter to be in good condition and fit for the above-mentioned purpose for which she was hired. The lighter was delivered to the respondent under the contract of hiring on August 23, 1907, in a condition which fulfilled this contract of warranty.

(5) The lighter was not used by the respondent for the purpose for which she was hired but for the other and different purpose of being kept at Cross Ledge and used there as a floating storehouse for stowage of material and other articles. This was a more dangerous use than that for which the lighter was chartered, and involved the lighter in greater risk of loss or damage, and was a use to which she was not intended or fitted. At times the lighter was anchored off the Cross Ledge in an exposed and dangerous position where she was likely to encounter heavy weather and be subjected to heavy seas. At other times she was moored alongside of a platform or pier erected on part of Cross Ledge shoal and was kept upon the windward side, and because of this jammed and bumped against the platform or pier. By reason of this the lighter was strained and damaged and parts of her upper gear gouged and chafed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(6) The libelant on September 18, 1907, and again on September 26, 1907, demanded of the respondent possession of the lighter to be given on or before September 30th. With this notice the respondent neglected and refused to comply. On the night of September 30, 1907, the lighter was anchored off the Cross Ledge at a point where she had the stone foundations of an old lighthouse directly on her lee. She was improperly anchored stern foremost with her tiller unshipped or unlashed and her rudder slashing in the waves, producing a strain upon her. The wind during the night rose to a gale, and on the morning of October 1st the lighter began to drift to leeward, dragging her anchor. She was taken in tow by a tug which had been sent for her by the libelant and towed to Philadelphia. Had she not thus been rescued by the tug, she would have drifted upon the stone pile referred to and become a total wreck.

(7) The lighter was damaged by the usage to which she was subjected, and by the further fact that parts of her woodwork had been removed and taken out and used by the respondent. The repairs necessary to restore the lighter to the condition in which she was at the time of her delivery to the respondent, less ordinary wear and tear, amounted to the sum of \$425, including the expense of taking her to the most convenient place in which the repairs could be made.

(8) The lighter, at the time she was taken away by the tug, had on board material and property belonging to the respondent. The damage to the lighter was caused by the acts and negligence of the respondent in improperly subjecting her to strains and bumps and in not exercising proper care and avoiding causes of injury.

(9) The delay in the completion of the contract on which the respondent was engaged, and its failure to complete the same, was not due to any act of commission or omission on the part of the libelant, and was not due to the removal of the said lighter. So far as it is a question of fact, the removal of the lighter by the libelant was justified and necessary for her preservation, and no loss or damage resulted therefrom to the respondent. If the lighter had not been removed, both the lighter of the libelant and the material and articles on board of her belonging to the respondent would have been lost.

(10) So far as it is a question of fact, there is due from the respondent to the libelant the sum of \$440 hire of the lighter from August 23d to October 5th, \$60 for demurrage during the time the lighter was under repairs between October 5 and October 11, 1907, and \$425 for repairs to the barge because of injuries resulting from the negligent acts of the respondent, including the expense of taking the lighter to the most convenient place for her repair.

Conclusions of Law.

The court finds the following conclusions of law, so far as it has been asked to find the same:

(1) Certain conclusions of law which possibly might have been stated, not having been asked for, are not found.

(2) The respondent is indebted to the libelant in the sum of \$440 for hire of lighter Roosevelt from August 23 to October 5, 1907, at \$10 per day.

(3) Damage was sustained by the lighter through the negligence of the respondent while the lighter was in its possession, for which the respondent is responsible; the amount of the damage thus sustained being the sum of \$300.

(4) The respondent is liable to the libelant for the further sum of \$60, being demurrage for the time the lighter was laid up undergoing repairs.

(5) The libelant is entitled to recover from the respondent the total sum of \$925 on the findings of facts as made by the court, to which findings the court was asked to restrict itself by the parties to the cause.

(6) The libelant is entitled to a decree for costs.

Lewis, Adler & Laws, of Philadelphia, Pa., for libelant.

Harris S. Sparhawk, of Philadelphia, Pa., for respondent.

DICKINSON, District Judge (after stating the facts as above). This case was heard and argued with *Monad Engineering Co. v. Charles Killam & Co.*, 216 Fed. 444, No. 74 of 1907 in admiralty. The

two cases grow out of the same transaction between the parties, and, although not in form consolidated, are in effect one and the same case, made up of claims and counterclaims.

Specific findings of facts and conclusions of law, so far as the court has been asked to find the latter, are filed herewith.

The main facts, so far as necessary to an understanding of the issues involved, are few and simple. The Charles Killam & Co. hired by a demise contract the lighter *Roosevelt* to the Monad Engineering Company. The lighter was to be employed in carrying stone from the Brandywine to a locality in the Delaware Bay, known as Cross Ledge, where the Monad Company were doing some constructive work for the United States. The term of hiring was from 25 to 28 days, from August 20, 1907, the date of hiring. The rate was \$10 per day. The man whom the Killam Company had on board the lighter as master left, and the Monad Company replaced him with a man of their own selection.

Instead of employing the lighter for the purposes for which she was hired, use was made of her as a floating warehouse or stowage boat by taking her to Cross Ledge and keeping her there. She was at times kept alongside of and moored to a platform, which had been there constructed, and at other times anchored near the platform. The place is a notoriously dangerous one, particularly at that time of the year when heavy weather and high winds from the northeast, southeast, and northwest are to be expected. The unavoidable risks which a boat of the description of this lighter in that locality would incur were increased by the way in which the boat was handled. She was kept lying at times on the windward side of the platform, without adequate protection either by fenders or other precautions to keep her off, with the consequent result that she was bumped against the platform and the pilings to which she was moored and was gouged and chafed by rubbing against projecting spikes. When she was anchored off, she was improperly anchored stern foremost with her tiller either unshipped or unlashed, and because of this her rudder slashed from side to side with a resultant strain upon her. Parts of the lighter were removed from her by the charterers and used in the construction of the platform referred to, and some of her tackle was removed or lost. A special danger and threat of the entire loss of the lighter was presented by the foundations of the old lighthouse being close aboard, and during prevailing storms directly to leeward, so that, if the lighter dragged her anchor, she would have drifted upon this obstruction and become a total wreck. Learning of the predicament in which she was placed, the Killam Company demanded her return, and, this demand not being complied with by the Monad Company, a tug was sent for the lighter, and she was removed from danger and restored to her owners. At the time the lighter was taken away, she was in part loaded with material belonging to the Engineering Company. The exigencies of the situation afforded neither opportunity nor time to unload her, and she was unloaded after she reached Philadelphia.

The original libel was filed to recover the hire of the lighter as agreed to be paid; demurrage for the time during which she was under repair, and the expenses to which her owners were put in preserving her from loss or further damage, and in restoring her to the

same condition of repair in which she was when hired. This demand was met by a counterclaim in the general nature of a set-off, which is based upon the averment that, by reason of the removal of the lighter and of the material which was on board of her, the Engineering Company were prevented from complying with the contract on work which they were engaged, and, in consequence, they had been subjected to loss and damage to an amount largely exceeding the claim of the owner.

The answer of the original libel denied responsibility for the damage to the boat, and averred further the counter allegation of unseaworthiness and unfitness for the work for which she was hired.

The court is relieved from passing upon some questions which suggest themselves as possibly arising out of the facts in this case and the relations of the parties to each other and to third parties in that we have been asked to pass upon the rights of the parties as determined wholly and solely by certain findings of fact which the court is asked by both parties to make. This reduces the questions involved to these mere questions of fact, and the case is therefore sufficiently disposed of by the formal findings which the court has made.

[1] No more is now necessary than to state the principles by which the court has been guided. One is that in contracts of this kind the owner of the boat warrants her to be seaworthy and fit for the use to which she is intended to be put. Another is the general principle that a bailee for hire is not responsible for loss or damage except such as may be brought about through his fault or by his negligence. This general principle is applicable to contracts for the hire or demise of vessels. It is usual for a charter party to contain a stipulation for or warranty of the seaworthiness of the vessel on the one side, and, on the other, a stipulation or covenant to deliver up the vessel in the same good order and condition as when originally delivered, ordinary wear and tear and perils of the sea, etc., excepted. Each and both of these covenants are, however, implied, whether expressed or not, so that, under the facts in this case, the findings of fact of express covenants are unimportant. Both covenants are, however, found in fact to have been made.

There is no denial other than the most purely formal one that the owner is entitled to a finding in its favor for the \$440 hire of the lighter, and this finding, both as a fact and a conclusion of law, is therefore made without further discussion. It only remains to determine whether or not the damage or injury found to have been done to this lighter was a damage she had received antecedent to her contract of hire, was incidental to the ordinary and reasonably careful use of her in the employment for which she was hired, or was an injury due to the acts of the charterer for which it is responsible to the owners.

[2] We find as a fact and as a conclusion of law that the necessity for repairing the lighter was due to the acts of the charterer, and that it is responsible for the damage done to the boat and answerable to her owners for the amount expended to repair the damage. This is on the ground, both that the damage resulted from negligence and want of reasonable and proper care taken of the lighter on the part of the charterer and as a breach of the implied, and, as it has been found, the express, covenant to redeliver her to the owner in the condition in

which she was when delivered under the contract of hire. This involves the further finding that the charterer is responsible to the owner of the lighter for the time she was laid up undergoing repairs. This is upon the principle that the charterer of a boat is responsible to her owners for the demurrage accruing during the time she was laid up for repairs, if the charterer is responsible for the injuries which have made the repairs necessary.

This disposes of the whole of this branch of the case, except a finding of the amount of money damage involved in the repair item. The bill of the owner and the circumstances attending the contraction of the bill have been somewhat seriously criticized by counsel for the charterer. Indeed, chief stress has been laid upon this feature of the claim. We have given much weight to all the observations of counsel upon this head, and have fixed the amount of the repairs at the sum of \$300. This leaves open for consideration only the counterclaim of the Monad Engineering Company. The amount of the claim is large. Here again we restrict ourselves to a mere finding of fact, both because the finding, being against the allowance of the claim practically and effectually disposes of all questions of law involved in it, but for the further reason that counsel on both sides have rested their cause upon the facts and have in effect limited the attention of the court to this single feature. We dispose of it by finding that the loss or damage, as claimed to have been suffered, was not due to any acts of the Killam Company, and further that all that was done by the Killam Company was due to and rendered necessary by the conduct and acts of the charterer of the lighter, and that all that was done was necessary to be done in order to protect their property, and indeed inured to the benefit of the Monad Engineering Company, because our finding is that, if the lighter had not been rescued, she would have become a total loss, for which the charterer would have been responsible, and this loss would have involved the loss of the material on the boat, and the Engineering Company would have been deprived of its use.

The strong argument addressed to us by counsel justifies, and perhaps the vindication of the conclusion reached calls upon, us to discuss the case at what would otherwise be undue length. Primarily, and ordinarily all through, the handling of a boat and the consequent responsibility for the results devolves upon the owner, whom the master represents. There are certain elements of fact here, however, which justify the placing of responsibility for the damage done upon the charterer. The Monad Company chose and placed the master in charge. The boat was a lighter of the scow type without motive power or any adequate means of propulsion. Her movements were at the mercy of the tugs of the charterer, and her master was helpless to do more than to ask and protest. This latter function he seems to have performed to the uttermost. The charterer was time and again warned by the man of their own choice of the risk of damage, but the warnings were unheeded. Ordinarily the owner must carry the burden of risk involved in the employment of the boat. Here again we are met with the fact that the boat was put to a more hazardous use than that for which she was chartered. The risks she encountered and the damage she sustained, which she would otherwise have avoided, can

not therefore be held to be incidental to her employment in exculpation of the charterer. To hold the owner responsible for the consequences of a removal of the boat from the work, even if damage had in fact been caused thereby, would be to find a right in the charterer to use the property of another without the consent of the owner, and, under the circumstances of this case, to deny to the owner the right to reclaim his property when the term of hiring has expired, and to rescue it from the danger of almost certain loss.

We have reduced the amount of the repair bill. The owner is entitled to have only the damage beyond his own obligation to repair made good to him. This boat had not been caulked since she came to the present owner. In the usual course she might, and probably would, have been good for some time longer without the need of repairs. Nevertheless the carrying of stone out of small creeks and rivers and into the frequently heavy seas of the bay is rough work and trying on a boat of this type, and, had she been confined to her intended use, it is almost certain that at least some caulking would have been required. This, coupled with the fact of which there is some evidence that the boat was in better shape than when chartered, calls for some reduction for the part of the repairs for which the Monad Company is not responsible. It does not, however, justify the conclusion, which we are asked to reach, that the owners seized an opportunity to make ordinary repairs at the charterer's expense. The proof of this is that the most casual glance over the boat would enable any one to see that the repairs which were needed were, outside of some parts of the caulking and painting, not ordinary repairs. The damage from the collision with the schooner comes within the claim, because of the fact that this damage resulted from a risk to which the lighter should not have been exposed.

The legal principles stated are supported by the decided cases. *Lake Michigan Co. v. Crosby* (D. C.) 107 Fed. 723; *Worrall v. Davis Co.* (D. C.) 113 Fed. 549, affirmed in 122 Fed. 436, 58 C. C. A. 418.

We therefore find that the Killam Company are entitled to recover of and from the Monad Engineering Company the sum of \$440 for the hire of the lighter *Roosevelt*, and the further sum of \$60 for the time she was laid up for repairs, and the additional sum of \$425 for her repairs, including all the expense of bringing her to a place in which the repairs could be made, making in all the sum of \$925, together with interest and costs, and the form of a decree accordingly may be prepared by counsel and submitted for approval.

MONAD ENGINEERING CO. v. CHARLES KILLAM & CO.

(District Court, E. D. Pennsylvania. August 14, 1914.)

No. 74.

In Admiralty. Suit by the Monad Engineering Company against Charles Killam & Co. Heard on libel, answer, and trial proofs. Decree for respondent.

Harris S. Sparhawk, of Philadelphia, Pa., for libellant.
Lewis, Adler & Laws, of Philadelphia, Pa., for respondent.

DICKINSON, District Judge. On the findings of fact and conclusions of law and the opinion filed in the case of Charles Killam & Co. v. Monad Engineering Co., 216 Fed. 438 (in Admiralty, No. 59 of 1907), the cross-libel is dismissed, with costs to the respondent.

THE MODOC.

(District Court, W. D. Washington, N. D. July 31, 1914.)

No. 2690.

COLLISION (§ 93*)—STEAM VESSELS CROSSING—VIOLATION OF RULES.

A collision in the evening in Elliott Bay, 400 feet off the Seattle piers, between the steamer Modoc, coming in from the north and proceeding parallel with the pier line, and the steamer Camano, which was heading for a slip, held due solely to the fault of the Modoc for failing to keep out of the way, as required by articles 19 and 22 of the Inland Rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), and rule 8 of the Pilot Rules, having the Camano on her own starboard side, and also for moving at excessive speed in violation of Seattle Harbor Regulations, § 32, which limits the speed of vessels running parallel with the piers and within 2,000 feet to six miles an hour.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 194, 195; Dec. Dig. § 93.*]

In Admiralty. Suit for collision by the Island Transportation Company, owner of the steamer Camano, against the steamship Modoc, Sound Packet Lines, claimant, and cross-libel. Decree for libelant.

Libelant relies upon the following authorities: Marsden's Collision at Sea (6th Ed.) 473, 474; Spencer on Marine Collisions, § 172; The Marion (D. C.) 56 Fed. 271; The St. John v. Paine, 10 How. 557, 13 L. Ed. 537; The Coe F. Young, 49 Fed. 167, 1 C. C. A. 219; The New Orleans, 106 U. S. 13, 1 Sup. Ct. 90, 27 L. Ed. 96; Wilders S. S. Co. v. Low, 112 Fed. 161, at pages 172 and 173, 50 C. C. A. 473; The Geo. W. Roby, 111 Fed. 601, 49 C. C. A. 481; James D. Leary (D. C.) 110 Fed. 685; Chamberlain v. Ward, 21 How. 570, 16 L. Ed. 211; The Amboy (D. C.) 22 Fed. 555; The State of Alabama (D. C.) 17 Fed. 847; The Susquehanna (D. C.) 35 Fed. 325; The St. John (D. C.) 29 Fed. 221; The American Eagle (D. C.) 29 Fed. 302; The City of Paris, 9 Wall. 634, 19 L. Ed. 751; The Eider (D. C.) 37 Fed. 903; The Alaska (D. C.) 22 Fed. 548; The Panama (D. C.) 46 Fed. 496; The Nereus (D. C.) 23 Fed. 448; The Bristol (D. C.) 11 Fed. 156; The Jay Gould (D. C.) 19 Fed. 765; The Frostburg (D. C.) 25 Fed. 451; The America (C. C.) 37 Fed. 815; The Peshtigo, 25 Fed. 488; The Garden City (D. C.) 19 Fed. 529; The Hustler (D. C.) 100 Fed. 134; The City of New York, 147 U. S. 85, 13 Sup. Ct. 211, 37 L. Ed. 84; Spencer on Marine Collisions, 194, 195, and 226; The Active (D. C.) 22 Fed. 175; McFarland v. Selby Smelt. Co., 17 Fed. 253; The R. H. Williams (D. C.) 46 Fed. 414; The Columbia (D. C.) 8 Fed. 716; The Hattie M. Spracker (D. C.) 29 Fed. 457; Greenman v. Naragansett (D. C.) 4 Fed. 244; The Oregon, 158 U. S. 186, at page 197, 15 Sup. Ct. 804, 39 L. Ed. 943.

In addition to certain authorities cited by libelant, claimant relies on the following: The Ping-On v. Blethen (C. C.) 11 Fed. 607, at page

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

618; *Spencer, Marine Collisions*, §§ 26 and 27; *The Louisiana*, 21 How. 1, 16 L. Ed. 29; *The Continental*, 14 Wall. 358, 20 L. Ed. 801; *The Pennsylvania*, 19 Wall. 136, 22 L. Ed. 148; *Desty's Ship. & Adm'r*, 387; *The Narragansett (C. C.)* 11 Fed. 918; *The Albert Mason (D. C.)* 2 Fed. 821; *The Oregon (D. C.)* 27 Fed. 758; *The Eleanor*, 17 Blatchf. 88, Fed. Cas. No. 4,335; *The Favorita*, 18 Wall. 601, 21 L. Ed. 856; *The Grace Girdler*, 7 Wall. 201, 19 L. Ed. 113; *Farr v. S. S. Farnley (D. C.)* 1 Fed. 637; *The City of Chester (D. C.)* 27 Fed. 319; *The Seacaucus (D. C.)* 34 Fed. 68; *City of Savannah (D. C.)* 41 Fed. 891, at page 893; *The Saratoga (D. C.)* 37 Fed. 119, affirmed 40 Fed. 509; *The Pavonia (C. C.)* 26 Fed. 106; *The State of Texas (D. C.)* 20 Fed. 254; *The Sam'l H. Crawford (D. C.)* 6 Fed. 910; *The Roman (D. C.)* 12 Fed. 219; *The Alabama (C. C.)* 10 Fed. 394; *Spencer on Marine Collisions*, § 175.

Bogle, Graves, Merritt & Bogle, of Seattle, Wash., for libellant.
Hastings & Stedman, of Seattle, Wash., for claimant.

CUSHMAN, District Judge. On the evening of March 1, 1914, between 7:30 and 8 o'clock, the sound steamers *Camano* and *Modoc* came in collision in the waters of Elliott Bay, Seattle's harbor, in the vicinity of Pier Nine.

The *Modoc* is a freight carrier 165 feet long, of 195 tons. The *Camano* is a passenger and freight carrier 110 feet long, of 98 tons. There is a libel brought by the *Camano* and a cross-libel by the *Modoc*, to recover for the damages sustained.

The night was clear. The *Camano* had, a few minutes before, left her berth at pier 3, backing out into the stream, about 600 feet, turning to starboard, and had proceeded northward to make a landing in the slip on the south side of pier 9. She was headed in for pier 9 at the time of the collision. There is a dispute in the testimony as to whether she was headed directly in, or finding her way in on a more northerly course. There is also a dispute as to how far out from a line along the face of the piers the collision occurred.

The *Modoc* was coming in from Everett to make a landing on the face of pier 3, her usual course in making such landing being, after passing Four-Mile Rock, to draw in near pier 6 and proceed south along the line of piers to her berth.

On behalf of the *Modoc*, it is contended that the collision occurred off pier 6. The *Camano* had slackened speed to about four miles an hour to make her landing. The *Modoc* was making eight miles per hour.

On account of the fact that those on the *Camano* were intent upon the landing they were making, it is more likely that they are right in the location of the point of the collision than those on the *Modoc*, who were only engaged in getting off pier 6 before proceeding to pier 3. I therefore find the point of collision no further south than off the face of pier 8, nor out further from the face of the pier than 400 feet. The stem of the *Modoc* struck the *Camano* almost at right angles on her port bow, 10 or 15 feet back of her stem.

The inland rules for preventing collisions provide:

"Art. 19. When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other. * * *

"Art. 21. Where, by any of these rules, one of the two vessels is to keep out of the way the other shall keep her course and speed.

"Art. 22. Every vessel which is directed by the rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other." 2 Fed. Stat. Ann. 162.

The pilot rules for inland waters provide:

"Rule 8. When two steamers are approaching each other at right angles or obliquely so as to involve risk of collision, other than when one steamer is overtaking another, the steamer which has the other on her own port side shall hold her course and speed, and the steamer which has the other on her own starboard side shall keep out of the way of the other by directing her course to starboard so as to cross the stern of the other steamer, or, if necessary to do so, slacken her speed or stop or reverse. The steamer having the other on her own port bow shall blow one blast of her whistle as a signal of her intention to cross the bow of the other, holding her course and speed, which signal shall be promptly answered by the other steamer by one short blast of her whistle as a signal of her intention to direct her course to starboard so as to cross the stern of the other steamer or otherwise keep clear.

"If from any cause whatever the conditions covered by this situation are such as to prevent immediate compliance with each other's signals, the misunderstanding or objection shall be at once made apparent by blowing the danger signal, and both steamers shall be stopped, and backed, if necessary, until signals for passing with safety are made and understood.

"Rule 9. When two steamers are approaching each other at right angles or obliquely, other than when one steamer is overtaking another, so that the steamer having the other on her own starboard side may cross the bow of the other without involving risk of collision, the steamer having the other on her own starboard side may cross the bow of the other. If the steamers are within half a mile of each other, the steamer having the other on her own starboard side shall give, as a signal of her intention to cross the bow of the other, two short and distinct blasts of her whistle, which, if assented to, the other steamer shall promptly answer by two similar blasts of her whistle, when the steamer having the other on her own starboard bow may cross the bow of the other, in which case the steamer having the other on her own port side shall keep out of the way of the other. If, however, the steamer having the other on her own port side deems it dangerous for the other steamer to cross her bow, she shall sound the danger signal, in which case both steamers shall be stopped, and backed if necessary, until signals for passing with safety are made, answered and understood."

Under these rules, the Modoc was the burdened vessel. It was her duty to keep out of the way of the Camano and to pass under her stern. The Modoc contends that she gave two whistles, indicating that she would cross the bow of the Camano, thus leaving her on the starboard side of the Modoc. Rule 9 authorizes such a maneuver only when it can be executed without involving risk of collision. The Modoc, by this maneuver, took the risk of collision.

Those on the Camano testified that they heard but one whistle from the Modoc, indicating that she would pass to the stern of the Camano. There is no dispute that the Camano answered with one whistle, indicating that she would keep her course.

On behalf of the Modoc it is claimed that, when 200 yards away, she first sighted the Camano, which she had not before seen because of smoke from the latter; that, when she sighted her, she could not see her lights or determine which way she was going; that the Modoc

immediately stopped and reversed her engines; that she only gave the two whistles when collision was imminent; that the circumstances authorized a departure from the rules in an attempt to escape collision; that, if it was a mistake, it was one made in extremis.

The harbor regulations of the city of Seattle provide:

"Sec. 32. That it shall be unlawful to run any vessel * * * within the corporate limits of the city of Seattle at a greater rate of speed than six (6) miles per hour, within certain limits as herein prescribed, to wit, within two thousand (2,000) feet of such dock or wharf at which such vessel or other water craft intends to make a landing. Provided such vessel * * * is approaching from or near the bell buoy off Duwamish Head, and if such vessel or other craft is approaching from or near the direction of Four-Mile Rock and running parallel or nearly parallel to said docks or wharves, it shall be unlawful to run at a greater rate of speed than six (6) miles an hour inside of a line run one mile parallel to said docks and wharves."

The Modoc was clearly in fault in keeping a speed of eight miles per hour on a course almost parallel to the face of the piers in a harbor of this character, no further out from the piers than she is shown to have been. Vessels finding their way into the slips or coming out necessarily have small headway, or sternway, and so can do little, so far as handling the vessel is concerned, to escape collision.

There being smoke drifting northerly, or northwesterly from the Camano, sufficient to prevent those on the Modoc seeing either the signal or cabin lights of the Camano, I am unable to find that there was fault on the part of the lookout on the Camano for not sooner sighting the Modoc.

On behalf of the Modoc, it is contended that the mast head light of the Camano was not burning prior to the collision. The mast head light, the side and range lights, were lit on the Camano before leaving pier 3. After the collision, the master of the Modoc, as the vessels backed away, called to the Camano that her headlight was out. This light was an electric one; the wires being carried in pipes to a point above the hurricane deck, where a detachable connection was made by means of a block thrust into a socket, some distance above the deck. After the collision, the block was found out of the socket, on the deck, and was replaced before the landing was made at pier 9. It was shown that, upon former occasions, the block had been knocked out of the socket by shocks of articles coming in contact with the conduit pipe in which the wires were carried to the socket. It is not unreasonable to suppose that the block was jarred out of the socket by this collision. The testimony on the part of the Modoc that the light was not burning prior to the collision is discredited by the fact that those so testifying did not see the range light of the Camano, which was admittedly burning. The smoke of the Camano could not drift forward so as to obscure the side lights, and aft, so as to obscure the range light and not reasonably be expected to obscure the mast head light, being higher than the side lights and not so high as the range light.

I am unable to find any fault on the part of the Camano contributing to the collision. The parties have agreed to the amount of damages, and decree will be for libellant for such amount.

RAINEY v. NEW YORK & P. S. S. CO., Limited, et al.

(Circuit Court of Appeals, Ninth Circuit. August 3, 1914.)

No. 2011.

1. ADMIRALTY (§ 1*)—FORM OF PROCEDURE—PLEADING.

In admiralty, courts determine causes on equitable principles, and treat as immaterial whether the pleading counts upon contract or tort.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 1-17; Dec. Dig. § 1.*]

2. SEAMEN (§ 9*)—CONTRACT OF HIRING—IMPLIED WARRANTY OF SEAWORTHINESS.

Under the general maritime law, in every contract of hiring of the crew, as well as of affreightment, there is an implied warranty on the part of the shipowner that the ship is seaworthy at the beginning of the voyage.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 31-33; Dec. Dig. § 9.*]

3. ADMIRALTY (§ 21*)—JURISDICTION—ACTION FOR INJURY CAUSING DEATH.

In the absence of a federal or state statute giving the right of action, a suit cannot be maintained in a court of admiralty to recover for the death of a seaman.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 218-220; Dec. Dig. § 21.*]

Jurisdiction of torts, see notes to *Campbell v. H. Hackfeld & Co., Limited*, 62 C. C. A. 279; *Monongahela River Consol. Coal & Coke Co. v. Schinnerer*, 117 C. C. A. 203.]

4. SEAMEN (§ 3*)—WHAT LAW GOVERNS—AMERICAN SEAMEN ON FOREIGN SHIP.

When an American citizen signs shipping articles as seaman on a British ship, and goes on board, he is on British territory and entitled to the protection of British law in behalf of British seamen, and subject to all of its obligations and liabilities. He assumes a temporary allegiance to the flag under which he serves, and his rights, while in such service, are governed by British and not by American law.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 31-33; Dec. Dig. § 3.*]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; C. H. Hanford, Judge.

Suit in admiralty by Mary F. Rainey, as administratrix of David L. Rainey, deceased, against the New York & Pacific Steamship Company, Limited, and W. R. Grace & Co., a corporation. Decree for respondents, and libellant appeals. Affirmed.

William H. Gorham, of Seattle, Wash., for appellant.

Hughes, McMicken, Dovell & Ramsey and Otto B. Rupp, all of Seattle, Wash., for appellees.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge. Subsequent to the filing in the court below of the libel in this case, the respective parties thereto entered into this:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 216 F.—29

"Stipulation as to Facts and Dismissal.

"It is hereby stipulated by and between the above-named libelant, W. R. Grace & Co., one of the above-named respondents, and the New York & Pacific Steamship Company, Limited, one of the above-named respondents, heretofore appearing specially and now appearing specially for the purposes of this stipulation, as follows:

"First. That the respondent New York & Pacific Steamship Company, Limited, a corporation of Great Britain, was between the 1st day of August, 1907, and the 25th day of February, 1908, the owner of the British steamship Cacique, mentioned in the libel herein.

"Second. That the respondent W. R. Grace & Co. at all times subsequent to the 1st day of August, 1907, was and still is a corporation organized and existing under the laws of the state of Connecticut and doing a shipping business and maintaining an office in the city of Seattle, state of Washington.

"Third. That at all times between the 1st day of August, 1907, and the 25th day of February, 1908, the respondent W. R. Grace & Co. was the charterer of said steamship Cacique under a charter party from said New York & Pacific Steamship Company, Limited, as owner, whereby, for a valuable consideration, (1) said owner delivered to said charterer the possession, command, and navigation of the entire vessel Cacique aforesaid, for and during the voyage mentioned and described in said libel, and (2) said charterer, as owner *pro hac vice*, manned (including the hiring and appointment of the master, officers, and crew), equipped, supplied, navigated, and operated said vessel for and during said voyage, assuming all liabilities and making all necessary disbursements therefor, and collecting the earnings of said vessel for and during said voyage for its own proper use and benefit.

"Fourth. That said libel may be dismissed as to the respondent New York & Pacific Steamship Company, Limited, without costs to either party, with prejudice."

Such dismissal was entered, and the libel thereupon amended. Subsequently a second amended one was filed, to which exceptions were taken by W. R. Grace & Co., and, the libelant declining to further amend, a decree was entered dismissing the libel, from which decree the present appeal was taken.

In substance the second amended libel alleges that the libelant is a citizen and resident of the state of Washington, the widow and sole heir at law of David L. Rainey, deceased, the administratrix of his estate, and sues the said W. R. Grace & Co. for her own benefit to recover damages growing out of the alleged death on the 25th day of February, 1908, at the port of Mollendo, Peru, of the said David L. Rainey, her husband; that the New York & Pacific Steamship Company, Limited, a corporation of Great Britain, was at all times between the 1st day of August, 1907, and the 25th day of February, 1908, the registered owner of the British steamship Cacique, and that at all times subsequent to August 1, 1907, the said W. R. Grace & Co. was, and still is, a corporation duly organized and existing under the laws of the state of Connecticut and doing a shipping business and maintaining an office in the city of Seattle, state of Washington; that at all times between the said 1st day of August, 1907, and February 25, 1908, Grace & Co. was the charterer of the steamship mentioned, under a charter party from the New York & Pacific Steamship Company, Limited, as owner, whereby, for a valuable consideration, the said owner delivered to the charterer the possession, command, and navigation of the entire vessel for and during a voyage "from the port of Seattle, Wash., to a

port or ports in Peru, South America, and return to the Pacific coast of the United States," and that the said charterer, "as owner pro hac vice, manned, including the hiring and appointment of the master, officers, and crew, equipped, supplied, navigated, and operated said vessel for and during said voyage, assuming all liabilities, and making all necessary disbursements therefor, and collecting the earnings of said vessel for and during said voyage for its own proper use and benefit," and thereafter, on or about September 1, 1907, as such charterer and owner pro hac vice dispatched the said vessel on the said voyage; that on or about September 1, 1907, and for a long time prior thereto, and at all times thereafter until his death on the said 25th day of February, 1908, the said David L. Rainey was a citizen of the United States and a resident of the city of Seattle, state of Washington, and during all of that time was duly licensed by the United States government, as well as by the British government, as chief engineer of ocean-going United States and British steamships, respectively; that on or about September 1, 1907, at Seattle, Wash., the said charterer, through its managing agent there, engaged Rainey as chief engineer of the steamship Cacique, then being in the waters of Puget Sound in the state of Washington, for a voyage then about to be commenced from a port on Puget Sound to a port or ports in Peru and return to the Pacific Coast of the United States, pursuant to which engagement Rainey "signed shipping articles, British form, to serve in the capacity of chief engineer of said vessel for said voyage, and for a term not to exceed ——— months," at certain specified wages, and thereafter, on or about September 1, 1907, said Rainey reported on board the ship to the master thereof, and entered upon and continued in the discharge of his duties as such chief engineer until his death; that at no time from the entry of Rainey upon his employment to the time of the injury which resulted in his death was the ship mentioned in a seaworthy condition; "that said steamship was what is known as an oil-burner, using oil as fuel for the purpose of generating the steam used in propelling said steamship, in operating winches for handling her cargo, and in operating an electric dynamo to illuminate said vessel, its passageways on, between, and below decks, and its several decks, so as to enable its crew, including said David L. Rainey, to perform their several duties required of them from time to time; that the feed pump on said steamship, used for supplying oil as fuel for the purposes aforesaid, was liable to become clogged with oil, fail to supply sufficient or any oil for fuel purposes, and would require to be put in working order again before the work of the vessel could go on, which was or should have been known to respondent; that said steamship was not furnished or supplied with safety lamps or any other method of illumination (exclusive of its electric plant) from which the volatile fumes of said fuel oil, wherever present on board said steamship, would be protected and ignition therewith thereby prevented, when said dynamo was for any reason out of commission and other means of illuminating had to be resorted to to enable the crew, including its chief engineer, to do the work necessary aboard said vessel;" that on the 30th day of January, 1908, at the port of Mollendo, Peru, and while Rainey was performing his duties as chief engineer, through no fault of his or of any member of the crew immediately under his

authority, a feed pump on board the ship, used for the purpose of supplying oil for fuel generating steam, became clogged, and failed to supply sufficient or any oil to keep up or generate any steam for the purposes of the ship, in consequence of which its dynamo was immediately put out of commission; that it thereupon became necessary and the duty of Rainey to immediately put the pump in working order in order to generate and keep up the steam, and the dynamo running in order to illuminate the ship, to the end that the work of the crew and of the vessel might proceed, and that in the prosecution of that duty Rainey was obliged, for want of other methods of illumination, to use and did use a lantern furnished by the charterer, which was what is known as a Dietz lamp, an oil lamp with its flame unprotected; that in doing so the volatile fumes of the oil arising from the oil in the feed pump became ignited by the flame of the lantern, thereby causing an explosion, which inflicted burns upon Rainey, from the effects of which he died the following 25th day of February, 1908, in the hospital at Mollendo, Peru, all of which was caused by the failure of the charterer to keep and maintain the said ship in a seaworthy condition.

In the libel the cause is designated as one "of tort, civil and maritime," and, besides allegations bearing upon the question of the amount of damages, it contains these further averments:

"That the laws of the United States in force at all of said times between the 1st day of August, 1907, and the 30th day of January, 1908, provided, *inter alia*, that in every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, there is implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship that the owner of the ship shall provide a seaworthy ship for the voyage at the time of the commencement of the voyage, and shall keep said ship in a seaworthy condition for the voyage during the voyage; and that the laws of Great Britain in force at all times between the 1st day of August, 1907, and the 30th day of January, 1908, provided, *inter alia*, as follows: 'In every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, and in every instrument or apprenticeship, whereby any person is bound to serve as an apprentice on board any ship, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship that the owner of the ship, and the master, and every agent charged with the loading of the ship or the preparing of the ship for sea or the sending of the ship to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the voyage.' 57 and 58 Vict. c. 60, commonly known as the Merchants' Shipping Act, 1894, and acts amendatory thereof."

It will be seen from the foregoing that the gist of the cause sued on is the alleged failure of the charterer as owner *pro hac vice* to provide a safety lamp, for lack of which the vessel is alleged to have been unseaworthy.

[1] Whether the libel sounds in tort or contract we deem immaterial. In admiralty, courts determine causes upon equitable principles, and treat as immaterial whether the pleading counts upon contract or tort. *California-Atlantic S. S. Co. v. Central Door & Lumber Co. (C. C. A.)* 206 Fed. 5, 7, and cases there cited. See, also, 2 *Parsons, Shipping and Admiralty*, 369.

Nor do we regard it as important that in the libel it is alleged:

"That the laws of the United States in force at all of said times between the 1st day of August, 1907, and the 30th day of January, 1908, provided, *inter alia*, that in every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, there is implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship that the owner of the ship shall provide a seaworthy ship for the voyage at the time of the commencement of the voyage, and shall keep said ship in a seaworthy condition for the voyage during the voyage."

Conceding the correctness of the contention of the proctors for the appellee that the meaning of that allegation is that there was a United States statute to that effect, the respective proctors are agreed that, as a matter of fact, there is not and was not any such statute. There is, however, in the United States statutes, this provision:

"If any person knowingly sends or attempts to send or is party to the sending or attempting to send an American ship to sea, in the foreign or coastwise trade, in such an unseaworthy state that the life of any person is likely to be thereby endangered, he shall, in respect of each offense, be guilty of a misdemeanor, and shall be punished by a fine not to exceed one thousand dollars or by imprisonment not to exceed five years, or both, at the discretion of the court, unless he proves that either he used all reasonable means to insure her being sent to sea in a seaworthy state, or that her going to sea in an unseaworthy state was, under the circumstances, reasonable and justifiable, and for the purposes of giving that proof he may give evidence in the same manner as any other witness." Section 4561, R. S., as amended December 21, 1898, 30 St. L. 758 (U. S. Comp. St. 1901, p. 3095).

[2] According to the general maritime law, there was an implied warranty on the part of the shipowner that the ship in question was seaworthy at the time of beginning the voyage in question. In *The Edwin I. Morrison*, 153 U. S. 199, 210, 14 Sup. Ct. 823, 825 (38 L. Ed. 688), the Supreme Court quoted with approval this statement of the law made by Mr. Justice Gray, on circuit, in the case of *The Caledonia* (C. C.) reported in 43 Fed. 681, 685:

"In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is, or shall be, in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence."

And the Supreme Court added:

"In *The Glenfruin*, 10 P. D. 103, 108, the same rule is thus expressed by Butt, J.: 'I have always understood the result of the cases from *Lyon v. Mells*, 5 East, 429, to *Kopitoff v. Wilson*, 1 Q. B. D. 377, to be that, under his implied warranty of seaworthiness, the shipowner contracts, not merely that he will do his best to make the ship reasonably fit, but that she shall really be reasonably fit for the voyage. Had those cases left any doubt in my mind, it would have been set at rest by the observations of some of the peers in the opinions they delivered in the case of *Steel v. State Line Steamship Co.*, 3 App. Cas. 72.'"

See, also, *Corsar v. J. D. Spreckels & Bros. Co.*, 141 Fed. 260, 264, 72 C. C. A. 378, and cases there cited.

A fortiori does the same rule apply in cases where the lives of passengers or crew are involved. So if, instead of the injuries to Rainey

having resulted in his death, he had survived and had brought a libel for damages for the injuries he received, and it be true that the failure of the owner to equip the ship with safety lamps rendered her unseaworthy, he could undoubtedly have recovered.

[3] But Rainey died from the effects of his injuries, and, according to the well-established rule, neither his widow nor any one else can maintain a suit in admiralty in a court of the United States to recover damages growing out of his death, in the absence of an act of Congress or a statute of a state giving a right of action therefor. The *Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358, and cases there cited. It is not contended that there is any such act of Congress. The state of Connecticut, of which state the appellee W. R. Grace & Co. is a corporation, has a statute to that effect, but, even if it ever had any application to the present case, it is conceded by the proctor for the appellant that the present suit falls within the bar of that statute.

The state of Washington, of which state the deceased Rainey was at the time of his death a citizen, and where he signed the shipping articles and became a member of the crew of the ship in question, also has a similar statute authorizing the commencement of such an action at any time within three years from the accruing of the right thereby created, within which time the present suit was brought. But we are unable to see that the statute of Washington has any application to the case. A state statute has force only within the confines of the state.

[4] The chartering of the ship in question to an American corporation for the particular voyage in question did not deprive the ship of its nationality. When Rainey, although a citizen of the state of Washington, went before the British consul at Seattle and signed the shipping articles, and thereupon stepped upon the British ship flying the British flag as a member of its crew, as the record shows he did, he stepped upon British territory and became entitled to the protection and benefit of all British law in behalf of British seamen, and subject to all of its obligations and liabilities. It is well to repeat the interesting discussion of that subject by the Supreme Court in the case *In re Ross*, reported in 140 U. S. 453, 472, 11 Sup. Ct. 897, 903 (35 L. Ed. 581):

"The position that the petitioner, being a subject of Great Britain, was not within the jurisdiction of the consular court is more plausible, but admits, we think, of a sufficient answer. The national character of the petitioner, for all the purposes of the consular jurisdiction, was determinable by his enlistment as one of the crew of the American ship *Bullion*. By such enlistment he becomes an American seaman—one of an American crew on board of an American vessel—and as such entitled to the protection and benefits of all the laws passed by Congress on behalf of American seamen, and subject to all their obligations and liabilities. Although his relations to the British government are not so changed that, after the expiration of his enlistment on board of the American ship, that government may not enforce his obligation of allegiance, and he, on the other hand, may not be entitled to invoke its protection as a British subject, that relation was changed during his service of seaman on board of the American ship under his enlistment. He could then insist upon treatment as an American seaman, and invoke for his protection all the power of the United States which could be called into exercise for the protection of seamen who were native born. He owes for that time, to the country to which the ship on which he is serving belongs, a temporary allegiance, and must be held to all its responsibilities. The question has been treated more as a polit-

ical one for diplomatic adjustment than as a legal one to be determined by the judicial tribunals, and has been the subject of correspondence between our government and that of Great Britain.

"The position taken by our government is expressed in a communication from the Secretary of State to the British government, under date of June 16, 1881. It was the assertion of a principle which the Secretary insisted 'is in entire conformity with the principles of English law as applied to a mercantile service almost identical with our own in its organization and regulation. That principle is that, when a foreigner enters the mercantile marine of any nation and becomes one of the crew of a vessel having undoubtedly a national character, he assumes a temporary allegiance to the flag under which he serves, and, in return for the protection afforded him, becomes subject to the laws by which that nation, in the exercise of an unquestioned authority, governs its vessels and seamen. If, therefore,' he continued, 'the government of the United States has by treaty stipulation with Japan acquired the privilege of administering its own laws upon its own vessels and in relation to its own seamen in Japanese territory, then every American vessel and every seaman of its crew are subject to the jurisdiction which by such treaty has been transferred to the government of the United States. If Ross had been a passenger on board of the Bullion, or if, residing in Yokohama, he had come on board temporarily and had then committed the murder, the question of jurisdiction would have been very different. But, as it was, he was part of the crew, a duly enrolled seaman under American laws, enjoying the protection of this government to such an extent that he could have been protected from arrest by the British authorities; and his subjection to the laws of the United States cannot be avoided just at the moment that it suits his convenience to allege foreign citizenship. The law which he violated was the law made by the United States for the government of United States vessels; the person murdered was one of his own superior officers whom he had bound himself to respect and obey; and it is difficult to see by what authority the British government can assume the duty or claim the right to vindicate that law or protect that officer. The mercantile service is certainly a national service, although not quite in the sense in which that term would be applied to the national navy. It is an organized service, governed by a special and complex system of law, administered by national officers, such as collectors, harbor masters, shipping masters, and consuls, appointed by national authority. This system of law attaches to the vessel and crew when they leave a national port and accompanies them round the globe, regulating their lives, protecting their persons, and punishing their offenses. The sailor, like the soldier during his enlistment, knows no other allegiance than to the country under whose flag he serves. This law may be suspended while he is in the ports of a foreign nation, but, where such foreign nation grants to the country which he serves the power to administer its own laws in such foreign territory, then the law under which he enlisted again becomes supreme.'

"The Secretary concluded his communication with the following expression of the determination of our government: 'So impressed is this government with the importance and propriety of these views that, while it will receive with the most respectful consideration the expression of any different conviction which Her Britannic Majesty's government may entertain, it will yet feel bound to instruct its consular and diplomatic officers in the East that in China and Japan the judicial authority of the consuls of the United States will be considered as extending over all persons duly shipped and enrolled upon the articles of any merchant vessel of the United States, whatever be the nationality of such person. And all offenses which would be justiciable by the consular courts of the United States, where the persons so offending are native-born or naturalized citizens of the United States, employed in the merchant service thereof, are equally justiciable by the same consular courts in the case of seamen of foreign nationality.'

"The determination thus expressed was afterwards carried out by incorporating the doctrine into the permanent regulations of the department for the guide of the consuls of this country. Seventy-second regulation.

"The views thus forcibly expressed present, in our judgment, the true status

of the prisoner while an enlisted seaman on the American vessel, and give effect to the purpose of the treaty and the legislation of Congress. The treaty uses the term 'Americans' in speaking of those who may be brought within the jurisdiction of the consular court for offenses committed in Japan. The statute designates them as 'citizens of the United States,' and yet extends the laws of the United States, so far as they may be necessary to execute the treaty and are suitable to carry the same into effect, not only over all citizens of the United States in Japan, but also over 'all others to the extent that the terms of the treaty justify or require.'

"Reading the treaty and statute together, in view of the purpose designed to be accomplished, we are satisfied that it was intended by them to bring within our laws all who are citizens, and also all who, though not strictly citizens, are by their service equally entitled to the care and protection of the government. It is a canon of interpretation to so construe a law or a treaty as to give effect to the object designed, and for that purpose all of its provisions must be examined in the light of attendant and surrounding circumstances. To some terms and expressions a literal meaning will be given, and to others a larger and more extended one. The reports of adjudged cases and approved legal treatises are full of illustrations of the application of this rule. The inquiry in all such cases is as to what was intended in the law by the Legislature, and in the treaty by the contracting parties.

"In *Geofroy v. Riggs*, 133 U. S. 258 [10 Sup. Ct. 295, 33 L. Ed. 642], which was before this court at the last term, it was held that the District of Columbia, as a political community, is one of 'the states of the Union,' within the meaning of that term as used in the consular convention of 1853 with France; such construction being necessary to give consistency to the provisions of the convention, and not defeat the consideration given by France for her concession of certain rights to citizens of the United States. And in the present case, to carry out the intention of the treaty and statute in question, they will be construed to apply to all parties who are by public law, or the law of the country, entitled to be treated for the time, from their employment and service, as citizens. There are many adjudications to the effect that such character will be ascribed to parties, and they be held liable to all its consequences, and entitled to all its benefits, on other grounds than birth or naturalization.

"A statute of Henry VIII enacted that if anybody should rob or take 'the goods of the king's subjects within this realm,' and be found guilty, the party robbed should have restitution of the goods. Of this statute Sir Matthew Hale said that, 'though it speaks of the king's subjects, it extends to aliens robbed, for, though they are not the king's natural born subjects, they are the king's subjects when in England, by local allegiance.' 1 Hale's Pleas of the Crown, p. 542.

"In *United States v. Holmes*, 5 Wheat. 412 [5 L. Ed. 122], which is in point in the case before us, certain parties were indicted in the Circuit Court of the United States for the district of Massachusetts, and convicted of murder on the high seas. It appeared that a vessel, apparently Spanish, was captured by privateers from Buenos Ayres, and a prize crew was put on board, of whom the prisoners were a part. One of them was a citizen of the United States and the others were foreigners. The crime was committed by drowning the person, whose death was charged, by the prisoners driving or throwing him overboard. On motion for a new trial certain questions arose on which the judges were divided in opinion. One of these was whether it made any difference, as to the point of jurisdiction, whether the prisoners or any of them were citizens of the United States, or that the offense was committed, not on board of any vessel, but on the high seas. The court said that the question contained two propositions: One as to the national character of the offender and the person against whom the offense was committed; and, second, as to the place where it was committed. In respect to the first the court was of the opinion that it made no difference whether the offender was a citizen of the United States or not, adding: 'If it (the offense) be committed on board of a foreign vessel by a citizen of the United States, or on board of a vessel of the United States by a foreigner, the offender is to be considered pro hac

vice, and in respect to this subject, as belonging to the nation under whose flag he sails.'

"The case of *The Queen v. Anderson*, L. R. 1 Crown Cases Reserved, 161, is still more in point. There one James Anderson, an American citizen, was indicted at the Central Criminal Court in England for murder on board a vessel belonging to the port of Yarmouth, in Nova Scotia; she was registered in London, and was sailing under the British flag. At the time the offense was committed the vessel was in the river Garonne within the boundaries of the French Empire, on her way up to Bordeaux, which city is, by the course of the river, about 90 miles from the open sea. The vessel had proceeded about halfway up the river, and was, at the time of the offense, about 300 yards from the nearest shore; the river at that place being about half a mile wide. The tide flows up to the place and beyond it. The prisoner was convicted, and the case was reserved for the opinion of the court. It was contended, on behalf of the prisoner, that the court had no jurisdiction in the case because he was an American citizen and in a foreign country at the time the offense was committed; and also that section 267 of the Merchant Shipping Act, which it was said the Crown relied upon at the trial, applied only to British seamen. Mr. Justice Blackburn, in regard to this last statement, observed, 'The expression "British seamen" may mean one who, whatever his nationality, is serving on board a British ship,' and also that it had been decided 'that a ship, which bears a nation's flag, is to be treated as a part of the territory of that nation. A ship is a kind of floating island.' Counsel answered that, if it floated into the territory of another nation, it would cease to be so, and the jurisdiction of the flag would then be excluded, and that the man might have been tried in France, to which Chief Justice Bovill replied: 'Even if he might, why should not this country legislate to regulate the conduct of those on board its own vessels, or so as to have concurrent jurisdiction?' All the judges concurred in sustaining the conviction. In giving his opinion the Chief Justice said: 'There is no doubt that the place where the offense was committed was within the territory of France, and that the prisoner was therefore subject to the laws of France, which that nation might enforce if they thought fit; but at the same time he was also within a British merchant vessel, on board that vessel as a part of the crew, and, as such, he must be taken to have been under the protection of the British law, and also amenable to its provisions. It is said that the prisoner was an American citizen, but he had embarked, by his own consent, on board a British ship, and was at the time a portion of its crew. There are many observations to be found in various writers to show that in some instances, though subject to American law as a citizen of America, and to the law of France as being found within French territory, yet that he must also be considered as being within British jurisdiction as forming a part of the crew of a British vessel, upon the principle that the jurisdiction of a country is preserved over its vessels, though they may be in ports or rivers belonging to another nation.' Page 165. Mr. Justice Blackburn said: 'Where a nation allows a vessel to sail under her flag, and the crew have the protection of that flag, common sense and justice require that they should be punishable by the law of the flag.' Page 170.

"The views expressed by the Department of State, quoted above, are in harmony with the doctrine uniformly asserted by our government against the claim by England of a right to take its countrymen from the deck of an American merchant vessel and press them into its naval service. It is a part of our history that the assertion of this claim, and its enforcement in many instances, caused a degree of irritation among our people which no conduct of any other country has ever produced. Its enforcement was deemed a great indignity upon this country and a violation of our right of sovereignty; our vessels being considered as parts of our territory. It led to the War of 1812, and, although that war closed without obtaining a relinquishment of the claim, its further assertion was not attempted. At last in a communication by Mr. Webster, then Secretary of State, to Lord Ashburton, the special British minister to this country, on the 8th of August, 1842, the claim was repudiated, and the announcement made that it would no longer be allowed by our government and must be abandoned. The conclusion of Mr. Webster's

communication bears upon the question before us. After referring to the claim of Great Britain, and demonstrating the injustice of the position and its violation of national rights, he said: 'In the early disputes between the two governments, on this so long-contested topic, the distinguished person to whose hands were first intrusted the seals of this department declared that "the simplest rule will be that the vessel, being American, shall be evidence that the seamen on board are such." Fifty years' experience, the utter failure of many negotiations, and a careful reconsideration now had of the whole subject at a moment when the passions are laid, and no present interest or emergency exists to bias the judgment, have convinced this government that this is not only the simplest and best, but the only rule, which can be adopted and observed consistently with the rights and honor of the United States, and the security of their citizens. That rule announces, therefore, what will hereafter be the principle maintained by their government. In every regularly documented American merchant vessel, the crew who navigate it will find their protection in the flag which is over them.' Webster's Works, vol. 6, p. 325.

"This rule, that the vessel, being American, is evidence that the seamen on board are such, is now an established doctrine of this country; and in support of it there is with the American people no diversity of opinion and can be no division of action.

"We are satisfied that the true rule of construction in the present case was adopted by the Department of State in the correspondence with the English government, and that the action of the consular tribunal in taking jurisdiction of the prisoner Ross, though an English subject, for the offense committed, was authorized. While he was an enlisted seaman on the American vessel, which floated the American flag, he was, within the meaning of the statute and the treaty, an American, under the protection and subject to the laws of the United States equally with the seaman who was native born. As an American seaman he could have demanded a trial before the consular court as a matter of right, and must therefore be held subject to it as a matter of obligation."

It is not contended by the proctor for the appellant that under the general admiralty law, or even under the common law, the widow or other heir of the deceased Rainey had any right to the recovery of damages by reason of his death.

The judgment is affirmed.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

(Circuit Court of Appeals, Second Circuit. May 26, 1914.)

Nos. 273, 274, 272, 188, 189, 275.

1. STREET RAILROADS (§ 58*)—LEASE—INSOLVENCY OF LESSEE—ACCOUNTING BETWEEN PARTIES.

A lease of a street railroad was made subject to all debts and liabilities of the lessor, which the lessee assumed and agreed to pay, except such as were due to itself, and including all bonds which should be issued by the lessor under a certain mortgage, some of which it was provided should be issued for the benefit of the lessee in payment of the cost of reconstructing and changing the motive power of certain parts of the road, which work had begun. By a further provision the lessee was authorized, if it should deem it expedient, to change the motive power on other parts of the road, and for the amount so expended it was to receive bonds of the lessor secured by a mortgage subordinate in lien to the first mortgage and to the rents reserved. Prior to the insolvency of the lessee and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

consequent termination of the lease it had changed the motive power on certain parts of the lines, but had not demanded nor received the bonds to which it was entitled therefor. *Held*, that as between the parties the indebtedness so created was a part of that assumed by the lessee, and that on an accounting between them it was not entitled to charge the amount against the lessor.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. § 58.*]

2. STREET RAILROADS (§ 49*)—LEASE—SECOND LEASE BY LESSEE—EFFECT AS ASSIGNMENT OF ORIGINAL LEASE.

A street railroad company, whose franchise had less than 100 years to run, leased its road, the lease to continue in force during all extensions of its charter. Subsequently the lessee leased its entire system, including such leased lines, to another company for 999 years. *Held*, that although at the time of the making of the original lease the law permitted an extension of charters in perpetuity, it could not be said that the lessor's charter would be extended beyond the term of the second lease; that, the reversionary right of the lessor therein being wholly uncertain, the second lease operated as an assignment of the first, and the second lessee was primarily liable by privity of estate to the owner of the property for any damages proved resulting from its failure to keep the road and equipment in repair, and to pay taxes and assessments, as required by the terms of the original lease, during the time it was in possession.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 125, 126; Dec. Dig. § 49.*]

3. STREET RAILROADS (§ 58*)—LEASE—INSOLVENCY OF LESSEE—ACCOUNTING BETWEEN PARTIES.

Bonds of a street railroad company, payment of which was expressly assumed by a long-term lessee, and which matured prior to the termination of the lease by reason of the insolvency of the lessee, *held*, as between the parties, basis for a provable claim against its estate.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. § 58.*]

4. STREET RAILROADS (§ 58*)—LEASE—INSOLVENCY OF LESSEE—ACCOUNTING BETWEEN PARTIES.

A lease of a street railroad provided that whenever the lessee deemed it expedient it might change the motive power in use at its own expense. It was further provided that in case it made such change on its request the lessor should issue and deliver to it mortgage bonds for the amount of the expenditure, but the lessee expressly assumed payment of such bonds. It made and paid for the change to electric power, but made no request for the issue of bonds therefor, and some eight years afterward the lease was terminated by reason of its insolvency. *Held*, that on an accounting between the parties it was not entitled to set off, against claims owing to the lessor for breaches of the lease, the amount expended by it in making the change of power.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. § 58.*]

5. STREET RAILROADS (§ 58*)—INSOLVENCY—CONTRACT WITH EXPRESS COMPANY—DAMAGES FOR BREACH.

The owner of a street railroad system entered into a contract with an express company, by which it granted to the latter the exclusive right of doing express business over its system for 20 years, including main lines, branches, and leased and controlled lines, so far as it could lawfully do so, and agreed to supply and operate the cars for that purpose in consideration of 20 per cent. of the gross profits of the business. The contract provided that it should bind the successors, assigns, lessees, and transferees of the parties. The railroad company through stock ownership

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

procured the execution of similar contracts with the express company by its controlled lines. It afterward leased its system by a lease which operated as an assignment of the contract during the continuance of the lease, but subject to its termination for breach of condition. Later the express company assigned the contract to another company, including also the other separate contracts, in consideration of an annual payment of \$10,000. The lessee performed the contract until by reason of its insolvency the lease was terminated, and thereafter its receivers and those of the lessor, which was also insolvent, continued to perform for some months, and then declined to adopt it and discontinued operation of the express cars. Thereupon the express company's assignee terminated its contract as provided therein. *Held*, that the railroad lessee was bound by the contract only until the termination of its lease, and, the contract having been performed until after that time, was not further liable, but that the lessor, as a party thereto, was liable to the express company for the value of the contract to the end of the term if the same could be proved; that the amount the express company received annually from its assignee, while evidence of such value, was not the sole measure, and that further evidence that such assignee while operating thereunder for three years earned an average net profit of \$30,000 a year was competent and sufficient to warrant the allowance to the express company of substantial damages.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. § 58.*]

6. RECEIVERS (§ 158*)—CLAIMS ENTITLED TO PREFERENCE.

To justify the giving of a preference to claims for supplies against the estate of an insolvent railroad company, the supplies furnished must have been of such quantity and to be paid for at such times as to indicate that they were necessary for current operation and were to be paid for out of current earnings, but direct evidence as to the latter condition is not necessary, as the court may draw the inference that such was the expectation of the parties from the circumstances attending the transaction.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 301-306; Dec. Dig. § 158.*]

7. RECEIVERS (§ 158*)—CLAIMS ENTITLED TO PREFERENCE.

Claims for supplies furnished for the use of a street railroad company within a reasonable time prior to the appointment of receivers in insolvency for such company, of which claims for sand used to facilitate the starting and stopping of cars, for globes, burners, and wicks used in the operation of horse cars and for track work, for lubricants used on cars and in power houses, and for coal used in power houses are types, *held* properly given preference over claims of general creditors out of current earnings or unmortgaged assets in the hands of receivers.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 301-306; Dec. Dig. § 158.*]

8. RECEIVERS (§ 163*)—PREFERRED CLAIMS—INTEREST.

Supply claims against the estate of an insolvent railroad company which are given a preference over the claims of general creditors out of a certain fund are entitled to interest after the appointment of receivers, where the fund is sufficient to pay all such claims in full with interest.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 312-316; Dec. Dig. § 163.*]

9. RECEIVERS (§ 158*)—CLAIMS ENTITLED TO PREFERENCE.

Tort claims against an insolvent street railroad company for injuries to individuals through negligence in operation are not for operating expenses in such sense as to entitle them to preference over claims of general cred-

itors, nor are claims for rental of leased lines, nor by a city for the cost of paving.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 301-306; Dec. Dig. § 158.*]

10. RECEIVERS (§ 158*)—DISTRIBUTION OF ASSETS.

The fact that an insolvent lessee of a street railroad system was controlled by its lessor and caused to apply its earnings to the payment of dividend rentals to the lessor's stockholders, which payments, although preferential, were of a valid indebtedness, does not deprive the receivers of the lessor, which is also insolvent, of the right to share equally with other general creditors of the lessee in respect to a proved claim for rent.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 301-306; Dec. Dig. § 158.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in equity by the Pennsylvania Steel Company and The Degnon Contracting Company against the New York City Railway Company and the Metropolitan Street Railway Company. Appeals from four decrees arising out of the receivership. Affirmed.

For opinions below, see 208 Fed. 168, 747, 757, and 777.

W. H. Page, of New York City, for Metropolitan Express Co.

Arthur H. Masten, of New York City, for Metropolitan St. Ry. Co., receiver.

M. C. Fleming, of New York City, for New York City Ry. Co., receiver.

Brainerd Tolles and Julien T. Davies, both of New York City, for Second Avenue Ry. Co.

C. T. Payne, of New York City, for Farmers' Loan & Trust Co.

Chase Mellen, of New York City, for the Central Park N. & E. R. Co., receiver.

J. R. Abney, of New York City, for Latta and others, tort creditors.

B. S. Catchings, of New York City, for Accident Creditors' Committee.

G. N. Hamlin, of New York City, for Contract Creditors' Committee.

C. H. Tuttle, of New York City, for Cornell and others.

C. M. Travis, of New York City, for Pennsylvania Steel Co. and another.

R. R. Rogers, of New York City, for the New York Rys. Co.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. We are about to decide four appeals arising out of the receivership in the above case.

Mr. Turner, the special master, and Judge Lacombe have written so fully in respect to the questions involved that it will not be profitable to go over the ground again; our conclusions being addressed to counsel thoroughly familiar with all the facts and all the authorities.

It will be convenient to begin by stating certain of our findings which are material in most of the cases once for all, so as to avoid unnecessary repetition.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

We have decided in the Termination of Lease Proceeding, *Pennsylvania Steel Co. v. N. Y. City Ry. Co.*, 198 Fed. 721, 725, 117 C. C. A. 503, that Messrs. Joline and Robinson, who were appointed receivers of the New York City Railway Company September 24, 1907, and of the Metropolitan Street Railway Company October 1, 1907, were really acting for the Metropolitan Company from September 24, 1907. This was upon the principle that the City Company had no interest to continue a losing lease, whereas the Metropolitan Company, as owner, was deeply interested in the continuance of the system as a going concern. Therefore between the two estates the Metropolitan Company was liable for everything done by the receivers.

We also held that this fact did not determine when the Metropolitan City lease actually terminated, and that this would depend upon the right and fact of re-entry. Although the lease was referred to in several decisions as having certainly terminated on or before dates named, the actual date was never determined until the special master fixed it as of October 1, 1907. The dual receivership caused the uncertainty. Separate receivers were not appointed until July 31, 1908. If different persons had been originally appointed receivers of each company there could have been no doubt as to the date when the lease terminated. Judge Lacombe's primary purpose from the beginning was to preserve the system of transportation as a going concern for the benefit of the public and by appointing the same persons as receivers of both companies he secured greater harmony and economy of operation. However, as both companies, when hopelessly insolvent, voluntarily put themselves in the hands of the court, and after September 24, 1907, never had possession, custody or control of the premises, there could not have been any actual re-entry by the Metropolitan Company. We think what was done amounted to a surrender of the lease by the City Company September 24, 1907, and an acceptance of the surrender by the Metropolitan Company October 1, 1907. Therefore we agree with the special master as to the date.

There was a paramount necessity at the beginning of the receivership to raise funds, which could only be done by the issuance of receivers' certificates. Although the District Court originally, and this court at first upon appeal, attempted to marshal the assets for the payment of these certificates, it was ultimately concluded that to give them greater marketability they should be made a first lien upon all the property of both companies; the question as to which estate they should be paid from being reserved to the final distribution. *Pennsylvania Steel Co. v. N. Y. City Ry. Co.*, 163 Fed. 242, 246, 90 C. C. A. 188.

One other consideration is to be noted. In the Express Company's appeal, 198 Fed. 735, 117 C. C. A. 503, we departed from the New York rule that only matured claims existing on the date receivers are appointed are provable. This rule has the advantage of absolute simplicity. Still, we thought it very inequitable that claims which were ascertainable at the time they were required to be presented should be excluded. Of course some day must be fixed, and fixed by the District Court, so as not to delay distribution. In this case he did fix the time before which all claims must be filed against the City Company as December 10, 1907, and against the Metropolitan Company as January 15,

1908. It is true that he did this when every one concerned understood that no claims were provable except those which were ascertained and matured at the date of the receivership, in accordance with the New York rule. By pure inadvertence he signed an order in some of the cases permitting claims to be filed of a later date, without inserting the usual provision that they should be filed nunc pro tunc as of the dates already fixed. This he very properly corrected when it was called to his attention. It is said that in accordance with the views we expressed in the case of the Express Company's appeal, 198 Fed. 735, 117 C. C. A. 503, he ought to have fixed much later dates than December 10, 1907, and January 15, 1908. But he has not been willing to change these dates. If his action is a subject of review by us, we are not at all willing to disturb it. No one knew better than he the necessities of this very complicated and perplexing receivership, throughout which he has exhibited an anxious disposition to deal fairly with every interest. We are entirely satisfied to rest upon his conclusion in this respect.

The subsidiary lessors of lines to the Metropolitan Company were in a position to re-enter their properties whenever default was made, but did not do so. They acquiesced in the operation of their lines by the receivers until the receivers returned them. The termination of these leases is therefore fixed at those dates respectively. During the period of experimental operation the receivers operated these lines for the benefit of the lessors; they being entitled to the net profits, if any, and obliged to bear the deficiency, if any. Termination of Lease Proceeding, 198 Fed. 725.

I. Appeal of Second Avenue Railroad Company et al. For opinions of the special master and the District Court, see *Pennsylvania Steel Co. v. N. Y. City Ry. Co.*, 208 Fed. 757.

This case involves claims against both the estate of the Metropolitan Company and the estate of the City Company arising out of the lease of the Second Avenue line, dated January 28, 1898, to the Metropolitan Company, which was included in the lease by the Metropolitan Company of its property to the City Company for 999 years from April 1, 1902. The Second Avenue Company had made a mortgage dated January 20, 1898, to secure an intended issue of bonds in the sum of \$7,000,000 to take up certain outstanding bonds and for electrification of the line. The receivers never adopted this lease, but returned the premises to the Second Avenue Company November 12, 1908, at which time the lease terminated.

The District Court made an order February 1, 1910, allowing the Second Avenue Company, the Guaranty Trust Company, trustee of the \$7,000,000 mortgage, and the receiver who had been appointed by the state court in an action to foreclose that mortgage, to file their claims against the Metropolitan Company and the City Company on or before March 1, 1910, which he subsequently amended, so as to make them filed nunc pro tunc as of December 10, 1907, against the city estate and January 15, 1908, against the Metropolitan estate. When we decided the Second Avenue bondholders' appeal, 198 Fed. 747, this amendment had not been made.

[1] The court below held that the Metropolitan estate was entitled to set off advances of \$740,836.21 for the improvements for which it

was authorized to call upon the Second Avenue Company to issue bonds subsequent to the \$7,000,000 First Consolidated bonds. This was on the theory that the Metropolitan Company did not assume payment of bonds to be issued at its request by the Second Avenue Company and secured on its property for the purpose of raising money to pay for permanent improvements. We cannot agree to this. The question depends of course upon the construction of the language used in the lease as follows:

"Whereas, the party of the first part heretofore obtained the approval of the State Board of Railroad Commissioners to a change of motive power on parts of said railroad from horse power to electric power, which change has been consented to by the owners of more than one-half of the property bounded on that portion of the railroad on which said change of motive power is proposed, and has entered into contracts for the reconstruction of its roadbed, rendered necessary by such change, and has incurred large debts and liabilities therefor, and is now largely indebted to the party of the second part for money paid upon such contracts, or advanced for the purpose of making such construction; and whereas, for the purpose of paying or refunding prior bonded indebtedness and for the additional purpose of paying the debts incurred in such reconstruction, and for carrying out the contracts entered into for the building, finishing and operating of the said electric lines of railroad, and providing equipment therefor, and for other lawful purposes of the corporation, the party of the first part has heretofore determined to issue and dispose of its bonds to the amount of seven millions of dollars, and to secure the payment thereof by a mortgage upon its said railroad, and all its real estate, property, right and franchises of every kind and description; and whereas, the party of the first part with the consent of more than two-thirds of its stockholders, has heretofore executed and delivered to the Guaranty Trust Company of New York a mortgage as aforesaid to secure the payment of its said bonds to the amounts aforesaid; and whereas, none of said bonds have been issued or disposed of, but are all as yet to be issued and disposed of for the purposes aforesaid:

"It is further agreed that the party of the first part will forthwith, in accordance with the terms and conditions of said mortgage, issue and dispose of its said bonds to an amount sufficient to pay and discharge all its debts and obligations and contracts heretofore incurred in the reconstruction of its road and roadbed made necessary by the change in its motive power, and will from the proceeds of such bonds pay and discharge all such debts, obligations and contracts, including the debt now due or hereafter to grow due for such purposes, to the party of the second part.

"And that it will hereafter at the demand and upon the request of the party of the second part issue and dispose of or cause to be issued and disposed of by the trustee named in said mortgage, and the proceeds paid over to the party of the second part, sufficient of its bonds to supply suitable cars, rolling stock, equipment and motive power to its said railroad to enable the party of the second part to operate the railroad hereby leased and demised by the underground system of electricity or by any other motive power, and to repay any expenditures made by the party of the second part in improving the leased property or in erecting, changing or reconstructing any building or buildings thereon, and whenever the party of the second part shall desire and determine to change the motive power upon parts or portions of the said railroad upon which changes have not heretofore been authorized or proposed, that the party of the first part will issue and dispose of and pay over the proceeds thereof to the party of the second part, or deliver to the party of the second part, or cause the trustee named in said mortgage to sell and dispose of and pay over the proceeds thereof to the party of the second part or deliver to the party of the second part the balance of its said bonds secured to be paid by the mortgage aforesaid, or so much thereof as is or will be necessary for a change of motive power and a reconstruction of its road and roadbed made necessary thereby, and to supply the necessary cars, rolling stock, equipment

and motive power thereof to enable the party of the second part to operate said road as reconstructed.

"Whenever it shall be deemed by the party of the second part expedient to extend the line or lines of the railroad hereby demised or to acquire additional real estate or construct additional buildings for the operation of said railroad, or to change the motive power upon said railroad, then upon the request of the party of the second part the party of the first part shall authorize, execute and deliver to the party of the second part the negotiable bonds of the party of the first part in the usual form for the amounts, the expenditure of which shall be required for such extension, acquisition, construction or change, and upon the like request of the party of the second part, shall secure such bonds by a mortgage or mortgages upon all its property and franchises, but such bonds when issued shall be applied solely to betterments for which the same are issued.

"This lease is made subject to all debts and liabilities of the party of the first part, except debts due or liabilities incurred to the party of the second part, and such debts and liabilities, except as aforesaid, and subject to the provisions and conditions of this lease, are hereby assumed and are to be paid by the party of the second part as a part of the consideration hereof, and all bonds that shall be issued by the party of the first part under the mortgage to the Guaranty Trust Company hereinbefore referred to, when issued or disposed of as hereinbefore provided, or as provided in said mortgage or in this lease, shall be included among the obligations which the party of the second part assumes and agrees to pay under the provisions of this lease."

The court below thought that the assumption by the lessee of all debts of the lessor (except those due to itself) applied only to existing debts, merely because the lease went on to provide expressly that the \$7,000,000 First Consolidated Mortgage bonds were to be included. We think, however, that the assumption of all debts and liabilities (except those to the lessee), made after the enumeration of debts both existing and future, included the future debts. If not, there being no other provision on the subject, the lessor would be liable, not only for the principal of the bonds when due, but for the interest in the meantime. It is out of the question that the parties intended the lessor to pay interest for, say, 999 years. The fact that the lessee always did pay it until default shows this, as does also the provision elsewhere in the lease that any lien created on the premises by a mortgage to secure such bonds should be subsequent to the payment of the stipulated rent, which would be quite useless if the Second Avenue Company were intended to pay the interest.

It is said that this court in *Farmers' Loan & Trust Co. v. Central Park North & East River R. R. Co.*, 193 Fed. 963, 113 C. C. A. 591, and *Second Avenue Bondholders' Appeal*, 198 Fed. 750, 117 C. C. A. 560, has held that such an assumption clause amounts only to a guaranty that the mortgaged premises shall pay the debt, and, this having been paid, there is no further liability on the Metropolitan Company. But these were not controversies between the lessor and the lessee. Both claims were by bondholders and the former was a foreclosure suit in which the bondholders were looking to the land. The opinion of the court in that case expressly reserved the question of the ultimate liability for the debt of the lessee between lessor and lessee, saying:

"This case does not require decision of the question whether the lease of 1892 imposed upon the Metropolitan Company the obligation of ultimately paying, not only the current indebtedness, but the already existing funded debt of the Central Park Company."

The concurring opinion was to the effect that between the Second Avenue Company and the Metropolitan estate the latter is the principal debtor. If bonds were to be issued for these advances they would have to be presently payable in view of the insolvency of the Second Avenue Railroad, and the Metropolitan Company would be liable to pay them. Therefore we think it was not entitled to use this advance as a set-off against the Second Avenue Company's claim. For the principal of the indebtedness of the First Consolidated bonds, \$7,000,000, and future interest, however, there can be no claim, because it was a contingent liability both on December 10, 1907, and January 15, 1908, there having been no foreclosure, and also because the parties expressed the liability of the Metropolitan Company, whatever it was, in the form of a guaranty printed on each bond taking effect in 1948, 198 Fed. 751, 117 C. C. A. 560.

[2] The District Court held that the Metropolitan City lease did not amount to an assignment of the Second Avenue lease to the City Company. We think it did. The charter of the Second Avenue Company had less than 100 years to run when the lease was made to the Metropolitan Company. Although the lease did provide that it was to continue during all extensions of the charter and at the time the lease was made the law permitted extensions in perpetuity, no one can say that the charter will be extended beyond 999 years, the term of the lease to the City Company. It is quite uncertain whether there will be any reversion in the Metropolitan Company. We think that the City Company is to be regarded as assignee of the lease of the Second Avenue Company and as such liable by virtue of privity of estate for any damages proved, resulting from the failure to keep the road and equipment in repair, as well as to pay taxes and assessments from April 1, 1902, to October 1, 1907, when the Metropolitan City lease terminated. The Metropolitan estate remains liable on the company's covenants notwithstanding the assignment, but between the two estates the city estate is primarily liable. The decree of the court below is to be modified in accordance with this opinion.

II. Claim of the Central Park, North and East River Railroad Company. For the opinions of the special master and the District Court, see 208 Fed. 777.

The receivers returned this line to the claimant August 6, 1908, at which date the lease terminated. The District Court allowed the claim to be filed on or before March 1, 1910, nunc pro tunc as of December 10, 1907, against the city estate and as of January 15, 1908, against the Metropolitan estate.

[3, 4] The Metropolitan Company expressly assumed the payment of the claimant's issue of \$1,200,000 of bonds which fell due December 1, 1902, and, not having been extended, became, as between lessor and lessee, a matured obligation provable January 15, 1908, within our decision in the claim of the Metropolitan Express Company, 198 Fed. 735, 117 C. C. A. 503. We think this claim should have been allowed against its estate. The set-off of \$861,792.37 expended by the Metropolitan Company in electrification should not be allowed, because it had expressly assumed the payment of the claimant's bonds if issued to pay

therefor. This is in accordance with our holding in the claim of the Second Avenue Railroad Company.

For the reasons stated in that case we think that the City Company was the assignee of this lease, and is, because of privity of estate, liable for failure to keep the road and equipment in repair and to pay all taxes and assessments between April 1, 1902, and October 1, 1907. As modified in these respects the order is affirmed.

III. Claim of the Metropolitan Express Company. For opinions of the Special Master and the District Court, see 208 Fed. 747.

[5] March 4, 1901, the Metropolitan Street Railway Company entered into a contract with the Metropolitan Express Company, whereby it gave the latter the exclusive right of doing express business over its system for 20 years, and agreed to supply and operate the cars for that purpose in consideration of 20 per cent. of the gross earnings of the business. The contract provided that it should "bind the successors, assigns, lessees and transferees of the parties respectively." The evident intention of the parties was to authorize the Railway Company to lease its system together with the contract, and the Express Company to assign the contract without prejudice to its provisions, and so that the lessee and the assignee should be bound as were the original parties. February 14, 1902, the Metropolitan Street Railway Company did lease its system to the New York City Railway Company. July 15, 1904, the Metropolitan Express Company assigned the contract to the American Express Company in consideration of an annual payment of \$10,000 in equal quarterly installments on the 15th days of October, January, April, and July, with the stipulation, among others:

"It is further expressly understood and agreed that if at any time during the term hereby demised, the party of the second part, its successors or assigns, in the operation of the business and property hereby transferred, shall from any cause other than its own negligence or its own default in observing the conditions of said contract with said Metropolitan Street Railway Company, be excluded from the full use and enjoyment of the trackage rights and other benefits and advantages provided for in said contract, then and in such event, at the option of the said party of the second part; its successors or assigns, the term hereby demised shall cease and determine, and the party of the second part shall in such event and upon the exercise of such option, be relieved and discharged from all further liability, claims or demands hereunder."

It assigned at the same time similar contracts which had been entered into with it by four independent lines which were controlled by the Metropolitan Street Railway Company and composed a part of the Metropolitan system. Under these contracts the car equipment was to be furnished by the Metropolitan Street Railway Company. The Railway Company obtained these contracts to be executed by means of its stock control of the four companies. The New York City Railway Company and the American Express Company continued to carry out the contract until September 24, 1907, when both the City Railway Company and the Metropolitan Street Railway Company became insolvent and unable to perform it further. The receivers continued to carry it out, but on February 28, 1908, notified the American Express Company that they considered it unadvisable to adopt the contract and would discontinue operation of the express cars on and after March 15.

March 13, 1908, the American Express Company, under the option given it in the contract of July 15, 1904, notified the Metropolitan Express Company that, because deprived of the "full use and enjoyment of the trackage rights and other benefits and advantages provided for in the contract," on and after March 15th it would treat the contract as at an end as of that date.

These contracts are sometimes loosely described as leases, which they were not, being merely licenses with mutual covenants without any privity of estate between the Express Company and the Railway Company.

The same claim having been rejected in the court below as a contingent demand was heretofore before us, and we then sent it back to permit the claimant to recover nominal damages and substantial damages, if it could prove them. *Pennsylvania Steel Co. v. New York City Railway Co.*, 198 Fed. 735, 117 C. C. A. 503. The special master reported that the average annual profit of the American Express Company was some \$30,000 and that the damage sustained by the Metropolitan Express Company was \$10,000 a year for the balance of the term or \$129,704.32, of which the New York City Railway Company should pay \$192.31, the proportion of that sum for the week between September 24 and October 1, 1907, when receivers of the Metropolitan Street Railway Company were appointed, the balance to be paid by the latter company. He also reported that the surviving contracts with the four controlled companies were merely incidental, and ceased to have any substantial value after the system was disintegrated.

The contract was for the express privilege over the whole Metropolitan System. It passed to the New York City Railway Company, lessee, and bound it so long as it remained lessee. It is quite incredible that the parties intended to require any one not in control of the system to furnish the express privilege and operate the cars over it. Therefore, when the City Company ceased to be lessee October 1, 1907, it ceased to be liable and the lessor to the Metropolitan Express Company continued to be liable to it, the American Express Company, assignee, having withdrawn. As the receivers refused to adopt the contract, the Metropolitan Street Railway Company became liable as of October 1, 1907, when it went into the hands of the receivers, to the Metropolitan Express Company, because its insolvency disenabled it to perform the contract. Its liability was for the value of the contract to the end of the term if the Metropolitan Express Company could prove it. That we think was ascertainable on recognized principles. Damages sustained in the shape of profits prevented would evidently be the measure. The District Court said:

"Testimony was introduced tending to show that for some time before receivership the latter company made a profit out of its operation of about \$30,000 a year. There is some criticism as to the sufficiency of this testimony—being in part averages and estimates—but courts are usually liberal when absolute accuracy in such matters is inherently impossible. Upon this evidence the special master has held that the contract was actually worth \$10,000 a year for the unexpired term of nearly 13 years. The difficulty with the calculation lies in its assumption that the \$10,000 a year which the American Company agreed to pay was wholly for this contract of March 4, 1901. That consideration, however, was for the assignment not only of this but also of

many other contracts and leases. As to some of these the master has found that they were of no substantial value; but there are others which were undoubtedly of substantial value. As we have seen, the contract of March 4, 1901, covered not only lines owned by the Metropolitan Railway Company, but all 'controlled' lines. Among such lines controlled through stock ownership were the Union Railway, Forty-Second Street, Manhattanville & St. Nicholas Avenue Railway, Yonkers Railroad, Southern Boulevard Railroad, Westchester Electric Railroad, and Tarrytown, White Plains & Mamaroneck Railway. The contract of March 4, 1901, contained no covenant that this control of these railroads should continue in the Metropolitan. It may be that while such control still existed the Metropolitan might have been compelled to secure from each of the companies thus controlled a concession to the express company similar to the one it had itself given; but if it parted with the control of either of them it would be powerless to obtain such concession for the express company. To that extent the value of the original contract would shrink and, there being no covenant for a continuance of control, the express company could maintain no claim for damages for such shrinkage. Whether or not the American Company would have agreed to pay \$10,000 or \$10 a year for the original contract does not appear. Before it took its assignments the weak point in that contract was covered; the controlled companies enumerated above had each of them made an independent contract with the Metropolitan Express Company similar in its terms to the contract of 1901. Thereafter the holder of *all these contracts* was secured in the use, for express purposes for the period named, of all the lines which the Metropolitan owned or controlled when the first contract was made. All these later contracts were included with the original one in the assignment to the American Company. The master has not found that these were 'of no substantial value'; that they were, some of them at least, of substantial value must be apparent to any one who is familiar with the intricacies of the street railway system in Manhattan and the Bronx. There was no apportionment of the \$10,000 among the several parcels covered by the assignment, and there is nothing in proof by which such apportionment could possibly be made. It seems to me, therefore, impossible to determine what sum of money would fairly represent the damages resulting from the breach of this contract, which stipulated for no continuance of control. For the breaches of their several contracts the roads formerly controlled by the Metropolitan may or may not be responsible, but the finding of substantial damages against the last-named road is not confirmed."

We think the District Court erred in treating the contract between the Metropolitan Express Company and the American Express Company as the sole measure of the value of the contract between the Metropolitan Street Railway Company and the Metropolitan Express Company. If this be so, it might well result that the Metropolitan Express Company could not prove against the Metropolitan Street Railway Company the actual amount of damages that it sustained because there is no way of apportioning the annual payment of \$10,000 between business over the lost lines and business over the four controlled lines which survive. But the contract with the American Express Company, though evidence of value, was not the only measure. In view of the fact that it made, excluding this payment of \$10,000, some \$40,000 a year, the master was well justified in finding that the value of the contract was at least \$10,000 a year. There is nothing to indicate that the license, if properly exercised by the licensee, would not have continued to be very valuable. We think there is every reason to infer exactly the contrary. There can in the nature of things be no absolute proof as to damages in the way of future profits. Even if the contracts with the four controlled companies which survive have some value, as the District Court

holds, that circumstance is no defense to the Metropolitan Company. The contract was for the whole system, and when the Metropolitan line dropped out the whole purpose of the contract was frustrated by its default.

It is suggested as a reason why the contract might not continue to be profitable, that the right of the Ninth Avenue line to do express business is doubtful and that certain spurs between the tracks and express stations owned by the Express Company had been constructed without proper authority and might be removed. We are satisfied with the special master's disposition of these objections. The decree is reversed, and the court below directed to dismiss the claim as to the New York City Railway Company and to enter a decree in favor of the claimant for the sum of \$129,704.32 against the Metropolitan Street Railway Company.

IV. Claim of Various Creditors for Preference, Called the Preference Proceeding. For opinions of the special master and the District Court, see 208 Fed. 168.

This cause raises questions as to how the estates of the Metropolitan Street Railway Company and the New York City Railway Company shall be distributed among creditors. Claims of preference in the assets over general creditors are made on behalf of: (1) Supply creditors of the City Company; (2) tort creditors of the City Company; (3) claims of the Metropolitan Company as lessor of the City Company, and of various companies as lessors of the Metropolitan Company for breach of leases; (4) claims of the city of New York for paving.

Four supply claims have been selected as types of all the supply creditors who claim a preference, as follows: (a) Hugh Thomas, for sand used to facilitate the starting and stopping of the cars; (b) Smith Company of New York for globes, burners, and wicks used in the operation of horse cars and upon trackwork. (c) Haggerty Company, for lubricants and dynamo oil used in the operation of cars and of power houses; (d) Berwind White Coal Company, for coal used in operation of power houses.

None of the preference claimants asserts an actual lien on anything. The diligence of counsel has referred us to a multitude of decisions, which show that the courts have differed greatly: (a) As to what claims accruing against a railroad corporation shortly before a receivership should be allowed a preference; (b) upon what grounds the preference should be allowed; (c) out of what property the preference should be paid. The most striking example of the uncertainty which surrounds the whole subject is the last utterance of the Supreme Court in *Gregg v. Metropolitan Trust Co.*, 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717, the majority of the court holding that one who supplied a railroad company with ties immediately before a receivership which the receiver used to replace rotten ties, and which were admitted to be necessary to maintain the railroad as a going concern, was not, in the absence of any diversion of income, entitled to be paid out of the corpus of the property to the prejudice of the mortgagee, while three justices, dissenting, held that he was.

It is to be noted that in all the cases on the subject the contest was between preferred claimants and mortgagees; there being no other

property than the corpus of the estate out of which any preference could be made good. In the present case, however, the City Company has a large amount of assets not covered by mortgages or any other lien.

[6, 7] Judge Lacombe allowed the preference claimed by the four typical supply creditors on the ground of public policy, viz., that those who furnish supplies necessary for the daily maintenance of a railroad as a going concern are entitled to be first paid out of the company's unmortgaged assets. What are such supplies it is, of course, for the court to determine. He recognized it as a condition that the creditors shall not have relied merely on the personal credit of the company. They must be of such a quantity and to be paid for at such times as to indicate that they are necessary for current operations and are to be met out of current earnings. Direct evidence as to the latter condition is not necessary. The court may draw the inference that this was the expectation of the parties from the circumstances attending the transaction, *Virginia & Alabama Coal Co. v. Central Railroad Co.*, 170 U. S. 355, 18 Sup. Ct. 657, 42 L. Ed. 1068; *Southern Railway Co. v. Carnegie Steel Co.*, 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458. We think he was quite justified in holding that the four type claims in this case were of such a character and were furnished to the Railway Company with such an expectation for use upon its system, which included some independent, but controlled, lines. If the preference is properly rested on public policy we do not see how it can be restricted to current earnings. Such claimants should be preferred over all general creditors, and if current earnings are not sufficient to secure the preference it should be extended to the company's unmortgaged assets. The current debt fund so often mentioned in the cases is spoken of in connection with the company's mortgaged property and to justify displacement of the mortgage lien upon the corpus of the estate to the extent that the current earnings have been diverted to the advantage of the mortgagee. Where, as in this case, there are unmortgaged assets of the company, they should be resorted to first.

[8] The allowance of interest on these claims after the appointment of receivers was refused on the ground that the delay thereafter was that of the court, for which neither the debtor nor the other creditors of the debtor should suffer. In *Thomas v. Railroad Co.*, 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663, this was said to be the general rule. In that case interest on a debt incurred during the receivership was refused as against the mortgagee out of the corpus of the estate. On the other hand, in *Southern Railway Co. v. Carnegie Steel Co.*, 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458, the court, without saying anything on the subject in the opinion, did allow interest as against the mortgagee on the ground of a diversion of income. The point was raised in argument and was decided. We presume that the court did not intend to overrule its prior decision in *Thomas v. Railroad Co.*, but found the particular case not to be within the general rule there laid down. As between creditors of the same class there would be no use in allowing interest out of a fund insufficient to pay all. In this case, however, the supply creditors are preferred and the fund is sufficient to pay them in full, with interest, and leave a balance over for general creditors. We are disposed to think that the ground on which

interest was allowed in the Southern Railway Case was that the mortgagee, having enjoyed the use of the diverted income, should restore it with interest. The opinion lately handed down by the Supreme Court in *American Iron & Steel Manufacturing Co. v. Seaboard Air Line Railway*, 233 U. S. 261, 34 Sup. Ct. 502, 58 L. Ed. 949, sets the question at rest. Lamar, J., said:

"In the discussion as to the answer which should be given that question, the Railway Company insists that, whether treated as part of the debt or allowed as damages, interest can only be charged against the railway because of delay due to its own fault, while here the failure to pay was due to the act of the law in taking its property into custody and operating the same by receivers in order to prevent the disruption of a great public utility. And it is true, as held in *Tredeger Co. v. Seaboard Ry.*, 183 Fed. 290 [105 C. C. A. 501], that as a general rule, after property of an insolvent is in custodia legis, interest thereafter accruing is not allowed on debts payable out of the fund realized by a sale of the property. But that is not because the claims had lost their interest-bearing quality during that period, but is a necessary and enforced rule of distribution, due to the fact that in case of receiverships the assets are generally insufficient to pay debts in full. If all claims were of equal dignity and all bore the same rate of interest, from the date of the receivership to the date of final distribution, it would be immaterial whether the dividend was calculated on the basis of the principal alone or of principal and interest combined. But some of the debts might carry a high rate and some a low rate, and hence inequality would result in the payment of interest which accrued during the delay incident to collecting and distributing the funds. As this delay was the act of the law, no one should thereby gain an advantage or suffer a loss. For that and like reasons, in case funds are not sufficient to pay claims of equal dignity, the distribution is made only on the basis of the principal of the debt. But that rule did not prevent the running of interest during the receivership; and if as a result of good fortune or good management, the estate proved sufficient to discharge the claims in full, interest as well as principal should be paid. Even in bankruptcy, and in the face of the argument that the debtor's liability on the debt and its incidents terminated at the date of adjudication and as a fixed liability was transferred to the fund, it has been held, in the rare instances where the assets ultimately proved sufficient for the purpose, that creditors were entitled to interest accruing after adjudication. 2 Blackstone's Comm. 488; cf. *Johnson v. Norris*, 190 Fed. 460 (5) [111 C. C. A. 291].

"The principle is not limited to cases of technical bankruptcy, where the assets ultimately prove sufficient to pay all debts in full, but principal as well as interest, accruing during a receivership, is paid on debts of the highest dignity, even though what remains is not sufficient to pay claims of a lower rank in full. *Central Co. v. Condon*, 67 Fed. 84 [14 C. C. A. 314]; *Richmond etc., Co. v. Richmond R. Co.*, 68 Fed. 116 [15 C. C. A. 289, 34 L. R. A. 625]; *First National Bank v. Ewing*, 103 Fed. 190 [43 C. C. A. 150]."

As the preferred creditors of the City Company will be paid in full out of the assets of that company, there is no occasion to inquire whether they might have, under any circumstances, a right against the estate of the Metropolitan Company.

[9] Creditors who have recovered damages against the City Company for injuries or death resulting from negligence in operation of the road do not, in our opinion, fall within the foregoing principle on which a preference has been allowed to supply creditors. Such claims may be included in operating expenses for the purpose of ascertaining net income for dividend purposes or for determining the amount of the special franchise tax, but the claimants in no way con-

tributed to the maintenance of the railroad as a going concern. On the contrary, their claims increased the difficulties of doing so.

Similarly claims for rent are not entitled to any preference. They were clearly founded on the personal credit of the company long before insolvency, to be enforced by the right of re-entry, should such necessity arise.

The claim of the city of New York for paving is an involuntary liability of the City Company for general preservation and not for daily maintenance. We do not think it entitled to any preference.

[10] The only inquiry left is that of the right of the Metropolitan Company to share equally with the general creditors. The law of the state of New York permitted the Metropolitan Company to lease its property to the City Company. The instrument was valid. If the Metropolitan Company subsequently controlled the City Company and caused it to apply its earnings to pay dividend rentals to the Metropolitan Company's stockholders, such payment, even if preferential, was entirely lawful as a payment of a bona fide indebtedness. Both companies are now insolvent, and if upon any principle of equity they could be treated as one corporation, then the most that could possibly be said would be that the general creditors of each should share equally in the assets of both. Nothing will ever reach the stockholders of the Metropolitan Company, who are said to have received preferential payments, and it would be, in our opinion, highly inequitable to postpone the claims of its bona fide creditors to those of the creditors of the City Company.

In view of the foregoing, other questions passed upon by the special master and affirmed pro forma by the District Court need not be considered.

The decree, modified as to interest on the preferred claims, is affirmed.

NATIONAL CITY BANK OF CHICAGO et al. v. WAGNER et al.

ROGERS v. NATIONAL CITY BANK OF CHICAGO et al.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1914. On Rehearing July 1, 1914.)

Nos. 2061, 2070.

1. CHATTEL MORTGAGES (§ 77*)—MORTGAGES (§ 86*)—VALIDITY—DURESS.

Evidence considered, and *held* not to sustain the allegation that a conveyance of property, made as security for a pre-existing debt of another, was voidable as having been procured through duress.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 149; Dec. Dig. § 77;* Mortgages, Cent. Dig. §§ 1350, 1355, 1364; Dec. Dig. § 86.*]

2. CANCELLATION OF INSTRUMENTS (§ 7*)—RIGHT TO CONTEST VALIDITY.

An executed conveyance of real or personal property, whether absolute or as collateral security for a debt, pre-existing or new, and either of the grantor or of another person, freely and voluntarily made, cannot be revoked.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 6; Dec. Dig. § 7.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. MORTGAGES (§ 25*)—CONSIDERATION—PRE-EXISTING DEBT OF THIRD PERSON.

When a conveyance is in effect a mortgage to secure a prior obligation of another, no new consideration, either to the debtor or to the mortgagor, is required in order to validate the mortgage as an executed grant.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 29-42, 1364; Dec. Dig. § 25.*]

4. EVIDENCE (§ 419*)—PAROL EVIDENCE—MORTGAGES—CONSIDERATION—CONCLUSIVENESS OF RECITAL.

A recital in a mortgage of a consideration paid is not subject to contradiction for purposes of revocation, in the absence of proof of fraud or other wrongdoing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.*]

5. MORTGAGES (§ 84*)—VALIDITY—FRAUD AND DURESS—RATIFICATION OF VOIDABLE MORTGAGE.

Complainant executed a conveyance of both real and personal property to defendant bank as security for a pre-existing indebtedness of a third person. More than a week afterward she executed a second conveyance of the same property, as security, to another creditor of the same debtor, expressly subject to the prior conveyance to the bank, the intention being, as stated therein, to convey her equity in the property after payment of the bank's claim. *Held*, that if, as claimed, the bank's conveyance was procured through fraud and duress it was ratified by the second conveyance with which the bank had nothing to do, and was valid.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 193; Dec. Dig. § 84.*]

6. MORTGAGES (§ 84*)—RATIFICATION OF VOIDABLE MORTGAGE—CONSIDERATION.

The ratification by the mortgagor of a mortgage previously executed requires no new consideration to render it effective.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 193; Dec. Dig. § 84.*]

7. CORPORATIONS (§ 123*)—PLEDGE OF STOCK CERTIFICATES—PLEDGEE AS BONA FIDE PURCHASER.

Stock certificates, indorsed in blank, while not strictly negotiable instruments, to some extent have the characteristics of commercial paper, in view of the general custom to treat them as such in commercial transactions, and the owner of such a certificate, who intrusts it to another, by whom, although in violation of his trust, it is sold to an innocent purchaser for value, loses his title; and under the law of Illinois, as also under the federal decisions one who takes such a certificate as collateral security for a pre-existing debt is deemed a purchaser for value, and protected as such.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. § 123.*]

8. MORTGAGES (§ 86*)—VALIDITY—DURESS—SUIT FOR CANCELLATION—RATIFICATION—BURDEN OF PROOF.

In a suit to set aside a mortgage as having been procured by duress, proof of the subsequent voluntary execution by complainant of an instrument which operated as a ratification of such mortgage, with full knowledge of the facts, establishes the defense of ratification *prima facie*, and, assuming that a knowledge by complainant of the legal right to disaffirm was essential to a valid ratification, the burden of going forward with evidence to prove want of such knowledge rests on complainant.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1350; Dec. Dig. § 86.*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; George A. Carpenter, Judge.

Suit in equity by Laura G. Rogers against the National City Bank of Chicago, L. H. Grimme, Thor R. Thorsen, G. L. Wire, and E. W. Wagner and Paul Tietgens, partners as E. W. Wagner & Co. Cross-appals by the Bank, Grimme, Thorsen, and Wire, and by complainant. Reversed on appeal of the Bank and others, and affirmed on complainants' appeal.

George T. Buckingham, of Chicago, Ill., for appellants National City Bank of Chicago and others.

Benj. C. Bachrach and A. R. Hulbert, both of Chicago, Ill., for appellant Rogers.

H. H. Barnum, of Chicago, Ill., for appellees E. W. Wagner & Co., and another.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

MACK, Circuit Judge. These cases grow out of the remarkable career in high financing of a youth just approaching manhood, one Butler Storke. It is unnecessary to detail his swindling operations. Suffice it to say that he managed, by a series of more or less plausible misrepresentations and deceptions, to become indebted to the appellant bank in a large sum of money and also fraudulently to secure possession, under a trust receipt, of a stock certificate indorsed in blank, theretofore pledged by him with appellees Wagner and Tietgens, stockbrokers, doing business as E. W. Wagner & Co. This certificate was delivered by him on the same day, March 1, 1913, to the bank as collateral security for his then indebtedness and for future advances. The bank, through its agents, on March 3 and 4, 1913, obtained conveyances of real and personal property from appellee, Laura G. Rogers, Storke's indulgent and confiding grandmother, as security for the joint collateral 15-day note of \$30,000 executed by Storke and Mrs. Rogers on March 3, 1913, and then and there delivered to the bank to cover Storke's indebtedness to it.

On March 12, 1913, appellee Rogers, at the request of Storke and one Barnum, the attorney for Wagner & Co., executed and acknowledged before a notary public at Milwaukee, Wis., her residence, and then and there delivered to Barnum the following document:

"Whereas, Butler R. Storke is indebted to E. W. Wagner and Paul Tietgens on a certain promissory note on which there remains due and unpaid the principal sum of ten thousand (\$10,000.00) dollars and interest; and whereas, the said Butler R. Storke is indebted to the National City Bank of Chicago to the extent of some twenty-eight thousand (\$28,000.00) dollars for which said bank holds certain bonds, stocks and other collateral; and whereas, I, the undersigned, have heretofore conveyed to the said bank certain real property at Oconomowoc, Wisconsin, and Milwaukee, Wisconsin, and Oak Park, Illinois, in order to secure the said bank against any losses on account of the said obligations of the said Butler R. Storke to the said bank and on account of certain guaranties made by him to the said bank, and have heretofore also delivered to the said bank certain personal property for the same purpose:

"Now, therefore for and in consideration of the sum of one dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged,

I, the said Laura Rogers, widow, do hereby convey, grant, set over and assign unto E. W. Wagner and Paul Tietgens, all of my right, title and interest in and to all of the said real estate so conveyed by me to the said bank for the purposes aforesaid, and all of the said personal property so pledged or delivered by me to the said bank for the purposes aforesaid, and all equity which I may have in any of the said property, real or personal, so conveyed or delivered to the said bank for the purpose of securing payment of the said note to the said E. W. Wagner and Paul Tietgens, and hereby authorize and direct the said National City Bank of Chicago to convey and deliver to them any and all of said property, real or personal, or the proceeds thereof which may remain in its hands or under its control after the adjustment and satisfaction of any claims which it may have against the said Butler R. Storke, and hereby empower said bank or its officers to execute all assignments, deeds, and other papers or instruments necessary to accomplish this purpose.

"It being the intention of the undersigned to hereby convey to the said E. W. Wagner and Paul Tietgens all her right, title and interest in and to all of said property, real and personal, including the release and waiver of the right of homestead, under and by virtue of the Homestead Exemption Laws of the state of Illinois and Wisconsin.

"In witness whereof, I have hereunto set my hand and seal this 12th day of March, A. D. 1913.
Laura G. Rogers. [Seal.]"

On April 26, 1913, Mrs. Rogers filed her petition in the District Court to set aside all of her hereinabove recited conveyances on the ground of duress, undue influence and want of consideration. Wagner and Tietgens, by answer and cross-bill, sought to recover from the bank both the stock certificate and all of the property conveyed by Mrs. Rogers. The chancellor found that the conveyances by Mrs. Rogers to the bank had been procured through fraud, duress, undue influence, and compulsion; that the instrument of March 12th was executed without any duress or threats and constituted a valid assignment to secure the indebtedness of Storke to Wagner & Co.; that although the bank was an innocent holder of the stock certificate, it had paid no new consideration therefor, either by making advances at the time of receiving it or thereafter, and thereupon decreed that the appellants in case No. 2061 should transfer the property received by them from Mrs. Rogers as well as the stock certificate to Wagner & Tietgens, to be held by them as collateral security for Storke's indebtedness in the sum of \$10,000.

Mrs. Rogers, appellant in case No. 2070, contests the finding of the court, both that the instrument of March 12th was executed without duress and, inasmuch as no present consideration was paid therefor, that it constituted a valid assignment.

The bank and its officers, appellants in case No. 2061, seek to reverse the decree on the grounds: First. That the conveyances of March 3d and 4th were executed voluntarily and without any duress or wrongdoing. Second. That the instrument of March 12th was, in any event, a ratification thereof. Third. That the bank made advances after the receipt and on the faith of the stock certificate, but that even as the bona fide recipient of the certificate to secure a pre-existing debt, it is to be protected as against Wagner & Co., the defrauded pledgees thereof.

As to case No. 2070, the decree, in so far as it holds that the instrument of March 12th was executed without duress, and constituted a

valid assignment of the property therein referred to, must be affirmed for the following reasons:

[1] First. Storke was concededly indebted to Wagner & Co. in the sum of \$10,000. He had swindled them out of this stock certificate, which had theretofore been given to him by his grandmother, Mrs. Rogers, to be used for the very purpose for which he deposited it with the stockbrokers. When his wrongful act was discovered, he went with the brokers' attorney, Barnum, to Milwaukee, and explained the situation to Mrs. Rogers. According to her own testimony, she clearly understood that Barnum had no connection whatsoever with the bank, and that his object was to get the equity in the property, theretofore conveyed to the bank, for his clients, Wagner & Co. No threats of any kind were used; Mrs. Rogers acted solely because of her confidence in Storke, a confidence which continued so absolute and implicit even at the time of the trial that, as she testified, she was entirely willing to risk her last dollar as surety for him. The fact that she had conveyed these properties to the bank eight or nine days earlier as collateral for Storke's indebtedness was mentioned by all parties during the interview; nothing, however, was said by any of them about duress or wrongdoing of any kind theretofore practiced upon her; she expressed no desire or intention to repudiate the original transfers; she knew that the document then executed by her specifically set out the fact of the earlier conveyances.

There is not a word of testimony to justify any inference that the mental state produced by the duress, alleged to have been practiced on behalf of the bank, continued at the later date, or that Wagner, Tietgens, or Barnum had ever had any knowledge thereof.

[2] Second. The instrument of March 12th is not a contract, but a grant, a conveyance under seal. It is elementary that an executed conveyance of real or personal property, whether absolute or as collateral security for a debt, pre-existing or new, and either of the grantor or of another person, freely and voluntarily made, cannot be revoked. If a consideration agreed to be given be not paid—if there be, not a want, but a failure of consideration—equity will, under certain circumstances, aid in a rescission of the transaction.

"While a person who signs an instrument of writing under seal is not allowed to show that it was without consideration, the rule has long prevailed that he has the right to show failure of consideration." *Koster v. Welch*, 57 S. C. 95, 35 S. E. 435.

[3] When the conveyance is in effect a mortgage, there must, of course, be an obligation to be secured thereby. But no new consideration, either to the debtor or to the mortgagor is required in order to validate the mortgage as an executed grant. *Perkins v. Trinity Realty Co.*, 69 N. J. Eq. 723, 61 Atl. 167, and cases cited therein, affirmed 71 N. J. Eq. 304, 71 Atl. 1135.

[4] Payment of consideration is, moreover, recited in the document, a recital not subject to contradiction for purposes of revocation, in the absence of proof of fraud or other wrongdoing. Consideration has to do with contracts, not with executed conveyances. Equity looks behind the forms, when its aid is sought to enforce executory

rights; it does not, however, lend its assistance to revoke executed grants merely because no consideration was in fact paid therefor. *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46.

The failure to distinguish between a contract and a conveyance led to the erroneous decision in *Kansas Mfg. Co. v. Gandy*, 11 Neb. 448, 9 N. W. 569, 38 Am. Rep. 370, while the decree in *Bell v. Bell*, 133 Mo. App. 570, 113 S. W. 667, was expressly based upon the limited power of a married woman, in Missouri, to execute a mortgage to secure her husband's debts.

As to case No. 2061, the decree must be reversed, in so far as it annuls the transfers by Mrs. Rogers to the bank and in so far as it gives priority to Wagner & Co. over the bank both as to the properties conveyed by Mrs. Rogers and as to the stock certificate. But for the fact that the chancellor saw and heard the witnesses, a careful consideration of the evidence would have led us to hold that the charges of duress, fraud, compulsion, or undue influence by or on behalf of the bank had not been sustained by the preponderance of the evidence. It is unnecessary, however, to determine this, for, even if the conveyances to the bank were voidable, they were subject to ratification. *Eberstein v. Willets*, 134 Ill. 101, 24 N. E. 967.

[5] In our judgment, the instrument of March 12th, executed, as the chancellor found, freely and without any wrongful inducement, operated not only to convey the equity in the properties to Wagner & Co., but also to ratify the earlier conveyances to the bank and thereby to waive any right that Mrs. Rogers might have had to avoid them.

The evidence, as already stated, fails to show that on March 12th Mrs. Rogers was still subject to any wrongful influences of any kind. It demonstrates clearly that at that time she knew exactly what had been done, what the situation then was, and in what way she could carry out her controlling desire, to aid an erring grandson in paying his debts and thus in rehabilitating himself. Even if there were a presumption that a second conveyance or ratification, obtained eight days later by the same parties whose original acts produced the condition of duress, was also made under duress (*Allen v. Leflore County*, 78 Miss. 671, 29 South. 161; s. c., 80 Miss. 298, 31 South. 815), it could have no bearing on the present case, for neither the bank nor its agent had anything whatsoever to do with the transactions of March 12th. Mrs. Rogers testified that she knew that Barnum did not represent the bank.

If she had desired to repudiate the former conveyances, she had, at that time, the fullest opportunity to do so. She might have conveyed the property and not merely her equity therein to the stockbrokers; she might have inserted in the document an express revocation of the former grants; she might have protested verbally against the alleged wrongs. Instead of this, however, she recited in the instrument itself the fact and purpose of the conveyances to the bank, and therein and thereby expressly authorized and directed the bank to pay over to Wagner & Co. only the balance remaining after the adjustment and satisfaction of its own claims. By clearest implication, if not by express words, she thereby evidenced her intention to ratify the original conveyances to the bank.

To set aside these transfers thus confirmed by a document directed and presented to the bank in accordance with her expressed intention that it be acted upon by the bank, the burden was on the petitioner, not merely to prove duress at the time of the original conveyances, but also its continuance at the later date. The evidence, however, of complete freedom from any duress on March 12th is uncontradicted.

[6] That no consideration was paid for the ratification either by or on behalf of the bank or by Wagner & Co. is likewise immaterial. A bilateral contract, executed by one acting without authority on behalf of another, may be ratified, "for ratification is neither a contract nor an estoppel, but a mere election." Wambaugh, 9 Harvard Law Review, 60, 65, note 1. It has been held that ratification after loss by fire is sufficient to render an insurance company liable on a policy issued without payment of the premium and on the request of an unauthorized agent. *Marqusee v. Insurance Co.*, 198 Fed. 475, 119 C. C. A. 251. A partner is liable as an accommodation indorser if he ratifies the unauthorized act of his copartner in so signing the firm name.

"It has never been suggested that to make such a ratification effectual, an independent consideration was necessary." *Commercial Bank v. Warren*, 15 N. Y. 577-579.

A fortiori, a conveyance, which requires no present consideration for its validity may be so ratified. *Phelps v. Pratt*, 225 Ill. 85, 80 N. E. 69, 9 L. R. A. (N. S.) 945.

"To ratify a mortgage (executed under a forged power of attorney) required no new consideration from the mortgagee." *Garrett v. Gonter*, 42 Pa. 143, 146.

Indeed, as ratification is not a bilateral transaction, but, "though it must be evidenced by external demonstrations, is merely an act of the mind * * * (its validity) does not depend upon its being communicated." *Bayley v. Bryant*, 24 Pick. (Mass.) 198, 203. See, too, *Parker v. Hill*, 8 Metc. (Mass.) 447; *Treadwell v. Davis*, 34 Cal. 601, 94 Am. Dec. 770; *Tucker v. Allen*, 16 Kan. 312; *Hall v. Vanness*, 49 Pa. 457; *Burt v. Quisenberry*, 132 Ill. 385, 401, 24 N. E. 622.

In the Illinois case it was held that the recital by the testator in a will that in a certain deed he had imposed obligations in favor of third persons on the grantee therein amounted to a ratification of the deed, even if it had originally been obtained by the grantee's undue influence. There is no essential distinction in principle between the ratification of an unauthorized conveyance by one wrongfully assuming to act as an agent and one's own conveyance, obtained by the grantee's fraud or other wrongdoing. In neither case is the principal or grantor absolutely bound by the original transaction; he may repudiate it, if he so desires; he may, however, waiving the wrong, elect to abide by it, and that, too, even though the original conveyance be a forgery. *Bank v. Crafts*, 4 Allen (Mass.) 447.

It is unnecessary, in this case, to limit ourselves to the rule, as we conceive it to be, that relation back to the date of the original transaction is an inherent part of ratification whenever and to the

extent that ratification is permitted, for whether Mrs. Rogers is to be deemed bound from March 3d and 4th or only from March 12th, the bank is protected against her subsequent attempt to repudiate, and, by the express terms of the instrument under which Wagner and Tietgens claim an interest in the property, the bank is given priority over them.

[7] The relative rights of Wagner and Tietgens and of the bank in the stock certificate depend upon entirely different considerations from those that determine the question at issue between them and Mrs. Rogers, or between themselves as to the other property conveyed by Mrs. Rogers.

It is elementary that even a purchaser for value without notice of a stolen chattel obtains no title as against the true owner; otherwise, however, as to commercial paper negotiable by delivery, transferred before maturity. Inasmuch as stock certificates are not strictly negotiable instruments, they are, when stolen, dealt with the same as chattels and not as commercial paper. *Knox v. Eden Musee Americaine Co.*, 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. Rep. 700; *Doran v. Miller*, 124 Ill. App. 551; *Miller v. Doran*, 151 Ill. App. 527, affirmed 245 Ill. 200, 91 N. E. 1039.

While therefore in the case of a theft, the courts have not given effect to the custom that exists among bankers and brokers to deal with stock certificates indorsed in blank practically as commercial paper, nevertheless they have recognized that, in certain respects, such documents, as well as bills of lading and warehouse receipts, are a species of property of a peculiar character distinguishable from ordinary chattels and, to some extent at least, to be dealt with like commercial paper.

The owner of a chattel who knowingly and intentionally hands over the possession or the custody for some specific purpose does not lose his rights therein if the bailee or custodian sells it to an innocent purchaser. The fact that he intrusts the possession to another, and the further fact that it is practically impossible for a purchaser to ascertain the falsity of the possessor's claim to ownership, do not give rise to an estoppel. The principle of caveat emptor applies. It is otherwise, however, in the case of stock certificates indorsed in blank. Even though only the bare custody thereof be intrusted to another who, in complete breach of his duty, disposes of them to an innocent purchaser, the title of the original owner is lost (*National Safe Deposit v. Hibbs*, 229 U. S. 391, 33 Sup. Ct. 818, 57 L. Ed. 1241), and that, too, though this custody was obtained by deceit and fraudulent representations (*Russell v. American Bell Telephone Co.*, 180 Mass. 467, 62 N. E. 751).

It is, however, urged that in these cases the purchaser paid a present consideration, that they are based on principles of equitable estoppel, and that as under an estoppel the only damages recoverable are those suffered because of reliance upon the acts or representations which give rise to the estoppel, the bank, which under the findings of the chancellor made no advances on the faith of the certificate, and therefore took it only as security for a pre-existing debt,

can have no claim thereon. Without determining whether, in fact, the bank actually advanced money on the faith of the certificate, and is therefore to that extent to be protected on principles of equitable estoppel, we are of the opinion that, even as a collateral security holder for a pre-existing debt, its claim, as a pledgee for value, has priority over that of Wagner and Tietgens.

In *Rumball v. The Metropolitan Bank*, 2 Q. B. Div. 194, the Court of Appeals decided in favor of the bank, which had taken stock certificate scrip solely as security for a pre-existing debt of Rumball's defrauding agent. It expressly based its decision both on principles of estoppel and because such scrip had been largely dealt in by bankers, money dealers, and members of the Stock Exchange and, through them, by the public, passing by mere delivery as negotiable instruments. And while the Supreme Court, in *Deposit Co. v. Hibbs*, supra, held that the principles which underlie equitable estoppel place the loss upon him whose misplaced confidence has made the wrong possible, it also stated that:

"Stock certificates are a peculiar kind of property. Although not negotiable paper, strictly speaking, they are the basis of commercial transactions large and small, and are frequently sold in open market as negotiable securities are. In *Bank v. Lanier*, 11 Wall. 369, 377, 378, 20 L. Ed. 172, this court said: '* * * Although neither in form nor character negotiable paper, they approximate to it as nearly as practicable.' * * * These principles are well known to business men and are constantly acted upon by them. This circumstance should be given due weight in determining the rights of the parties in this case."

This "due weight," in our judgment, leads to the conclusion that, in this respect, stock certificates are to be dealt with in the same way as commercial paper. By the great weight of authority at common law, both in England and the United States, and now by the Uniform Negotiable Instruments Act, in force in 46 jurisdictions, one who takes commercial paper as collateral security for a pre-existing debt is deemed to have given value. *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Railroad Co. v. Bank*, 102 U. S. 14, 26 L. Ed. 61; *Manning v. McClure*, 36 Ill. 490; Illinois Negotiable Instruments Act (1907) § 25, cl. 2. Stock certificate cases decided by the state courts which decline to follow the federal rule as to negotiable commercial paper are therefore not persuasive.

In Illinois, moreover (*Butters v. Haughwout*, 42 Ill. 18, 89 Am. Dec. 401; *Kranert v. Simon*, 65 Ill. 344), contrary to the weight of authority (*Bank v. Taylor*, 53 Fed. 854, 4 C. C. A. 55; *Bank v. Bates*, 120 U. S. 556, 7 Sup. Ct. 679, 30 L. Ed. 754), the pledgee of an ordinary chattel, given to secure a pre-existing debt, is protected as against a defrauded vendor thereof; a like rule prevails in the 11 jurisdictions that have adopted the Uniform Sales Act, Williston Sales, § 620.

As further evidencing the mercantile view of the character of documents such as stock certificates, bills of lading, and warehouse receipts, it may be noted that under the provisions of the Uniform Warehouse Receipts Act, in force in 30 jurisdictions, including Illinois, the Uniform Bills of Lading Act, in force in 11 jurisdictions,

including Illinois, and the Stock Certificate Act, in force in 9 jurisdictions, purchaser for value is defined as including one taking such documents as collateral for a pre-existing debt. Moreover, stock certificates and bills of lading, even though stolen, and warehouse receipts, when intrusted to another, are made fully negotiable. 34 Am. Bar Assoc. Rep. 1086-1096; 38 Am. Bar Assoc. Rep. 1029-1031; Laws of Illinois 1907, p. 477, §§ 40a, 47, 58; 5 Jones & Addington's Ill. Stat. Ann. §§ 9039, 9046, 9057; Laws of Illinois 1911, p. 227, §§ 31, 53; 2 J. & A. Ill. Stat. Ann. §§ 2196, 2218.

While *Otis v. Gardner*, 105 Ill. 436, may not be a direct adjudication of these questions in reference to stock certificates, inasmuch as the court based its decision, partially, at least, upon the fact that there was no limitation to the authority given to the agent in that case, clearly under Illinois law one taking stock certificates as collateral for a pre-existing debt would receive the same protection as a pledgee of commercial paper, bills of lading, warehouse receipts or ordinary chattels. As both parties are citizens of Illinois and as all the transactions in question took place in Illinois, the Illinois law should be applied, unless clearly contrary to the principles of commercial law established by the decisions of the Supreme Court of the United States. In our judgment, for the reasons heretofore stated, there is no such conflict.

On the questions involved in the appeal in case No. 2070, the decree is affirmed. On those involved in case No. 2061 the decree is reversed, and the cause remanded for further proceedings, including marshaling of the securities, not inconsistent with the views herein expressed.

On Rehearing.

[8] In the petitions for rehearing it is now, for the first time, urged that in addition to the elements enumerated in the opinion, another essential to ratification is Mrs. Rogers' knowledge of her legal right to disaffirm the original transfers and to recover the property.

A number of cases are cited in support of this contention. Many of them will be found in the notes to 2 Pomeroy Eq. Jur. § 964. In most of them the ground of rescission was actual or constructive fraud by one occupying a fiduciary position in securing a conveyance from his beneficiary. The highest degree of fairness and good faith demanded of a fiduciary must also be exercised in respect to ratification of such transactions, even though it be obtained after the relation has been terminated, and therefore proof of the beneficiary's knowledge of his legal rights is required.

In a few cases the same rule has been applied when the original conveyance was obtained, not by fraud but by duress, and not by a fiduciary but by a stranger. In most of the cases of duress and actual undue influence, however, when no confidential relation existed, the courts, in defining the requirements of a valid ratification, do not specify knowledge of the legal right to disaffirm.

Assuming, without now deciding, that even such a ratification must be based upon an election to waive one's known legal right of repudiating the original transaction, we are nevertheless of the opin-

ion that the burden of going forward with direct evidence of such knowledge is not on the defendant but on the complainant; that proof of the voluntary execution of the ratifying document with full knowledge of the facts constituting the original duress establishes, *prima facie*, the defense of ratification. This is so both because common experience fairly justifies the inference of fact that such a grantor knows of his legal right to rescind a conveyance obtained by such duress as is alleged to have been exercised in this case, and particularly because the direct evidence of the grantor's actual knowledge of his legal rights is peculiarly within his exclusive control.

The record before us contains no direct proof of any kind as to Mrs. Rogers' knowledge of her legal rights. While the court would weigh such evidence, if it were in the record, in the light of all of the facts bearing on the witness' credibility, and might, therefore, under some circumstances, hold it insufficient to overcome the inference, clearly, in the absence of any direct testimony whatsoever on the subject, the court is justified, if not compelled, to find that the defense of ratification has been established.

The decree will therefore, be reversed and the cause remanded for further proceedings, including marshaling of the securities not inconsistent with the views expressed in the original opinion.

DEUPREE v. WATSON.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1914.)

No. 2457.

1. BANKRUPTCY (§ 467*)—APPEAL—FINDINGS—REVIEW.

A finding by a referee in bankruptcy affirmed by the district judge will not be set aside on appeal on anything less than a demonstration of plain mistake.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. § 467.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

2. BANKRUPTCY (§ 303*)—MORTGAGES—FRAUD.

Evidence *held* insufficient to show that a mortgage executed by the bankrupt to his mother was fraudulent in whole or in part or had been withheld from record in order to give the bankrupt an unwarranted credit or to defraud subsequent creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 455-462; Dec. Dig. § 303.*]

3. MORTGAGES (§ 175*)—LIENS—PRIORITIES—FAILURE TO RECORD—NOTICE.

Ky. St. 1903, § 496, provides that no deed, deed of trust, or mortgage shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deeds shall be acknowledged or proved according to law, and lodged for record. *Held*, that under such statute a mortgage duly executed and delivered for a valid consideration is good as between the parties though not recorded, and also as against creditors taking with notice and subsequent creditors who have not obtained a lien on the property.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 175.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. BANKRUPTCY (§ 184*)—LIENS—UNRECORDED MORTGAGE—VALIDITY—STATE LAW.

Whether an unrecorded mortgage executed by the bankrupt is invalid as against the bankrupt's trustee under Bankr. Act July 1, 1898, c. 541, § 67a, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), providing that claims which for want of record or for other reasons would not have been valid liens as against claims of the creditors of the bankrupt shall not be liens against his estate, depends on the effect of the recording law of the state.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

5. BANKRUPTCY (§ 184*)—UNRECORDED MORTGAGES—PRIORITY.

Bankr. Act July 1, 1898, c. 541, § 47, cl. 2, subd. "a," 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), provides that trustees in bankruptcy as to all property in the custody or coming into the custody of the bankruptcy courts shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, and, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied. *Held*, that a mortgage executed and delivered in Kentucky in good faith and for a valid consideration prior to the date of the amendment, and recorded afterwards but before the petition in bankruptcy against the mortgagor was filed, was not subordinate to the claims of judgment creditors who became such subsequent to the execution of the mortgage and before it was recorded.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. § 184.*]

6. BANKRUPTCY (§ 161*)—MORTGAGES—RECORD—PREFERENCES.

Where a mortgage was executed by a bankrupt more than four months prior to the institution of bankruptcy proceedings and was valid under the state law except as against subsequent creditors who had acquired a lien and equally valid against the bankrupt's trustee, representing no such creditors, though not recorded until less than four months prior to bankruptcy, the date of record could not be regarded as the date of execution for the purpose of determining the four months' period in order that it might be declared a voidable preference under Bankr. Act July 1, 1898, c. 541, §§ 60a, 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1911, p. 1506).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261-263; Dec. Dig. § 161.*]

Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Action by William J. Deupree, trustee in bankruptcy of Luther B. Watson, against Alice P. Watson. Judgment for defendant (201 Fed. 962), and plaintiff appeals. Affirmed.

F. W. Schmitz, of Covington, Ky., for appellant.

U. J. Howard, of Covington, Ky., for appellee.

Before WARRINGTON and KNAPPEN, Circuit Judges, and HOLLISTER, District Judge.

HOLLISTER, District Judge. The controversy in this case is between William J. Deupree, trustee in bankruptcy of Luther B. Watson, and Mrs. Watson, mother of the bankrupt, over a mortgage given

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by him to her, which was, by the District Court, awarded priority over the claims of unsecured subsequent creditors.

The mortgage is attacked on several grounds: That the debt is fraudulent in whole or in part; that the mortgage is in itself fraudulent; that it was withheld from record and became invalid under section 496 Kentucky Statutes (1903), as against subsequent creditors without notice of its existence; that it was withheld from record in order to enable the mortgagor to obtain credit, and that it constitutes a preference under sections 60a and 60b of the Bankruptcy Act of 1898 and the amendments of 1903 and 1910.

[1] The conflicting testimony was carefully weighed by the referee as shown by his report. He found the amount of the debt was as claimed by Mrs. Watson, that the mortgage itself was free from taint, and that it was withheld from record through no fraudulent reason. Judge Cochran weighed the testimony with even more than his usual painstaking and discrimination, and affirmed the judgment of the referee ([D. C.] 201 Fed. 962). Under these circumstances, this court would not be warranted in reaching a different conclusion "upon anything less than a demonstration of plain mistake." This rule is established and of frequent application in this court and elsewhere. *Bank v. Mack*, 163 Fed. 155, 158, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184; *Wabash Ry. Co. v. Compton*, 172 Fed. 17, 21, 96 C. C. A. 603; *In re Holden*, 203 Fed. 229, 232, 121 C. C. A. 435; 1 *Loveland on Bankruptcy* (4th Ed.) pages 225, 226. That demonstration is not forthcoming. On the contrary, the testimony fully justifies the conclusion reached by the district judge and the referee.

[2] Mrs. Watson, evidently a woman of considerable business experience and judgment, had carried on for many years a saloon business in Covington, Ky., on premises owned by her near the Latonia Race Track. Her husband kept the bar and she attended to the business transactions necessary to carry on that business. She and her husband spent in acquiring, and upon, the property as much as \$18,000. She was the owner of other parcels of real estate and had maintained good credit. Her husband had died some little time prior to the transactions which give rise to this controversy and she had intermarried with one Wilson, from whom afterwards she was divorced and restored to her former name of Watson. Her son, Luther, the bankrupt, 23 years of age, enjoyed the confidence of his mother, and also of William Riedlin, president of the Bavarian Brewing Company, Covington. The fact that he was about to go into the saloon business near his mother's saloon caused negotiations between him and her in December, 1908, looking to the purchase by him of her saloon premises. For some time before he had been operating her saloon on his own account and had incurred an indebtedness to the Moerlein Brewing Company of Cincinnati of some \$1,600, to secure which he had given chattel mortgages on saloon fixtures and chattels on the premises. He had been accustomed to purchase most of the beer used by him from that company, although he obtained a small part from the Bavarian Brewing Company. The purchase price agreed upon between him and his mother was \$10,800, of which \$4,000 was to

be paid in cash and the balance, \$6,800, was evidenced by five promissory notes one payable each year, the first for \$700 and each of the others for \$1,525, to be secured by mortgage upon the premises.

Luther had been promised \$4,500 by the Moerlein Brewing Company to assist in carrying through the transaction for which he was to give a mortgage. \$500 of this he needed for improvements upon the premises and \$4,000 to make the cash payment to his mother. In January, Mrs. Watson employed D. A. Glenn, a reputable lawyer of Covington, to prepare the necessary papers embracing a deed from Mrs. Watson to Luther, a mortgage to the Moerlein Brewing Company for \$4,500, and the purchase-money mortgage for \$6,800, referring specifically to the Moerlein mortgage to which it was subordinate. The deed was dated January 20, 1909; was acknowledged by her then husband, to whom it had been sent at Memphis for his signature; and was by her acknowledged February 15, 1909. It was delivered the next day.

Luther, being dissatisfied with the delay of the Moerlein Brewing Company in furnishing the \$4,500, applied to Riedlin and obtained the money at the Farmers' & Traders' National Bank at Covington through the indorsement of Riedlin to whom, his wife joining, he executed a mortgage to secure that sum. One of the most convincing arguments for the bona fides of Mrs. Watson's mortgage is that, in the consummation of the transaction of sale, the fact that William Riedlin became the paramount mortgagee instead of the Moerlein Brewing Company, as had been expected, was overlooked, and the mortgage to Mrs. Watson, as originally drafted, remained unchanged.

Mrs. Watson being indebted for something more than \$1,100 for improvements on the premises, the indebtedness was paid out of the \$4,000, and she received a check from Luther on February 16, 1909, for the balance. The check was made the same day the deed was delivered, and Luther and his wife executed the mortgage for \$6,800 and the notes which it secured. On that day Luther, Riedlin, and Theissen, a lawyer of Covington employed by Riedlin to examine the title to the property, met at the bank for the purpose of closing the negotiations for the loan of \$4,500. Since the deed from Mrs. Watson to Luther recited a consideration of \$1 and other considerations paid and to be paid, Mr. Theissen thought Mrs. Watson ought to be consulted. Her son called her over the telephone, or she called him. She complained that a transaction in which she was so vitally interested ought not be carried on unless she were represented. Riedlin then talked with her and told her a first mortgage was about to be given to him to secure the \$4,500 and advised her not to put her mortgage on record as to do so would amount to "double taxation," in that the property was already assessed and her mortgage would be, if she put it on record. Glenn, her lawyer, also advised her not to put the mortgage on record.

After the purchase and apparently up to the time he left Covington in August, 1910, Luther carried on quite a large business, and in the spring of 1909, the exact date not being important, he paid the Riedlin mortgage from the proceeds of \$6,000 borrowed on mortgage from a

bank, and discharged the Moerlein chattel mortgages. That mortgage, having been at once recorded, is conceded to be prior to Mrs. Watson's mortgage.

Through the Moerlein Brewing Company a saloon had been established in the neighborhood in competition with Luther's business and Riedlin loaned \$1,900 (constituting his unsecured claim) to Luther for the purpose of constructing a bowling alley, better toilet facilities, and other improvements, so as to make his resort more attractive than it was. Luther, after becoming the owner of the saloon, bought all his beer from the Bavarian Brewing Company.

Luther, up to the time of abandoning his business in August, 1910, was apparently doing well, but was either unable to or had not paid Riedlin his \$1,900 nor the Bavarian Brewing Company's debt of \$3,041.22 owing it for beer. The claims of Riedlin and the brewing company constitute by far the greater part of Luther's unsecured indebtedness.

In August, 1910, Riedlin demanded of Luther a mortgage to secure the \$1,900. Luther, realizing that injury might result to his mother, her mortgage not being recorded, declined to secure Riedlin, and appreciating his inability to pay him and the brewing company and his other creditors, he, without notifying his mother or any one, left home and obtained employment at Detroit, where he was living with his wife and children at the time his deposition was taken during the pendency of these proceedings. It is probable that he went away either because he was ashamed or afraid to meet his creditors, or was oppressed by the sense of failure and wanted to begin life over in another locality.

On August 13, 1910, Luther employed a lawyer to prepare a mortgage to his mother for \$6,800 which he and his wife executed and left with the lawyer with directions to record the same. It was recorded on the 15th. After the 13th he went away but left a letter for his mother telling her of the execution of the mortgage. She did not know he intended to go away and had no knowledge of the execution of that mortgage until his letter told her of it. She did not know until the 16th that he had gone away and then put on record the mortgage of February 16, 1909, the mortgage in question in this case. Whatever may be the explanation of the mortgage of August 13, 1910, it is of no consequence now, since, under all the facts, it is established that the mortgage of February 16, 1909, was a valid mortgage given to secure \$6,800 balance of purchase money represented by the five notes hereinbefore described.

On August 17, 1910, the day after Mrs. Watson recorded her mortgage, attachments were levied upon the real estate at the instance of the Bavarian Brewing Company and Riedlin for their claims and by three other creditors for claims amounting to \$1,071.95.

August 26, 1910, involuntary proceedings in bankruptcy were instituted against Luther and he was adjudged a bankrupt on October 8th following.

The validity of the debt to Mrs. Watson and the mortgage to secure the same cannot be doubted. She withheld the mortgage from

record for, to her, and to many persons otherwise honest, laudable reasons, not in any event affecting her son's possible or probable prospective creditors. It was not withheld from record as the result of an agreement between herself and son. Her motives had to do with her own interests and had nothing to do with any possible effect upon her son's credit. It does not appear that any subsequent creditor gave credit to her son which would have been withheld had he known of the existence of her mortgage, while Riedlin and the brewing company knew of the mortgage and the reason why it was not recorded.

[3] It is not denied by the trustee, and it is without doubt the law (*Crucible Steel Co. v. Holt*, 174 Fed. 127, 129, 98 C. C. A. 101), that a mortgage in Kentucky duly executed and delivered upon a valid consideration is good as between the parties, though not recorded; and, since Mrs. Watson's conduct was free from fraud and no subsequent creditor deceived into giving credit to Luther, there is no basis for the claim that the mortgage was withheld from the record in order to enable him to obtain credit and this ground of attack must fail.

The Kentucky statute invoked by the trustee reads:

"No deed or deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deeds shall be acknowledged or proved according to law, and lodged for record." Kentucky Statutes 1903, § 496.

The fact that Riedlin and the brewing company had full notice and could take nothing under this statute may be overlooked in view of the comprehensive character of the trustee's duties, representing, as he does, all unsecured creditors.

[4] The Supreme Court of the United States in *Holt v. Crucible Steel Co.*, 224 U. S. 262, 32 Sup. Ct. 414, 56 L. Ed. 756, in which the judgment of this court (174 Fed. 127, 98 C. C. A. 101) was affirmed, construing this section with section 67a of the Bankruptcy Act, reading "Claims which for want of record or for other reasons would not have been valid liens as against claims of the creditors of the bankrupt shall not be liens against his estate," were of opinion that the recording law of the state must determine the effect to be given an unrecorded chattel mortgage, and that, following the more recent decisions of the Court of Appeals of Kentucky, the word "creditors," in the statute under consideration, "does not include antecedent creditors or subsequent creditors whose claims are acquired with notice of the unrecorded mortgage, but does include subsequent creditors, without notice, who by their diligence secure a specific lien upon the property, as by execution or attachment, before the mortgage is recorded." And so it was held that, as the subsequent creditors in that case had not, prior to the bankruptcy proceedings, fastened any lien upon the property, the unrecorded mortgage was good as against them.

[5] But, it is urged, the trustee, for the purposes of his trust and in working out the rights of creditors, has such a lien by virtue of the provisions of the amendment of June 25, 1910, to section 47, cl. 2, subd. "a," of the Bankruptcy Act. This provides:

"* * * Such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the

rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

The date of the mortgage is February 16, 1909; the date of its record August 16, 1910.

This situation raises the question whether or not in Kentucky a mortgage executed and delivered in good faith and for a valid consideration prior to the date of the amendment, and recorded afterwards but before the petition in bankruptcy was filed, becomes subordinate to the claims of general creditors who became such subsequent to its execution and before it was recorded. The answer must be in the negative, because the Supreme Court denies to the amendment any retroactive effect (*Holt v. Henley, Trustee*, 232 U. S. 637, 639, 34 Sup. Ct. 459, 460, 58 L. Ed. 767); Mr. Justice Holmes saying:

"We do not need to consider whether or how far in any event the constitutional power of Congress would have been limited. It is enough that the reasonable and usual interpretation of such statutes is to confine their effect, so far as may be, to property rights established after they were passed."

The trustee takes nothing, as to any of his claims, by the amendments of 1910, and since Mrs. Watson's mortgage was effective against unsecured subsequent creditors without notice who had not fastened a lien upon the property, and, by recording, became "valid" under the Kentucky statute, the attachments subsequent to the date of record are futilities. It follows that the attack upon the mortgage based upon the Kentucky statute must fail.

[6] But counsel for the trustee contends with much earnestness that the mortgage is a voidable preference under sections 60a and 60b of the Bankruptcy Act, as amended in 1903, basing his argument on the claim that the date of recording fixes the time with respect to which the elements constituting a voidable preference are to be ascertained and determined. The proposition is that a purchase-money mortgage, although a security of high rank in equity, unimpeachable when made, and good as against the trustee in bankruptcy (*York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782), and, under the laws of Kentucky (*Holt v. Henley*, 232 U. S. 637, 34 Sup. Ct. 459, 58 L. Ed. 767), good as against all persons becoming general creditors after its execution who have not fastened a lien upon the property, nevertheless changes its character at the date of recording and, by recording, becomes a voidable transfer under sections 60a and 60b of the Act of 1898 and the amendments of 1903. We cannot give our assent. The proposition is based upon an erroneous conception of the effect of the amendments of 1903 respecting the time of expiration of the four months' period within which a preferential transfer may be attacked.

The effect of the amendments of 1903, which control in this case, including the clause in 60a providing that where there is a preference, consisting of a transfer given within the four months before the filing of the petition in bankruptcy, "such period of four months shall not

expire until four months after the date of recording, or registering the transfer, if by law such recording or registering is required," has been heretofore decided by this court. In the case of *In re Klein*, 197 Fed. 241, 249, 116 C. C. A. 603, 611, it was said by Judge Sater, speaking for the court:

"The purpose of the amendment was, we think, as stated in *Re Sturtevant*, 188 Fed. 196, 110 C. C. A. 68 (7th Cir.), to prevent preferential fraudulent transfers from escaping the four months' provision, unless they were filed or recorded, as the case may be, before that period began to run. It did not change the date as to which such transfers are to be judged in determining their voidable character."

He quotes with approval what was said by Judge Cochran in *Debus v. Yates* (D. C.) 193 Fed. 447:

"It simply prolonged the time in which, by the filing of a petition in bankruptcy, a recordable preferential transfer might be deemed to be a voidable preference. It had nothing whatever to do with changing the date as of which it was to be judged in determining whether all the elements of a voidable preference were present."

In the eighth circuit there are cases in which language is found seemingly expressive of a contrary opinion; but Judge Dyer (*In re Jackson Brick & Tile Co.* [D. C.], 189 Fed. 636, 645) distinguished those cases from the case before him and held that a deed of trust executed in September, 1902, securing notes delivered to a bank for a present loan in December, 1902, but not recorded until August, 1906, within four months of the petition in bankruptcy, was not a voidable preference because the deed of trust was given as security for a present loan and not for an antecedent indebtedness. He was of opinion that the statute ought not be construed in such a way as to create a transaction different from what it actually was. We are of the same opinion, and follow here the decision of this court on the same subject in the case *In re Klein*. The result is that Mrs. Watson's mortgage is not obnoxious to any provision of the bankruptcy law applicable to the facts in this case.

The attacks of the trustee upon the mortgage having failed, the judgment of the District Court is affirmed, with costs.

HOLDEN v. CIRCLEVILLE LIGHT & POWER CO.
(Circuit Court of Appeals, Sixth Circuit. June 8, 1914.)
No. 2449.

1. COURTS (§ 367*)—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

In a suit in a federal court involving the title to real property, if the question is balanced with doubt, the court will incline to an agreement with a decision of the highest court of the state bearing upon it, although it may not be such as to create a rule of property.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 958, 959; Dec. Dig. § 367.*]

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468; *Converse v. Stewart*, 118 C. C. A. 215.]

2. WILLS (§ 439*)—RULES FOR CONSTRUCTION—INTENT OF TESTATOR.

The intent of the testator is the cardinal rule in the construction of wills, and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. § 439.*]

3. TRUSTS (§ 191*)—CONSTRUCTION OF TESTAMENTARY TRUST—POWER OF SALE.

No technical or express words are necessary in a will to create a power of sale, but if the intention is apparent such power will be implied, and it may be inferred from the general tenor of the instrument, or from the fact that a trustee is empowered and directed to do certain things, to which the sale of the trust property is necessarily a condition precedent.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 243; Dec. Dig. § 191.*]

4. TRUSTS (§ 191*)—CONSTRUCTION OF TESTAMENTARY TRUST—POWER OF SALE.

Where a suit to recover property conveyed by a testamentary trustee was not commenced until nearly 50 years after the conveyance was made, during which time the purchaser and its successor had acquired rights by the making of improvements and otherwise in reliance on the validity of the conveyance, such facts may properly incline the court, in case of doubtful language in the will, to a construction which will sustain the power of the trustee to convey.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 243; Dec. Dig. § 191.*]

5. TRUSTS (§ 200*)—CONVEYANCE OF PROPERTY BY TRUSTEE—CONSTRUCTION.

Where a grantor had apparently no title to the land conveyed, except by virtue of a will creating a testamentary trust in such grantor, the presumption is justified that the deed was made in reliance upon the power conferred thereby, although such power is not invoked nor expressly mentioned in the deed.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 267-269; Dec. Dig. § 200.*]

6. TRUSTS (§ 202*)—SALE OF PROPERTY BY TRUSTEE—RIGHTS OF PURCHASER—APPLICATION OF PROCEEDS.

A bona fide purchaser from a trustee empowered to sell, who pays the purchase money, is not required to look to its application.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 271, 272; Dec. Dig. § 202.*]

7. COURTS (§ 342*)—FEDERAL COURTS—EQUITABLE DEFENSE TO ACTION AT LAW.

Under the federal practice, facts which might raise an equitable estoppel do not constitute a defense to an action at law for the recovery of real estate.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 912, 913; Dec. Dig. § 342.*]

Equitable defenses in actions at law, see note to Standard Portland Cement Corp. v. Evans, 125 C. C. A. 5.]

8. WILLS (§ 672*)—TESTAMENTARY TRUST—POWER OF TRUSTEE TO SELL PROPERTY.

A testator devised and bequeathed all of his residuary estate to his widow for life, and provided that all of the property remaining at the time of her death "shall constitute a fund for the support and maintenance of my daughter * * * and her children during her life, and at the death of my said daughter * * * the same shall be equally divided between her children." There was a further provision that, should the daughter's husband die or become incapacitated during the widow's

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

life, the daughter should have the use of a house and grounds free of rent. The property consisted largely of unproductive real estate. *Held*, following a decision of the Supreme Court of the state in a suit between other parties, that the fund created by the property remaining at the death of the widow included all the property, real and personal, and that both principal and income were charged with the support and maintenance of the daughter and her children during her lifetime, including the reasonable education of her children; also that to that end, which was clearly the paramount object of the testator, the daughter took a life estate subject to the trust, with an implied power to sell and convey real estate when she deemed it necessary.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1579–1581; Dec. Dig. § 672.*]

In Error to the District Court of the United States for the Southern District of Ohio; John E. Sater, Judge.

Action at law by Martha Bierce Holden against the Circleville Light & Power Company. Judgment for defendant, and plaintiff brings error. Affirmed.

C. B. Matthews, of Cincinnati, Ohio, for plaintiff in error.

E. L. De Witt, of Columbus, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. This action was brought to recover possession of a six-ninths interest in certain premises in Circleville, Ohio, of which plaintiff claimed to be the owner in fee. The case was tried without a jury, and judgment rendered for defendant. The testimony has not been sent up. From the findings of fact made by the trial judge we condense the following as a sufficient statement for present purposes:

Isaac Darst died testate in the year 1844, leaving a widow, and without issue, except one daughter, who was then married. His will, which was duly probated, after providing for the application to the payment of his debts of his moneys and credits, such part of his personal effects as his widow should not wish to retain, and, so far as necessary, his least productive real estate (which the executor was authorized to sell), contained the following provision:

"I further will and bequeath to my wife, Martha Darst, all the rest and residue of my estate, real and personal, to be used and kept by her during her lifetime, and

"I further will and direct that after the death of my wife Martha, all the property then remaining shall constitute a fund for the support and maintenance of my daughter, Ann Bierce, and her children during her life, and at the death of my said daughter Ann the same shall be equally divided between her children. I would further provide and direct that should my daughter Ann become a widow or should her husband, W. W. Bierce, by sickness or otherwise become disabled from doing business and supporting his family during the lifetime of my wife, she, my said daughter, shall have the use and occupancy of the house she now occupies with the privilege of a small garden on lot No. 11 in the town of Circleville, free of charge."

Then followed a provision that, in the event of the death of his daughter without living children, his property "shall then be divided

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

between" certain of the testator's nieces. The widow died in 1855. In December 1860, the daughter, who then had nine living children, joined with her husband in conveying by warranty deed to the Circleville Gas, Light & Coke Company (hereafter called the Coke Company) the entire of the premises in question, together with other property.

In February, 1864 (more than three years after the conveyance to the Coke Company), Mrs. Bierce applied to the appropriate common pleas court of Ohio by petition, alleging the necessity of selling certain other real estate "in order to support said petitioner and her children," stating that "doubts have arisen as to whether your petitioner is entitled to a fee simple or life estate in the said lands, and your petitioner, being desirous of selling said lands, is not able to do so on account of apprehension in the minds of some persons as to the title," praying a construction of the will, and a determination "whether she may under any circumstances, and, if so, under what circumstances, sell said lands in fee simple, and that the court may order the same to be sold." Plaintiff formally consented to the sale asked for. Apparently in connection with this proceeding, plaintiff and another of Mrs. Bierce's children voluntarily quitclaimed to the Coke Company all their interest in the premises here in controversy. The common pleas court held that the will authorized "petitioner, as trustee for herself and her children, and in the event of its being necessary to the support of herself and children, to sell said premises," found that such sale was necessary for the purpose stated, and accordingly directed petitioner and her husband to make the sale.

Proceedings to review this judgment were taken in 1879, when the youngest of Mrs. Bierce's children attained majority. The Supreme Court of Ohio affirmed the judgment of the common pleas court, holding that the "fund" composed of the property remaining at the widow's death was "charged with the support and maintenance of Ann and her children as its primary object," and that "if the income proved insufficient the principal could be resorted to for proper support." *Bierce v. Bierce*, 41 Ohio St. 241.

Mrs. Bierce died in 1901, her husband having died in 1893. In 1909 the six children who had not quitclaimed to the Coke Company in 1863 and 1864, quitclaimed all their interest in the premises in controversy to the plaintiff, who thereupon instituted this suit against defendant in error, which had, in 1891, succeeded by purchase to the interests of the Coke Company.

Plaintiff contends that Mrs. Bierce took at her mother's death only a life estate in the property then remaining, with remainder in fee to her children, and that her deed to the Coke Company thus merely conveyed her life estate, which terminated in 1901. Defendant contends that the property remaining at the death of the testator's widow constituted a trust fund, of which, not only the income, but the principal, so far as necessary, was charged with the support and maintenance of Mrs. Bierce and her children (including the education of the children) during the lifetime of Mrs. Bierce, that the latter was made trustee of this fund, with power to sell the real estate belonging thereto, so far as necessary, for such support and maintenance, that necessity for such sale existed, and that the title accordingly passed thereunder.

The decision in *Bierce v. Bierce* is invoked as an adjudication of defendant's construction of the will. Plaintiff denies the binding effect of this decision, and insists that, even if it be followed, plaintiff is still entitled to recover, because the sale here in question was not, as in *Bierce v. Bierce*, under order of court. That decision, as applied to the controversy before us, determined only that the principal of, as well as the income from, the fund composed of the property remaining at Mrs. Darst's death was charged with the support and maintenance of Mrs. Bierce and her children. It did not determine that Mrs. Bierce was the trustee of this fund, with power to dispose of its principal without previous authority of court; for, although there are expressions in the opinion smacking of this view, not only was that question not involved, because the lower court had authorized the conveyance in question, but the proposition is not mentioned in the headnotes, which, under the rule in Ohio, alone expressed the actual decision of the court.

[1] Conceding that the decision in *Bierce v. Bierce* is not, strictly speaking, *res judicata* in defendant's favor, for the reason that neither it nor its property was before the court, yet, if that decision expresses the settled law of the state, it may be invoked by defendant in this cause as a rule of property; for, although pronounced after the sale by Mrs. Bierce to the Coke Company, it was rendered before the purchase from that company by defendant, who will be presumed to have bought in reliance upon it. We find nothing in the Ohio decisions which should cause us to reject the decision as stating the settled law of the state. But, regardless of whether or not that decision created a rule of property, and regardless of whether made before the rights here involved accrued, it being the decision of the highest court of the state in which the lands are situated; we should lean to an agreement with it if the question is balanced with doubt. *Kuhn v. Fairmount Coal Co.*, 215 U. S. 345, 360, 30 Sup. Ct. 140, 54 L. Ed. 228; *Mesinger v. Anderson*, 225 U. S. 436, 445, 32 Sup. Ct. 739, 56 L. Ed. 1152. And see *Rowe v. Hill*, 215 Fed. 518, 132 C. C. A. 30, decided by this court May 15, 1914.

[2] Turning, then, to the question of the correct construction of the will: The intent of the testator is the cardinal rule in the construction of wills, and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail. *Finlay v. King*, 3 Pet. 346, 377, 7 L. Ed. 701; *Colton v. Colton*, 127 U. S. 300, 309, 8 Sup. Ct. 1164, 32 L. Ed. 138; *Carter v. Reddish*, 32 Ohio St. 1; *Foster v. Stevens*, 146 Mich. 131, 135, 109 N. W. 265.

Plaintiff urges that the testator's intention that the land should not be sold is evidenced by the fact that the property was not directed to be "turned into" a fund, but to "constitute" a fund; by the use of the word "same" in referring to the division to be had at the daughter's death, which it is contended can only mean "the same property," which remained at the widow's death; by the failure to give the daughter the fee simple of the property; and by a supposed inconsistency between an inclusion of the real estate in the trust fund charged with the maintenance and the express devise to the daughter's children after their mother's death. But neither one nor all of these considerations

are necessarily controlling. The rules they invoke are aids only in determining the controlling question of intent, which must be arrived at from a consideration of all the terms of the will. It was said by Mr. Justice Miller¹ that "of all legal instruments wills are the most inartificial, and less to be governed in their construction by the settled use of technical legal terms"; and, as said by Mr. Justice Matthews,² "it is a question in each case of the reasonable interpretation of the words of the particular will, with a view of ascertaining through their meaning the testator's intention."

It is clear that the testator was chiefly solicitous that his daughter and her children be properly cared for so long as the daughter should live. This paramount solicitude is shown in the postponement of any division of the property until the daughter's death; in providing for her free use of the home in case of intervening necessity, even during her mother's lifetime, and though such use would lessen the income of the testator's widow from an estate largely unproductive and presumably so known to the testator; in the fact that the testator's property was to be "used and kept" by his widow during her lifetime, while at her death all the remaining property was to "constitute a fund" for the support and maintenance of the testator's daughter and her children during the daughter's lifetime; in the fact that there was not only no stated limitation of expenditure to income, but no express restriction of any kind as to the amount usable for the purposes stated—all considered in connection with the fact of the largely unproductive nature of the estate. We are by no means satisfied that the Supreme Court of Ohio, in the Bierce Case, erred in holding that the fund created by the property remaining at the death of the testator's widow included all the property, real and personal, and that not only the income, but its principal, so far as necessary, were charged with the support and maintenance of the daughter and her children, from the time of the widow's death to the decease of the daughter. We therefore accept the decision of that court. It is supported by *Ladd v. Chase*, 155 Mass. 417, 421, 29 N. E. 637; *Parker v. Travers*, 74 N. J. Eq. 812, 71 Atl. 612, and other cases. It logically follows that the term "maintenance" includes the reasonable education of the daughter's children. *Patterson v. Read*, 42 N. J. Eq. 621, 9 Atl. 579.

The question then arises whether Mrs. Bierce had the power, without the authority of court, to sell the real estate in question. It is conceded that she held an estate for life in all the property, real and personal, remaining at the death of her mother, the testator's widow. Indeed, unless she had such legal estate, with the sole right of possession during her lifetime, this action would be barred by the statute of limitations. Gen. Code Ohio 1910, § 11219. The case must be judged as if the will had made the conveyance of the life estate to Mrs. Bierce, and the remainder over to her children, expressly subject to a trust whereby the estate, both real and personal, remaining at the widow's death was chargeable, both principal and interest, with, and liable to be sold for, the support and maintenance of Mrs. Bierce and her chil-

¹ *Clarke v. Boorman's Executors*, 18 Wall. at page 502, 21 L. Ed. 904.

² *Colton v. Colton*, 127 U. S. at page 310, 8 Sup. Ct. 1164, 32 L. Ed. 138.

dren, but without in terms conferring power of sale upon Mrs. Bierce. For no technical language is necessary to the creation of a trust in a will (*Colton v. Colton*, 127 U. S. 300, 310, 8 Sup. Ct. 1164, 32 L. Ed. 138); and, subject to an exception which does not apply here, "whenever a person, by will, gives property, and points out the object, the property, and the way [it should] go, a trust is created." *Inglis v. Sailors Snug Harbor*, 3 Pet. at page 119, 7 L. Ed. 617. See, also, *Hoxie v. Hoxie*, 7 Paige (N. Y.) at page 192. If the power of sale was expressly or impliedly conferred upon Mrs. Bierce, no sanction of the court was necessary to a conveyance. *Perry on Trusts* (6th Ed.) § 476. The will obviously did not expressly confer the power to sell real estate. The specific question thus is whether such power is to be implied, as coupled with the life estate, and in view of the trust with which the entire fund was charged.

[3] No technical or express words are necessary in a will to create a power of sale. If the intention is apparent, such power will be implied. It may be inferred from the general tenor of the instrument, or from the fact that a trustee is empowered and directed to do certain things, of which the sale of trust property is necessarily a condition precedent. *Farwell on Powers* (2d Ed.) pp. 48, 546; 2 *Perry on Trusts*, § 501; *Winston v. Jones*, 6 Ala. 550, 554; 2 *Beach on Trustees*, § 450. And see 1 *Lewin on Trusts*, p. *434, and note (b). For example, if there is a general direction to sell, and it is not stated by whom the sale is to be made, the power of sale will be implied in the executor, trustee, or other person, as the case may be, by whom the proceeds of the sale are to be applied. 2 *Perry on Trusts* (6th Ed.) § 501, and notes; *Tylden v. Hyde*, 2 Sim. & Stuart, 238, 241. But this rule is not limited to cases of express direction to sell.

In *Going v. Emery*, 16 Pick. (Mass.) 107, 111 (26 Am. Dec. 645), a direction to the executor to collect the residue of the testator's property, real and personal, "as soon as can be done consistently without sacrificing too much by forcing the sale thereof in an improper manner," and to pay over the proceeds to certain persons named for religious purposes, was held to create a power in the executor to sell real estate in order to carry into effect the other purposes of the devise, although the legal title was not in terms conveyed to any one. In *Shaw v. Hussey*, 41 Me. 495, the testator gave to his wife all his property, real and personal, "during her natural life." In a later item he directed that at his wife's death all his "real estate, that may remain unexpended by her, be divided in equal shares between" certain persons. It was held that the wife took a devise for life, with the power of sale of real estate, as implied in the words "that may remain unexpended by her." In *McGuire v. Gallagher*, 99 Me. 334, 59 Atl. 445, the testator's property was devised to his widow "during her life," "to be used by her according to her desire," with direction that after her death "all the property remaining" be divided among certain persons. It was held that the wife took a life estate in the entire property, with an implied power of sale of any or all of it, both real and personal, with the right to use the proceeds for her support and comfort as she might desire.

In *Newlin v. Phillips* (Del.) 60 Atl. 1068, all the testator's property, real and personal, was given to his widow, "to hold, to keep, and en-

joy for her own use and benefit, to be free from the control or interference of any person or persons whatever," with the expressed desire that she should "carefully husband and keep intact as nearly as possible the estate, in order that the revenues therefrom may give her a comfortable and sufficient livelihood for the remainder of her life," with directions that "such as may be remaining thereof" be at her death divided in a certain manner. It was held that the wife took merely a life estate, with the implied power, if she should find the income insufficient, to dispose of such part of the estate as might be necessary for that purpose. In *Silvers v. Canary*, 109 Ind. 267, 9 N. E. 904, a devise to a wife of certain real and personal property for life, with directions that what should not be consumed at her death should be divided among the testator's children, was held to give the wife the power to convey the fee in the land.

Adopting, as we do, the construction that the testator intended his real estate to be sold, so far as necessary, for the support and maintenance of his daughter and her children during the daughter's life, an implied power in the daughter to sell would seem, under the authorities cited, to be justified, provided the testator intended that his daughter should determine the necessity of sale, and should herself disburse the proceeds thereof for her own and her children's support. There are some decisions out of harmony with this rule, but we have found none of controlling authority. The District Judge, in his opinion on final hearing, said:

"The will imposed no restriction on the daughter as to her expenditures for the support and maintenance of herself and children. The amount rested in her discretion, confidence in which is shown by the testator in his failure to exact a bond of her for the preservation of the estate and to require an accounting by her to some appropriate court. She was, in law, authorized to expend such a sum as persons stationed and circumstanced in life as she and her children were ought reasonably to have for support and maintenance."

If the construction we have adopted as to the general purpose and intent of the will is the correct one, the view of the District Judge quoted does not seem far-fetched.

[4] The validity of the conveyance in question was not directly attacked until more than 49 years after the sale was made, and not until 30 years after the decision of the Supreme Court of Ohio in *Bierce v. Bierce*. It is not improbable that during this long period defendant or its grantors have acquired rights, by way of improvements or otherwise, in reliance upon the sale. While these considerations do not afford a defense to this action, they "may properly incline a court, in the case of doubtful language in the will, to a construction of it that will validate the deeds and the exercise of the power, by which alone they can be supported."³

The case has been argued here as if Mrs. Bierce's children were all minors when the sale was made. We think the District Judge was justified in inferring that the circumstances of the family were such as to make the sale and the use of the principal or its proceeds neces-

³ Language of Judge Taft in *Smith v. McIntyre* (C. C. A., 6th Cir.) 95 Fed. at page 588, 37 C. C. A. 177.

sary to the support and maintenance of Mrs. Bierce and her children, including the latter's education. As this proposition is not challenged in brief or argument of plaintiff, we content ourselves with stating it without elaboration, beyond saying that, in our opinion, plaintiff's voluntary conveyance to the Coke Company of her interest in the premises upon her attaining legal majority, especially as made in connection with her formal assent to the further sale of real estate for the support of the testator's daughter and her children, is a more or less cogent admission that the circumstances justified the sale made nearly four years earlier.

[5] As neither Mrs. Bierce nor her husband had apparently any title to the land in question, except by virtue of the will, the presumption is justified that the deed was made in reliance upon the power conferred thereby, although such power is not expressly invoked or mentioned in the deed. *Warner v. Conn. Mutual Life Ins. Co.*, 109 U. S. 357, 365, 3 Sup. Ct. 221, 27 L. Ed. 962; *Smith v. McIntyre*, 95 Fed. at page 591, 37 C. C. A. 177; *Bishop v. Remple*, 11 Ohio St. 277, 281; 2 *Perry on Trusts*, § 511c and note (a).

[6] There is nothing in the record to impugn the good faith of the Coke Company, and a bona fide purchaser who pays the purchase money to one empowered to sell is not required to look to its application. *Potter v. Gardner*, 12 Wheat. 498, 502, 6 L. Ed. 706.

[7] Plaintiff's purchase under which she claims in this suit is purely speculative, and the record suggests a question of equitable estoppel. But under the federal practice, such estoppel is not a defense to a suit at law for the recovery of real estate. *Foster v. Mora*, 98 U. S. 425, 25 L. Ed. 191; *Johnson v. Christian*, 128 U. S. 374, 382, 9 Sup. Ct. 87, 32 L. Ed. 412; *Langdon v. Sherwood*, 124 U. S. 74, 84, 8 Sup. Ct. 429, 31 L. Ed. 344; *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059; *Highland Boy Gold Mining Co. v. Strickley* (C. C. A., 8th Cir.) 116 Fed. 852, 854, 54 C. C. A. 186; *Davis v. Davis* (C. C. A., 5th Cir.) 72 Fed. 81, 83, 18 C. C. A. 438.

[8] We therefore have not, in determining the rights of the parties in this suit, taken this question into account. The important question of the existence of the power of sale, necessary to sustain the deed before us, is not by any means free from difficulty. But having in mind the deference due to the construction of the will, so far as made, by the Supreme Court of Ohio more than 30 years ago, our duty, in view of the long delay in attacking the conveyance in question, to incline to such construction of doubtful language affecting the question of implied power of sale as will validate the deed, the actual decision of the common pleas court, the facts found by the District Judge and his carefully considered opinion, together with the broad general rule that we should not reverse a judgment unless the record gives rise to a clear conviction of error (*Chicago Junction Ry. Co. v. King*, 222 U. S. 222, 32 Sup. Ct. 79, 56 L. Ed. 173; *Seaboard Air Line v. Moore*, 228 U. S. 433, 435, 33 Sup. Ct. 580, 57 L. Ed. 907; *L. & N. Ry. Co. v. Lankford* [C. C. A., 6th Cir.] 209 Fed. 321, 325, 126 C. C. A. 247), which conviction does not here exist, we are constrained to accept the conclusion of the District Court, and so to affirm its judgment.

AMERICAN CAR & FOUNDRY CO. v. KINDERMANN.†
(Circuit Court of Appeals, Eighth Circuit. July 13, 1914.)

No. 4164.

1. EVIDENCE (§ 588*)—WEIGHT AND SUFFICIENCY—CONTRADICTION BY PHYSICAL FACTS.

When the testimony of a witness is positively contradicted by the physical facts, neither the court nor the jury can be permitted to credit it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. § 588.*]

2. MASTER AND SERVANT (§ 278*)—ACTION FOR INJURY—NEGLIGENCE OF FELLOW SERVANT.

While plaintiff was working under a car blocked up in defendant's yards for repair, it was struck and knocked from its supports by another car moved by an engine operated by an engineer, who was a fellow servant, and plaintiff was injured. The ground of defendant's liability relied on was that the spring on the engine, the function of which was to hold the throttle closed, was weak and defective, and failed to work properly. The only evidence of the defect was the testimony of the engineer, which was contradicted, and it was further shown by defendant without contradiction that the spring worked properly on the night before and the night after the injury, when other engineers were in charge, and that it had not been replaced or repaired, but had been in constant use and worked perfectly up to the time of trial. *Held*, that the testimony of the engineer was positively contradicted by such physical fact, and that the court should have directed a verdict for defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action at law by Nestor Kindermann against the American Car & Foundry Company. Judgment for plaintiff, and defendant brings error. Reversed.

M. F. Watts, Edwin W. Lee, William R. Gentry, and G. A. Orth, all of St. Louis, Mo., for plaintiff in error.

Lon O. Hocker, of St. Louis, Mo. (George F. Haid, of St. Louis, Mo., on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and TRIEBER and REED, District Judges.

TRIEBER, District Judge. This is an action to recover damages for injuries sustained by the defendant in error, who will be referred to herein as the plaintiff, while in the employ of the plaintiff in error, referred to herein as the defendant, due to the alleged negligence of the defendant. The petition alleges that on the 12th of March, 1913, he was directed to go under a car standing in defendant's yards for the purpose of making repairs on the same; that the body of the car was raised several feet from the ground, and each end of the car body was resting on supports or wooden timbers; that while he was under the car an engine operated by the defendant ran into the car, knocked it from its supports, causing it to fall on plaintiff, thereby injuring him. The negligence of the defendant is charged to con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied October 5, 1914.

sist of the failure of the defendant to exercise ordinary care to provide plaintiff with a reasonably safe place to work; that it made no provision for his being warned or protected against the movement of cars in the yards, and in failing to advise the other employes of plaintiff's dangerous position under said car; that the engine which ran into the car was in a defective and unsafe condition in that the spring on the throttle was defective and would not work, so as to enable the engineer to stop the same or to check the speed thereof in time to avert the collision.

The evidence on the part of the plaintiff was that he was in the employ of the defendant, and on the day of the accident, he was assigned to work underneath a car belonging to a certain railroad company, which car had been sent to defendant's plant for repairs; the car had been taken off the wheels and put on two horses or timbers about 20 inches high, one near each end of the car; the car leaned somewhat to one side, so that one edge of it was much closer to the ground than the other; the position of plaintiff while at work under the car was such that he could not see whether other cars were approaching or not; he was driving rivets into the bottom of the car; a young man named Senciboy was his helper; Senciboy stood inside of the car while plaintiff was working on it; Senciboy called out a warning to him that a car was coming in on the track and was going to hit the car on which plaintiff was at work; plaintiff attempted to escape, but before he could do so the car on which he was working was struck by the other car, inflicting the injuries complained of.

The cause of the accident was that the switching crew in the employ of the defendant was handling an engine and a car attached thereto, intending to bring the same into the yard where plaintiff was at work; the engine was headed north, but was backing toward the south, having one box car immediately south of it, which it was pushing into the yard; between the gate and the car where plaintiff was at work there stood a box car, which was a few feet inside of the yard and a short distance north of the car under which plaintiff was working and on the same track. The plan of the switching crew was to enter the yard above the car attached to the engine, run against the box car standing north of the one where plaintiff was at work, draw it out of the yard, and switch it away, replacing it with the car that was attached to the engine. The engine approached very slowly, the bell being rung at the time by the fireman; when the car which was coupled to the engine bumped against the car which the engine was to draw out of the yard the coupling missed, and one of the members of the switching crew gave a stop signal which the engineer immediately obeyed; the knuckle on the car was then readjusted by the switchman and a come ahead signal was given; the engineer opened the throttle, moved slowly forward until he bumped into the car the second time, received a second stop signal, and immediately shut off steam and started to apply the brake, but as he did so the throttle flew open, permitting steam to come into the cylinders of the engine, and thereby caused the engine to make a sudden lurch forward with such violence as to force the car nearest the one on which plaintiff was working toward the south, striking the car where

plaintiff was at work, and knocking it down upon him. The cause of this lurch, as testified to by Mr. Overpeck, the engineer in charge of the engine, was that the spring on the throttle, the function of which was to hold the throttle closed, had become weak and lost its temper, so that it would at times fail to hold the throttle closed when the engineer closed it. He testified that the throttle on that engine had been in that condition for about three weeks preceding the accident, and that on two occasions prior to the accident he had made a written report of the condition of the spring to the night foreman of the roundhouse where the engine was kept; that the report was made to a man he knew as Buster Brown, the man in charge of the roundhouse at night. In addition to the two written reports made to this man Mr. Overpeck testified that he had notified him of the defect of the spring orally four or five times before the accident, and that Buster promised to fix it, but it was never fixed. Mr. Overpeck also testified that Mr. Cowell, who was his superior, had instructed him that if anything was wrong about the engine to hand the written report to Buster, if he (Cowell) was gone.

On the part of the defendant, Mr. Cowell testified that he had never instructed Mr. Overpeck to make any reports to Buster, that Buster was merely a subordinate employé in charge of the roundhouse at night, and that if any written reports had been made by Mr. Overpeck and left at the roundhouse they would have been received by him. Mr. Buster denied positively that Overpeck had either made written or oral reports to him concerning the condition of the spring at any time preceding the accident.

The defendant also introduced evidence tending to show that the spring in the throttle on that engine was in perfect condition at that time; that it has never been changed since the accident; that it worked perfectly immediately before and after the accident, when it was tested by the defendant's representatives, has been used ever since, and was still in perfect condition at the time of the trial. Mr. Cowell and the master mechanic of the defendant, Mr. Cribben, examined the spring while Mr. Overpeck was on duty on the engine, and after a most thorough test found it in perfectly good condition.

There was also evidence of experts to the effect that such springs as the one in question usually lasted the lifetime of the engine on which they are placed. They also testified that the rules of the defendant company required that when anything was wrong with an engine, upon discovery by the engineer, it was his duty to report it to the head engineer, Mr. Cowell, and if Mr. Cowell was absent from the roundhouse the written report was to be made out by the engineer and left at the roundhouse for Mr. Cowell. It was also testified that the company did not carry in stock such springs as the one which it is claimed caused the accident, nor could one be obtained from any other place than the locomotive works which had manufactured the locomotive. Mr. Evans, another engineer, testified that he had handled the same engine on the night preceding the accident, and also on the night following, and that the spring worked perfectly both nights.

Counsel for the defendant in error, in their brief as well as argument, conceded that under the decisions of the national courts the engineer, Overpeck, in the operation of his engine, was a fellow servant of the plaintiff. The ground of liability upon which plaintiff relies is stated in the brief as follows:

"Liability is charged by the plaintiff by reason of the fact that the throttle of the engine which caused the accident had been permitted to remain in a defective condition for about three weeks; that defendant was advised of this defective condition, and negligently failed to repair the same, or to take the engine out of service pending repairs."

Counsel have very ably argued the question whether Mr. Buster, by reason of the fact that Mr. Overpeck testified that he had been instructed by Mr. Cowell to report to him any defects in the engine during his (Cowell's) absence, was a vice principal, and a report made to him and his promise to have the repairs made was notice to and a promise of the company. The only testimony on the part of the plaintiff that such instructions were given is that of Mr. Overpeck, which was positively denied by Mr. Cowell and Mr. Buster. But as that was a question of credibility of the witnesses, and giving the strongest probative effect to the testimony of the party against whom it is sought to have a verdict directed, we would not feel at liberty to reverse a judgment submitting that question of fact to the jury. We do not deem it necessary, in view of the conclusions reached, to determine whether Mr. Buster would, under these circumstances, be a vice principal or merely a fellow servant.

[1] In our opinion there is no substantial evidence justifying the submission to the jury of the question as to whether the spring on the throttle on that engine was defective. It is true that the testimony of Mr. Overpeck is positive; but the rule is well settled that when the testimony of a witness is positively contradicted by the physical facts, neither the court nor the jury can be permitted to credit it. This was expressly decided by this court in *M., K. & T. Ry. Co. v. Collier*, 157 Fed. 347, 353, 88 C. C. A. 133. A petition for certiorari in that case was denied by the Supreme Court. 209 U. S. 545, 28 Sup. Ct. 571, 52 L. Ed. 920.

[2] The uncontradicted evidence in this case shows that this engine was used by Engineer Evans on the night preceding the accident and on the night following it, and the spring worked perfectly both nights. The testimony of Mr. Cowell and Mr. Cribben, the master mechanic, was that they made an examination of the spring shortly after the accident, and in the presence of Mr. Overpeck, tested it and found it in perfect condition. The same spring was used up to the date of the trial, and no defect was ever found in it. A case almost parallel with this is *Galusha v. Chicago Great Western Ry. Co.*, 165 Fed. 333, 336, 91 C. C. A. 319.

In view of this evidence, we are of the opinion that Mr. Overpeck's testimony is positively contradicted by the physical facts, and therefore the court should have granted the request of the defendant for a directed verdict in its favor.

The judgment is reversed, with directions to grant a new trial.

REBILLARD v. MINNEAPOLIS, ST. P. & S. S. M. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. July 27, 1914.)

No. 4173.

1. APPEAL AND ERROR (§ 695*)—REVIEW OF EVIDENCE—PARTIAL RECORD.

On a question of fact an appellate court cannot have the entire record before it, where the trial court and jury made an inspection of the premises where an accident occurred.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2914; Dec. Dig. § 695.*]

2. NEGLIGENCE (§ 93*)—IMPUTED NEGLIGENCE—INJURY TO PASSENGER IN AUTOMOBILE.

Plaintiff was riding with others as a guest in an automobile at night. The lights gave out, and they stopped at a town, but could procure no light, except an oil lamp, which was very dim. After traveling several miles, while they were on a trail not used or treated as a public road, and with which none of those in the car was acquainted, the machine went over an embankment into a cut made by defendant railroad company, and plaintiff was injured. The place was within the limits of a city, but in a part which had not been platted, nor streets or alleys dedicated. *Held* that, aside from the question of defendant's negligence, plaintiff was chargeable with contributory negligence and could not recover.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 147-150; Dec. Dig. § 93.*]

3. NEGLIGENCE (§ 93*)—NEGLIGENCE OF DRIVER OF VEHICLE IMPUTABLE TO PASSENGER.

The rule that the negligence of the driver of a conveyance will not be imputed to a passenger, whether the conveyance is a public one or the passenger is the guest of the driver of a vehicle, does not apply where the passenger has full knowledge of the danger and voluntarily incurs the risk.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 147-150; Dec. Dig. § 93.*]

In Error to the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Action at law by Charles Rebillard against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

C. J. Murphy, of Grand Forks, N. D. (Murphy & Toner, of Grand Forks, N. D., and William M. Anderson, of Devil's Lake, N. D., on the brief), for plaintiff in error.

Fred J. Traynor, of Devil's Lake, N. D. (Flynn & Traynor and P. J. McClory, all of Devil's Lake, N. D., and John L. Erdall and A. H. Bright, both of Minneapolis, Minn., on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and TRIEBER and REED, District Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

TRIEBER, District Judge. This is an action for personal injuries sustained by the plaintiff below, who is the plaintiff in error, and will be referred to herein as the plaintiff, caused by an automobile, in which he was riding as a guest with a friend, running over an embankment into a deep cut made by the defendant in the construction of its road, and which was unguarded.

The allegations in the complaint are that the defendant constructed a line of railway through the city of Devil's Lake, N. D., which intersected a public highway located west of said city; that in building the railroad a cut 19 feet in depth at the point of intersection with the highway was made; that the cut was not bridged over, nor guarded in any way, so as to warn travelers upon the highway of the dangerous situation there existing; that on April 26, 1913, at 11:45 p. m. while plaintiff was riding as a guest in the rear seat of an automobile driven by the owner of the car over the said highway, the car was driven over the embankment into the cut, thereby injuring plaintiff.

The answer is a general denial, and also pleads contributory negligence on the part of the plaintiff. At the conclusion of the evidence the court gave a peremptory instruction in favor of the defendant.

The evidence introduced on the part of the plaintiff tended to show that one Doyon, who was the owner of an automobile, had invited the plaintiff to take a trip in his car, plaintiff being associated with him in the mercantile business at Doyon, N. D.; that at Church's Ferry they picked up two additional guests, Mr. McLean, who was sheriff of that county, and Mr. Chambers, a newspaper man and postmaster at Church's Ferry. They left Church's Ferry about 8 o'clock shortly before dark; the car was provided with a prest-o-lite tank for lighting purposes; when about 8 or 9 miles from Church's Ferry the gas gave out; there was an oil lamp on the dash of the car, but neither wick nor oil in it; they proceeded in the dark about two miles to Grand Harbor, where they tried to get a prest-o-lite gas tank, or an ordinary lantern, but failed; they procured some kerosene and a wick there, but the latter was too large for the lamp on the car, and it was trimmed down so as to make it do, but the light afforded by the lamp was very dim; they then proceeded on their journey to Devil's Lake, which was about 6 miles. Mr. McLean was the only person who was at all familiar with the roads in that section, but he had not been over this road for some time, and not since the defendant built its line and made the cut, several months before the accident occurred. They traveled over what seemed to be a prairie trail on the section lines, grown over with grass and weeds, and which had never been treated as a public road, nor as a street or alley of the city of Devil's Lake, within whose corporate limits it was, and where the accident occurred, and was but little traveled. Mr. McLean was standing on the running board of the car for the purpose of keeping a lookout, while the plaintiff and Mr. Chambers were sitting on the back seat of the car. Shortly before reaching the place of the accident they got off the trail, which was very indistinct. They

then tried to get back on the trail, but a large rock was in the way, which caused them to turn toward the section line, and in attempting to get back to the trail the car went over the embankment. The cut does not cross the trail at right angles, but a little "biased." It is undisputed that, had the car been supplied with proper lights, the party would not have taken this trail, but would have used the public road, which would have enabled them to avoid this cut, or, if on the trail, the cut could have been seen in time to avoid the accident.

Section 2171, North Dakota Rev. Code, prescribes:

"Every automobile or motorcycle shall also be provided with lights, the automobile to carry not less than two lights in front of such machine, one of which to be on either side."

The evidence is undisputed that the trail was not treated or used as a public road, nor, being within the limits of a city, as a street or alley. It was a part of the city which had never been platted, nor any streets or alleys dedicated. It is claimed on behalf of the plaintiff that the trail, being on the section lines, was under the provisions of section 2477, R. S. U. S. (U. S. Comp. St. 1901, p. 1567), and by reason of the acceptance of the grant of this strip as a public road by the territory of Dakota in 1877, a public road, and therefore it was the duty of the railway company to guard the cut at the intersection of this road. Several decisions of the Supreme Courts of South and North Dakota are cited to that point, but an examination of them shows that they are not in point, as all they decided was that the owner of the lands bordering on section lines takes them subject to the easement of the county and state to use them as public roads or streets, whenever they see proper to do so, a privilege which had never been exercised by either the city, county, or state in this case.

But it is claimed on behalf of the plaintiff, quoting from the brief, that:

"There was at least a road established by user which the defendant had no right to obstruct. This trail had been used for many years, and the defendant, in utter disregard of the safety of travelers excavated a cut 30 feet wide and about 15 feet deep through the road without so much as putting up a warning signal. Even if the users of the road were mere licensees, the defendant owed them the duty of warning them by building a barrier, placing signal lights or in some other manner. The conditions were such as to advise defendant of the long use of this road for highway purposes, and it was bound to know that travelers might continue to use this road, and that it might, under conditions such as existed on the night in question, become a veritable deathtrap. This was the defendant's duty under the general law as to licensees, and neglect of that duty would render it liable to any person injured without contributing fault."

[1] The evidence, as to whether the trail indicated that it was used to any appreciable extent as a public road, is conflicting, but the record shows that during the trial the jury and trial judge, by consent of all parties, made an ocular inspection of the place, where the accident occurred. What that inspection conveyed to the minds of the court we cannot know from the record; in such case the appellate court cannot have the entire record before it. Choctaw, etc.,

R. R. Co. v. Holloway, 114 Fed. 458, 52 C. C. A. 260, affirmed 191 U. S. 334, 24 Sup. Ct. 102, 48 L. Ed. 207.

[2] Assuming that the above statement of the law made by counsel for plaintiff to be correct, the question arises whether the accident which caused plaintiff's injuries occurred "without contributing fault on his part." It is undisputed that the car on that occasion was not provided with lights as required by the laws of North Dakota, and even in the absence of such a statute no reasonably prudent person would, on a dark night, on a road with which he was unfamiliar, travel in a motor car without sufficient lights to enable him to see whether there were any dangerous places along the road of travel, especially when going to a city known to him to have several railroads whose tracks would have to be crossed. All the evidence tends to show that had the car been supplied with proper lights this road would not have been used by the party, and if used the cut would have been seen in time to have avoided it. This clearly was such negligence as to prevent a recovery on the part of those in charge of the car.

[3] But it is claimed, and that is the main ground upon which a reversal of this cause is asked, that as the plaintiff was merely a guest of the owner and driver of the car, and exercised no control over the driver, the driver's negligence is not attributable to him.

In *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652, which is the leading American case on this subject, and which has been followed by the American courts generally, the rule was established that the contributory negligence of the driver of a public conveyance would not be imputed to a passenger. And this court in *Union Pacific Ry. Co. v. Lapsley*, 51 Fed. 174, 2 C. C. A. 149, 16 L. R. A. 800, and *City of Winona v. Botzet*, 169 Fed. 321, 94 C. C. A. 563, 23 L. R. A. (N. S.) 204, has extended this rule to a person who accepts a gratuitous invitation of the owner and driver of a vehicle to ride with him, even if it is not a public conveyance. But an examination of the many cases on that question shows that the writers of the opinions are careful to except a passenger or guest who with knowledge of the danger remains in such dangerous position. *Dyer v. Erie Ry. Co.*, 71 N. Y. 228; *Brickell v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 290, 294, 24 N. E. 449, 17 Am. St. Rep. 648; *Transfer Co. v. Kelley*, 36 Ohio, 86, 91, 38 Am. Rep. 558; *Wabash, etc., Ry. Co. v. Shackel*, 105 Ill. 364, 44 Am. Rep. 791; *Davis v. C., R. I. & P. Ry. Co.*, 159 Fed. 10, 19, 88 C. C. A. 488, 497, 16 L. R. A. (N. S.) 424; *Brommer v. Pennsylvania Ry. Co.*, 179 Fed. 577, 581, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924; *Dean v. Pennsylvania R. R. Co.*, 129 Pa. 524, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733.

In *Davis v. C., R. I. & P. Ry. Co.*, supra, this court quoted with approval the following extract from *Brickell v. N. Y. C. & H. R. R. Co.*, supra:

"The rule that the driver's negligence may not be imputed to the plaintiff should have no application to this case. Such rule is only applicable to cases where the relation of master and servant or principal and agent does not exist,

or where the passenger is seated away from the driver by an enclosure, and is without opportunity to discover danger and to inform the driver of it. It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver to learn of danger, and avoid it if practicable."

The same rule is laid down in *Shultz v. Old Colony Street Ry. Co.*, 193 Mass. 323, 79 N. E. 873, 8 L. R. A. (N. S.) 597, 118 Am. St. Rep. 502, 9 Ann. Cas. 402; *Partridge v. Boston & M. Ry. Co.*, 184 Fed. 219, 107 C. C. A. 49.

The plaintiff, as a reasonably prudent person, must have known of the danger incident to riding in a motor car on a dark night, without lights, over roads with which neither the driver of the car, nor any of the persons with him in the car, were familiar. When with full knowledge of that fact the plaintiff remained in the car he was as guilty of negligence as the driver himself. As stated by Judge Philips in the *Davis Case*:

"The law of common sense applied to such a situation is that the movement and control of the vehicle is as much under the direction and control of one as of the other."

The action of the court in directing a verdict in favor of the defendant was right, and the judgment is accordingly affirmed.

NATIONAL TUBE CO. v. MARK et al.

(Circuit Court of Appeals, Sixth Circuit. July 25, 1914.)

No. 2417.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—MECHANISM FOR RIFLING PIPES OR TUBES.

The Fell patent, No. 888,984, for apparatus for rifling pipes or tubes was not anticipated, discloses patentable invention, making a distinct and valuable advance in the art, and its claims are entitled to a fairly broad construction; also held infringed as to claims 1, 2 and 3.

2. PATENTS (§ 165*) — CONSTRUCTION OF CLAIMS — "SUBSTANTIALLY AS DESCRIBED."

At least in all recent patents, granted since the rule of the Patent Office established by the decision of the Commissioner in 1902 in *Ex parte Shepler*, 102 O. G. 468, has been in force, and save in exceptional instances, the presence or absence of the phrase "substantially as described" in a claim is of no interpretative importance, words of such import being implied if not expressed. Such words, if present, do not limit the patentee to the exact mechanism described, nor deprive him of the benefit of the rule of equivalents to the same extent as if they were absent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*

For other definitions, see Words and Phrases, vol. 7, pp. 6741, 6742.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. PATENTS (§ 157*)—CONSTRUCTION—RULES OF PATENT OFFICE.

When the Patent Office has a settled rule of construction under which a certain phrase in a patent grant has a fixed meaning, acquiesced in by the patentee, the courts cannot afterward rightfully say that the phrase means something more or something less.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 229-232; Dec. Dig. § 157.*]

Conclusiveness and effect of decisions of patent office in proceedings on applications, see note to Novelty Glass Mfg. Co. v. Brookfield, 95 C. C. A. 530.]

4. PATENTS (§ 165*)—CONSTRUCTION OF CLAIMS.

Where a patent contains both a broad and a narrow claim and suit is brought on the broad claim, the court cannot construe into it a limitation not therein expressed, but which is expressed in the narrower claim, and by which alone one is distinguished from the other.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

5. PATENTS (§ 168*)—CONSTRUCTION—ESTOPPEL BY PROCEEDINGS IN PATENT OFFICE.

It is not necessarily important that when the examiner rejects a claim in an application for a patent on a reference to an earlier patent, the applicant thereupon amends the claim, but it is of importance and creates an estoppel against the patentee only when it additionally appears that the effect of the amendment was to narrow the claim.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 243½, 244; Dec. Dig. § 168.*]

Appeal from the District Court of the United States for the Southern District of Ohio; John E. Sater, Judge.

Suit in equity by National Tube Company against Cyrus Mark, Anson Mark, and Clayton Mark, partners, as the Mark Manufacturing Company. Decree for defendants, and complainant appeals. Reversed.

D. Anthony Usina, of New York City and Charles C. Linthicum, of Chicago, Ill., for appellant.

Charles Neave, of New York City and James K. Bakewell, of Pittsburgh, Pa., for appellees.

Before KNAPPEN and DENISON, Circuit Judges, and COCHRAN, District Judge.

DENISON, Circuit Judge. [1] This is the usual patent infringement suit, brought by appellant, as plaintiff in the court below, and based upon patent No. 888,984, issued May 26, 1908, to Charles Fell for "apparatus for rifling pipes or tubes." Pipes used for the transmission of liquids had always been constructed with as smooth an inner surface as possible, in order to minimize the friction. It developed that in the long-distance carrying of the heavy viscous oils of California, the adhesion of the oil to the inner surface of the pipe was a serious obstacle. In 1904 Isaacs and Speed made an ingenious discovery. They found that a film of water interposed between the pipe and the oil would remove the trouble, that if a little water was put in with the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

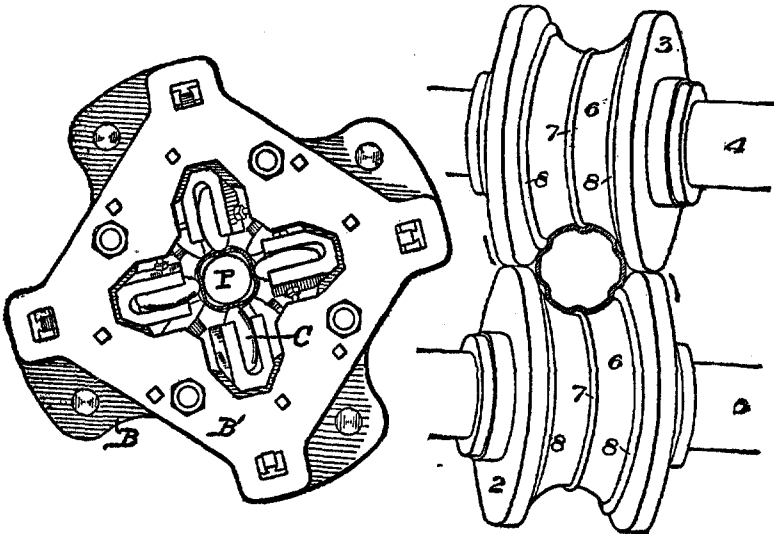
oil and the whole liquid given a rotary motion, the resulting centrifugal force would throw the water out against the pipe and create the desired water film, and that sufficient rotary motion could be induced by rifling the pipe, so that when the contents were pumped through, giving primarily a longitudinal motion, there would be induced a secondary spiral motion. They utilized their discovery by a method patent, not now involved, and by an apparatus or device for rifling pipe. This was designed for use in the field, after the pipe was manufactured in the ordinary way, and it consisted of a rigid framework encircling the pipe and carrying four rollers or small wheels which projected inwardly radially to the pipe, and the innermost points of which were in a circle considerably smaller than the outer periphery of the pipe. It necessarily followed that as the pipe was passed through, four corresponding indentations would be made, resulting in ribs upon the inside of the pipe. These indenting wheels were so hung in the surrounding frame that their axes were not parallel to the corresponding diameter of the pipe, but were at an angle of, say, 20 degrees therefrom. It followed that the pipe, as it passed through lengthwise, would slowly rotate, and that the resulting ribs, grooves, or depressions on the inside of the pipe would be helical instead of longitudinal. This invention received distinct commercial approval, but the difficulty and expense of handling pipe in this way were considerable, and application was made to plaintiff, a large manufacturer, to produce and sell pipe in that form at its factory. The natural query was whether pipe could be put into that shape by or in connection with the original drawing and rolling process, and while it was hot and comparatively plastic; and, if so, how that could be done. These questions were submitted to Fell, plaintiff's superintendent, and the patent in suit is his answer.

Fell built his invention upon a device very common in the rolling mill art, a pair of skewed rolls. These consist of an upper and a lower horizontal shaft, each carrying a roll with such concavity in its surface that the pipe may travel between the two, while moving longitudinally upon a line at right angles to a vertical plane halfway between the vertical planes of the two roll shafts; in other words, the upper and lower roll shafts, instead of being at right angles to the travel of the pipe, make complementary angles thereto of, e. g., 70° and 110°, the upper roll shaft having its left-hand end moved 20° forward, and the lower one having its corresponding end moved 20° backward from the right-angled position. Obviously, if the concavity in each roll was upon the arc of a circle, this nonparallelism of the upper and lower roll shafts would so distort the opening that a circular pipe could not pass through, and in order to make this opening or "pass" circular, when projected upon a plane at right angles to the pipe axis, and so suitable for the passage of circular pipe, it is necessary to make each concavity partially elliptical. Such "skewed rolls" operate at the same time to forward and to rotate the pipe, and were in common use, particularly for straightening purposes. It occurred to Fell that by putting circumferential beads or ribs upon the concave faces of these rolls he could get the desired result. Experiment demonstrated that

this was so. The difference between what Isaacs and Speed had done and what Fell did is made clear by the following sketches:

(Fig. 1, Isaacs & Speed.)

(Fig. 3, Fell.)



Fell's patent has 14 claims; the bill alleged infringement of all. In the court below plaintiff relied upon nearly all, but in this court it practically confines itself to the first three; and we shall find it necessary to refer to the others only for the sake of applying the differentiation test, in order to determine the meaning of the first three. They are as follows:

"1. In apparatus for rifling pipes or tubes, a pair of skewed rolls formed with circumferential grooves or passes for the pipes or tubes having circumferentially extending rifling beads or ribs, substantially as described.

"2. In apparatus for rifling pipes or tubes, a pair of skewed rolls formed with circumferential grooves or passes for the pipes or tubes having circumferentially extending rifling beads or ribs, and means for positively rotating both of the rolls, substantially as described.

"3. In apparatus for rifling pipes or tubes, a pair of rolls having each a groove or pass for the pipes or tubes with circumferentially extending rifling beads or ribs, the two rolls having their axes crossing each other, and means for positively driving the said rolls, substantially as described."

We see no substantial distinction between these claims. The element added by the second claim, "means for positively rotating both of the rolls," is the statement of an element which, in some form, must be present to make the device independently operative; and the third claim merely uses different terms of description for the same rolls, so we may confine ourselves to the first claim.

The novelty of the broad result which Fell accomplished is not questioned; no one had ever before rifled pipe with a pair of skewed rolls carrying circumferential beads; upon this branch of the case, the only question is whether his solution required invention as distinguished from expert skill. There were in existence two classes of

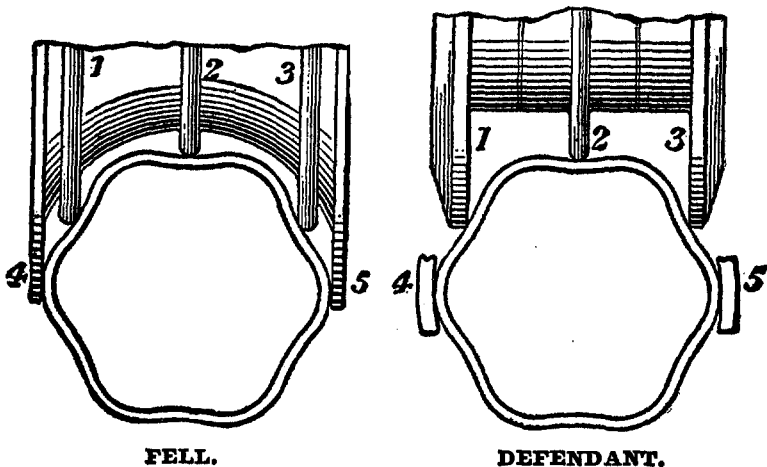
machines, more or less analogous. One was for corrugating hollow pipe; the other was for twisting solid bars. The first class is typified by Fife, No. 426,439, April 29, 1890. This consisted of two indenting rollers, upper and lower, upon skewed axes so that, as the tube was fed between them, they produced a helical indentation. The axes of the rolls were almost parallel with the axis of the pipe, whereby it resulted that the helix had a very low pitch, and the product was what would naturally be called a corrugated tube; but if there is any distinction between corrugating and rifling due to the pitch of the groove, Isaacs and Speed had bridged the gap by applying the same idea to rifling, except that they used four indenting rolls, and thus provided a pass within the circle struck through these four points, instead of through merely the two opposite contact points of Fife. The other class of devices was used for making twist drills, and is best typified by Denk, No. 761,880, June 7, 1904. He uses skewed rolls, each having one circumferential, large, high rib. The round bar to be twisted was first provided with two oppositely disposed large longitudinal grooves of about the same cross-section shape as the cross section of the circumferential rib on the rolls, and these grooves were made very deep, so that the two left only a comparatively thin web of the bar between them. As the rod is advanced through the skewed rolls, with the upper and lower ribs engaging the respective grooves, and as the rear end of the rod is gripped fast against rotation, it necessarily twists on this central web, and the result is a twist drill.

We are satisfied that Fell made a distinct and valuable advance, and one beyond the limits of mechanical skill, and that his first claim is valid. No one of the pipe corrugating devices had an indenting bead upon a roll, which roll conveyed a double motion to the pipe. In all these corrugating devices the parts which corresponded to, and were perhaps equivalent to, the indenting bead were carried upon a stationary pipe-inclosing framework. They were adaptations of the screw-cutting lathe. The idea that this indenting element could be carried circumferentially upon the surface of a roll is not disclosed by any of the corrugating patents, had not occurred to these inventors, and to us seems not obvious. If it did occur to one, it seems likely that the thought would be rejected because all these corrugating and indenting rollers pressed inwardly on a pressure line radial to the pipe; and, while the same thing would be true of one centrally located bead in the upper and lower rollers, this would produce only two grooves—not enough for efficient rifling—and as soon as the beads were put anywhere except in the center of the rolls the indenting pressure became tangential and not radial. That this apparently abnormal action would produce a satisfactory result in pipe of this character is due only to the fact that well-shaped grooves are not necessary, and that a slight indentation is sufficient.

The twist drill machine is, upon the whole, no closer. It has skewed feed rolls, carrying one circumferential bead, but this also, being central on the roll, is radial to the pipe; and—more important than that—it was not designed to, and did not operate to, make an indented groove in pipes or in anything else. The groove was made by other

means, and, having been so provided, was then used as a means of twisting the weakened central web. It was a small device, used for making small things in a tool factory; and to take this device and enlarge it to be suitable for rolling-mill purposes, and to substitute tangential, small, slightly indenting beads for the single, radial, comparatively large gripping bead, producing eight-inch rifled pipe, instead of a small twist drill, impresses us as clear and strongly marked invention, which, while not primary in every sense of the word, yet is so distinct and so meritorious as to entitle Fell to a fairly broad and liberal construction of his patent. The advance was great enough and the invention clear enough so that we do not need to place reliance upon the great practical utility of the device, or upon the fact that defendants, after experimenting with several other forms, were apparently forced to adopt the same general plan of manipulation; though both of these features are present in this case.

The question of infringement requires an interpretation of the terms of the claim, which may or may not cover defendants' structure, according as the interpretation is liberal or narrow. The defendants, having received an order for a large quantity of this rifled pipe from the same customer who had been buying from plaintiff, and on the condition that they would sell at a less price, first tried a modification of the Isaacs and Speed device, and then made some other changes, settling down upon and continuing to use a structure which, instead of the conventional roll, is built up from discs of different sizes rigidly attached to a shaft. This structure is shown in comparison with plaintiff's by the following sketches made by plaintiff's expert, and which, though not accurate, are not essentially unfair (only the upper roll of the pair being shown):



It is obvious that if there was indenting pressure exercised vertically upon the upper and lower parts of a hot and ductile pipe, the circular cross-section would be distorted and the sides would be bulged out horizontally, unless resistance against such distortion was provided at this

point. The plaintiff's rolls, extending as they do to the same central, horizontal plane, provide this resistance by the extreme parts of the semielliptical concavity; and when these rolls are projected upon an intermediate vertical plane, as has been done in the above sketch, these extreme parts appear to be and may not improperly be thought of as flanges on the rolls, and they provide a rolling, frictional contact with the pipe, resisting the tendency to side expansion along and near its central, horizontal plane; and, while we recognize that the term lacks perfect accuracy, we shall, for convenience, speak of this part of the roll as the "flange." The defendants' rolling structure does not have this part. The largest disc on the upper roll is the one which makes the lowermost indentation in the upper half of the pipe, and as it does not extend below this point, it cannot provide resistance for the tendency to horizontal expansion; but, as this resistance is vitally necessary, the defendants provide it by guide-plates (4 and 5) fixed to the framework and accomplishing the same ultimate function by a sliding friction instead of a rolling friction. The defendants say of their device: First, that it is not a roll at all; second, that the roll flanges are an essential part of plaintiff's structure, and that these the defendants have omitted. It is also contended, rather as part of the first point just named, that the patent contemplates and is confined to a roll which is in contact with the walls of the pipe throughout the greater part of the roll surface between the beads, so as to have throughout its surface the forming function. The considerations which require that construction of the claim which will support these contentions are said to be found on the face of the patent, in the Patent Office proceedings and in the prior art.

We see nowhere any reason for doubting that the defendants' built-up structure comes within the broad and general definition of "a pair of skewed rolls with circumferential grooves having circumferential beads." As the beads are the chiefly effective parts in the rifling operation, it can make no difference whether they are built up by discs, leaving the intervening parts open, or whether all parts were first cast solid and then the intervening parts cut away. The points which grip and indent and forward and rotate the pipe are just the same whether the body of the device is in solid or in skeleton form. The development of defendants' structure demonstrates that it is "a pair of skewed rolls." They took their ordinary sizing rolls with semicircular groove, cast ribs in the grooves, and skewed the axes. This device would not work, because the pass was not circular. The extremities of the groove—what we have called the roll flanges—were, by the skewing, projected into the pass on the sides. These flanges being thus in the way, the defendants cut them off and substituted the guides, but by this change the rolls did not lose their general character; they continued to be skewed rolls, with a circumferential groove having circumferential beads. The defendants then cut away some of the face of the roll between the ribs, making the ribs higher, whereby it became apparent that they were, as they always had been, the edges of discs imbedded in the roll; but the structure did not, because its surface contour was thus changed, cease to be a roll carrying beads. It also

continued to have the circumferential groove. Obviously there must be grooves, or else the pipe could not pass through. A groove is an opening with a bottom and with sides, and these parts are sufficiently marked by the three discs. If these were close together, or if two more graduated discs were inserted between the central one and each side one, it would be perfectly apparent that there was a circumferential groove; and we think it no less true because the surface is not completely marked. We are not sure that defendants intend to deny that their device responds to a definition of the terms of the claim, so broadly considered.

Are the side-supporting flanges of plaintiff's rolls to be considered as performing a function essential to the device and as a feature which defendant must use, in form or by equivalent, before there is infringement? We think they are. It is true that the first claim does not call for these flanges in so many words, and that some of the other claims impliedly do so by calling for a "semielliptical groove or pass," since the groove will not be completely semielliptical unless it is carried down to the central plane; but this term, "a pair of rolls," used in this connection, necessarily means rolls that will roll pipe; and such a construction of them or their associated parts that the pipe will retain its general form is necessarily implied. However, the very fact that this limitation as to the form of the roll is not expressed in the claim, but that any implication on that subject arises from the necessity that the device shall operate, indicates that no narrow rule of equivalency can be applied, and that when something else is substituted which was already a well-known means of performing the same function, and when its construction did not involve any invention, the thing so substituted is a mechanical equivalent, and infringement is not thereby escaped. We have already pointed out that these side flanges or extreme ends of the semielliptical groove have no function, except to resist the outward bulge of the pipe at this point. In a fair sense they are rolling guides; and the stationary guides used by defendants (shown in cross-section in the above sketch) have precisely the same function and perform it in the same way, except that the friction is sliding instead of rolling. Further, the Root patent, No. 180,643, of August 1, 1876, had skewed rolls, in each of which the groove or pass was not semielliptical, but more shallow, and was provided with central stationary guides or "keepers," all arranged (as said in defendants' brief) "just exactly as in defendants' machine." The defendants, therefore, have substituted for the roll flanges not only an equivalent, but a known equivalent; and this confirms the conclusion that infringement is not thereby avoided.

We find nothing upon the face of the patent requiring the claim to be limited to rolls which had these flanges attached to and integral with the rolls. It is true that neither by drawing nor specification does Fell suggest the performance of this function by stationary parts of the frame, but this is not necessary. In the absence of something clearly showing that the patentee did intend to have his grant confined to a specific form, a broad and generic claim may rightfully stand on a mere specific disclosure; and the invalidity of such a claim (if

it is invalid) will result, not from the applicant's failure to use more sweeping language in his specification, but from the state of the art limiting the actual invention. The claims are part of the description required by statute, and in them, and not in that part of the description which is now commonly called "specification," is the proper place in which to define the breadth of the invention, as was most accurately apprehended by Fell's solicitor when he (though quite unnecessarily) said that various changes might be made "without departing from my invention as defined by the appended claims."

[2] Nor can we find the supposed claim limitation to these specific roll-flanges in the fact that Fell's specification and drawings showed rolls having flanges, and that he claimed the rolls "substantially as described." The stress which defendants' counsel in argument have put upon this quoted phrase, and the constant recurrence of the question in cases coming before us, make it advisable to consider and determine what place this phrase should have in the rules of claim construction. We think a review of the controlling principles, of the authoritative cases, and of the established Patent Office practice, in the light of which its grants must be considered, demonstrate that, at least in all recent patents, and save in exceptional instances, the presence or absence of this phrase is of no interpretative importance.

Upon principle the matter seems clear. The statute requires that the specification should describe the invention, and that the patentee should specifically claim what is new. He cannot claim that which he has not substantially described; and it seems necessarily to follow that the idea—not "exactly as described" or "precisely as described," but "substantially as described," that is to say, "not varying in any vital way from the description" or "either in the form shown or in its substantial equivalent"—is necessarily inherent in every claim. So, in *Mitchell v. Tilghman*, 86 U. S. (19 Wall.) 287, 391 (22 L. Ed. 125), referring to these words, it was said, "Words of such import, if not expressed in the claim, must be implied"; and again, in *Hobbs v. Beach*, 180 U. S. 383, 400, 21 Sup. Ct. 409, 416 (45 L. Ed. 586), speaking of the rule that these words refer us back to the specifications, that court says, "This rule, however, is equally applicable whether these words be used or not." To say that these words must be implied, if not expressed, and to say that if expressed they import an otherwise nonexistent limitation, is to propound a dialectic paradox. We cannot lightly assume such a self-destructive contradiction in the law, and its seeming existence calls for a careful analysis of the apparently pertinent and authoritative cases.

In *Seymour v. Osborne*, 78 U. S. (11 Wall.) 516, 547 (20 L. Ed. 33), the question was whether the claims were void as being for an effect or a function, as, for example:

"Discharging the cut grain from a quadrant-shaped platform on which it falls as it is cut, by means of an automatic sweep-rake sweeping over the same, substantially as described."

The court unquestionably placed reliance on this phrase, "substantially as described," in reaching the conclusion that the claims were not functional, but it is not apparent that the court would have reached

any different decision if the words had not been there; and the language of the opinion on this point is written by Mr. Justice Clifford, who, only three years later, in *Mitchell v. Tilghman*, supra, 19 Wall. 287, 391 (22 L. Ed. 125) found it necessary to use the language which we have already quoted:

"Words of such import, if not expressed in the claim, must be implied, else the patent in many cases would be invalid," etc.

It seems quite clear that Mr. Justice Clifford could not have regarded his language in *Seymour v. Osborne* as laying down any rule of law to the effect that the actual presence of words, always constructively present, could have controlling importance. It is further to be noted that *Seymour v. Osborne* was decided in 1870, construing patents issued before 1865, and both issue and construction were before the Patent Office rule on the subject became finally settled as hereafter pointed out. In the *Corn Planter Patent*, 90 U. S. (23 Wall.) 181, 23 L. Ed. 161, the claim involved called for a combination of several parts "substantially as and for the purpose set forth." From the discussion and disposition of the matter on pages 217, 218, and 219, it is apparent that the court construed the claim by reading into it what was necessary to make it an operative device of the general class and for the general purposes described; and it is difficult to see that any different course could have been taken if the concluding phrase had not been present in the claim. The remark that this phrase "throws us back to the specification for a qualification of the claim" seems rather casual, because clearly we will be thrown back to the specification for that purpose without any propelling aid from this clause. In *Westinghouse v. Boyden*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136, the opinion was by Mr. Justice Brown, and his remark on this subject, on page 558, referred only to *Seymour v. Osborne* and to the *Corn Planter Patent*, omitting reference to *Mitchell v. Tilghman*. The question as to the proper construction of the claim had already been decided, and the presence of this phrase is only referred to as one of the "other facts which have a strong bearing in the same connection." Just as Mr. Justice Clifford, when the matter was the second time before him, did not seem to be controlled by his comment the first time, so Mr. Justice Brown, going into the subject more thoroughly in *Hobbs v. Beach*, was unwilling to say that these words had any meaning.

In *Hobbs v. Beach*, supra, 180 U. S., at page 399, 21 Sup. Ct. at page 416 (45 L. Ed. 586), the court was confronted more squarely than ever before with the question of what force should be given to these words. This question was one of those upon which the two courts below had differed, and if they were held to import full limitation to the form of the specifications and drawings, there was no infringement. It seems a fair conclusion from the opinion that Justice Brown found himself embarrassed by what had been said in the three last above cases, on the one side, and on the other by *Mitchell v. Tilghman* and the inevitable logic of the situation, which compelled him to say that the rule of going back to the specification for a qualification of the claim and for the elements of the combination "is equally applicable whether these words be used or not." He, therefore,

while unwilling to say that they are "absolutely meaningless," did conclude that "it is difficult to say exactly what effect should be given to these words," and that "the authorities really throw but little light upon their proper interpretation," and finally concluded that "without determining what particular meaning, if any, should be given to these words," they did not limit the patentee to the exact mechanism described, but that he was still entitled to the benefit of the doctrine of equivalents. In spite of the uncertainty shown by the language of the opinion, and on studying the specification and claim of the Beach patent and the scope that must be given in order to sustain the charge of infringement by defendant's device, and also the opinions of the courts below, it is difficult to see why *Hobbs v. Beach* is not a decision that a claim containing these words is entitled to the same breadth of benefit of the rule of equivalents as if the words were not there.¹

Since *Hobbs v. Beach*, the Supreme Court has mentioned the question only once, so far as we find. In *Singer v. Cramer*, 192 U. S. 265, 284, 285, 24 Sup. Ct. 291, 48 L. Ed. 437, Mr. Justice White clearly indicates his supposition that the presence of this phrase in a claim did have a limiting effect; but what is said on this subject is without reference to *Hobbs v. Beach*, and is said after a discussion of the Patent Office proceedings and the limitations accepted therein had led him to the conclusion that the limited construction of the claim must be given. We do not think this case should be taken as a decision that the presence of the words necessarily imports a limitation. It may be usefully noted that in most, if not all, of those Supreme Court cases which give claims a broad construction and do not limit them to the form shown in the specification these words were present. See (e. g.) *Winans v. Denmead*, 56 U. S. (15 How.) 330, 14 L. Ed. 717; *Clough v. Barker*, 106 U. S. 166, 1 Sup. Ct. 188, 27 L. Ed. 134; *Morley Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299, 32 L. Ed. 715; *Hoyt v. Horne*, 145 U. S. 302, 12 Sup. Ct. 922, 36 L. Ed. 713.

In the decisions of this court, statements are to be found looking in both directions. In *Stilwell Co. v. Eufala Co.*, 117 Fed. 410, 414, 54 C. C. A. 584, Judge Day was illustrating the rule that a claim should be construed by the specifications, and cited some of the above-named Supreme Court cases referring to "substantially as described." So far as the case indicates, he did not, in reaching the result, place any dependence upon that phrase; on the contrary, the defendant's claim of noninfringement was overruled and the claims were given a construction sufficiently broad to cover defendant's apparatus. In *Sanders v. Hancock*, 128 Fed. 434, 436, 63 C. C. A. 166, it was said of this phrase that it "carried into the claims the description of the specification." Judge Severens again was only illustrating the propriety of a

¹ In addition to the cases cited in *Hobbs v. Beach*, the Supreme Court had referred to the subject in *Brown v. Davis*, 116 U. S. 237, 251, 6 Sup. Ct. 379, 29 L. Ed. 659, and in *Pope v. Gormully*, 144 U. S. 248, 253, 12 Sup. Ct. 641, 36 L. Ed. 423, but in neither of these cases is the matter of any particular importance to the decision, nor is it considered upon principle or authority, nor in connection with the fixed Patent Office practice. See, also *Avery v. Case* (C. C.) 139 Fed. 878, 882 (reversed, but not on this point, in 148 Fed. 214, 78 C. C. A. 110).

decision that when an element was named in a claim without description, except the name, resort should be had to the specification to see what the element was. That no decision was intended as to the definite effect of "substantially as described" is evident from the fact that of the four cases cited by Judge Severens one (*Stilwell Co. v. Eufala Co.*) treated the point only incidentally as above noticed, two (*Soehner v. Favorite Co.*, 84 Fed. 182, 28 C. C. A. 317, and *Canda v. Michigan Co.*, 124 Fed. 486, 61 C. C. A. 194) contain no reference to the point, and the remaining one (*Lamb Co. v. Lamb Co.*, 120 Fed. 267, 269, 56 C. C. A. 547) says it is not necessary to enter into this "beclouded question." When, however, in *General Elec. Co. v. International Co.*, 126 Fed. 755, 758, 61 C. C. A. 329, the limiting force of this phrase was somewhat more directly involved, and the then recent case of *Hobbs v. Beach* was apparently first considered by this court, it was held that these words did not import into the claim all the details of the specification, but only meant that if the parts named in the claim operated substantially as described, "that is all that is necessary." So, in *Houser v. Starr*, 203 Fed. 264, 269, 121 C. C. A. 462, 467, we said (though unnecessarily to the decision):

"Whatever parts are named in the claim are of necessity intended to be named with reference to the specification and drawings. The reference cannot be made narrower by saying, 'as described,' nor broader by saying, 'substantially.' The words 'substantially as described' do not create this necessity for construction by the entire patent; they are only a formula of recognition of the rule."²

[3] If, however, there was a doubt about the force to be given in the present case to this phrase as one of limitation, that doubt must be set at rest by consideration of the rules of construction in force in the Patent Office when this patent issued. The meaning put upon possibly ambiguous language of the grant, both by the Patent Office and by the patentee, becomes a binding rule of construction of that grant. This is both by the general law of contracts and by the rules of estoppel. It seemingly must be equally true of a fixed and universal construction, applied all the time to all patents, and presumably known to all patentees, as of a special meaning fixed by the special action. Just as a statute adopted from another state after interpretation by its highest court must, in the adopting state, receive the same construction, so when the Patent Office has a settled rule of construction under which a certain phrase in a patent grant has a fixed meaning, acquiesced in by the patentee, the courts cannot afterwards rightfully say that the phrase means something more or something less. In 1902 the practice of the Patent Office on this subject was considered, and, so far as there had been any uncertainty, was finally settled by Commissioner Allen in his decision in *Ex parte Shepler*, 102 O. G. 468. The substance of this ruling is that thereafter these words in a claim shall be considered as "inconsequential," and that a claim with them in is no narrower

² In this court, as in the Supreme Court, it is useful to observe that we have given a broad construction to claims containing the phrase and a narrow construction to those which did not, often apparently quite regardless of its presence.

than a claim without them. The importance of the opinion merits its reproduction in full in the margin.³ This general view of the matter was not new in 1902. As early as 1869, Commissioner Fisher (In re Rubens & Co., Com. Dec. of 1869, p. 107) said:

"The practice of allowing claims for inventions which can only be distinguished from those previously invented or patented by the construction to be given to such words as 'substantially as described,' 'as herein set forth,' etc., cannot be too strongly condemned. The claim should state all the elements of the combination intended to be patented, and if the parts are the same in name and number as in some prior machine, and the improvement consists in some modification of one or more of those parts, the claim should distinctly state that modification. It should not be concealed in ambiguous phrases. The words 'substantially as described,' and the like, have no fixed legal meaning. They may serve to expand or contract the claim. In general, they are employed for the latter purpose, so that a claim may appear to be broad upon its face which, in truth, by virtue of this mysterious phraseology, is exceedingly narrow. Sometimes they are added by inventors as a matter of course, by way of rounding off the claim, and have no particular meaning, and again, they are intended to signify that the patentee claims that which he describes and everything substantially like it. They are, at the best, ambiguous and dangerous phrases, and, however else they may be used, they must not be employed in the granting of letters patent to make a claim good that, without them, would be bad and unpatentable.

³ Allen, Commissioner: This is a petition from the action of the primary examiner requiring the applicant to elect between two sets of claims on the ground that they are substantially the same. The two sets of claims are identical, except that one includes the words "substantially as described." The question is whether a claim including these words is substantially different from the same claim omitting them. It is a fundamental rule that the claim of a patent must be construed by reference to the description accompanying it, and this is true whatever form the claim may take. Under section 4884, Revised Statutes, the specification is a part of the patent, and it is the rule that in determining the legal effect of an instrument all parts of it must be taken into consideration. In a patent the specification particularly describes the thing which the applicant has made, and the claim points out the part or parts of that thing which the applicant regards as new. Section 4888, Rev. Stats. It is unnecessary in the claim to say that it has reference to what is described, for that is obvious and necessarily follows from the provisions of the law itself.

As said by the Supreme Court in *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586, in reference to the words "substantially as described": "So in the corn-planter patent (23 Wall. 181, 218 [23 L. Ed. 161]), it was said that 'this clause throws us back to the specification for a qualification of the claim, and the several elements of which the combination is composed.' This rule, however, is equally applicable whether these words be used or not."

The petitioner in this case seems to think that the courts may give the claim a broader construction upon the question of equivalents if the words "substantially as described" are not included, and therefore argues that the claims are not the same in scope. Even if the words will be construed as having this effect, they do not themselves import any definite limitation into the claim. They leave that to the construction of the court in view of the facts brought to its attention in the particular case before it, and therefore to this extent they are vague and indefinite. If there are any particular limitations which the applicant wishes these words to import into the claim, he should state them clearly and definitely, instead of attempting to include them by a blanketing clause at the end of the claim, the effect and meaning of which is, according to his own showing, very uncertain. The law requires that the patentee distinctly claim the features which he regards as his invention, and it is the duty of this office to require that the claims be made definite and cer-

"In conformity with the current practice of the office * * * the concluding words of the second and third claims should be ignored in considering the novelty of what is therein claimed."

In 1872, Commissioner Thatcher said (In re Sperry, Com. Dec. 1872, p. 221):

"It has become the settled practice of the office to reject the clause as a limitation unless so placed as to obtain special significance."

Again, Commissioner Leggett said of these words (In re Collins Co., Com. Dec. 1872, p. 251):

"There is no objection whatever to their use where they make sense; but they have no legal effect either to enlarge or limit a claim properly drawn; and, so far as the grant of the patent is concerned, they should have no influence one way or the other. The claim should be sufficient in its terms either with or without them, because, either with or without them, its meaning and effect are to be determined in the courts by the light of the specification."

The only exception to this rule—that the words are "inconsequential"—which seems to inhere in the situation is that if a patent was issued which contained two claims not distinguishable from each other save by the presence in one claim of this phrase, it might be the duty of the court, in giving effect to every part of the patent, to find in them

tain. The fact that the courts in order to secure to a meritorious inventor the protection to which he is entitled sometimes sustain a vague and indefinite claim by construing it as covering the particular thing invented is no reason for the allowance by this office of vague claims.

In *Merrill v. Yeomans*, 94 U. S. 568, 24 L. Ed. 235, the Supreme Court said: "The developed and improved condition of the patent law, and of the principles which govern the exclusive rights conferred by it, leave no excuse for ambiguous language or vague descriptions."

As said by the Supreme Court in *Burr v. Duryee*, 1 Wall. 533, 17 L. Ed. 650: "Here we have the first experiment in the art of expansion by an equivocal claim, which may be construed a claim for the result or product of the machine, or for its principle or mode of operation. By this construction another inventor may be frightened from the course. But when challenged in a court of justice as too broad, the words 'substantially as herein described,' may be resorted to as qualifying this claim of a function, result, or principle, and arguing that as the specification described a machine, it meant nothing more."

The purpose here stated by the court seems to be the only one for attempting to limit a claim by the words "substantially as described," instead of definitely stating the limitations intended to be included thereby. If the use of these words serves to accomplish this purpose, the result is to conceal the scope of the claim instead of making it clear, as required by law, and this is not permissible. If these words alone are regarded as sufficient to distinguish claims, it would seem that a third set, including the words "identically as described," should be allowed.

It is no more permissible on principle to refer to the description for some limitations which should be and are intended to be included in the claim than it is to refer to the description for all of the limitations, as by a claim covering "the device substantially as described." Without regard to the effect which the courts may in particular instances give to the words "substantially as described," it must be held that this office in its treatment of claims must regard them as inconsequential.

The examiner's requirement is right, and the petition is denied.

some distinguishing force; but if such instances exist at all of late years, it can only be by inadvertence in the Patent Office.⁴

The foregoing considerations seem to us fully to justify the proposition with which this discussion is opened—that at least in all recent patents, and save in possible exceptional instances, the presence or absence of this phrase is of no interpretative importance.⁵

Limitation to Fell's specific form of roll and differentiation from defendants' three-disc structure are also thought to be found in the drawings, showing that practically all of the roll surface between the beads was in contact with or "hugged" the pipe surface, and in the specification referring to this portion of the roll surface as a "forming wall." It appears to be a fact beyond dispute that this contact could not occur to anything like the extent shown in the drawings, unless the pipe material was too soft to be capable of rolling without a mandrel, and that in the practical operation of plaintiff's device there is contact, if at all, only at one point midway between the beads; while the successful use of defendants' device demonstrates that even so much contact is unnecessary. It is clear enough that the solicitor and the draftsman supposed that the rolls would operate in the specific way shown in this figure 3 of the drawing, and Fell is probably chargeable with the same supposition; but this comes to nothing more than an illustration and description of the supposed best form of device, with specific claims limited to that form, but accompanied by broad claims lacking such limitation. Claims 10 and 12, for example, cannot be effectively distinguished from the first three claims, except by the added limitation:

"The walls of said passes being arranged to support the pipe or tube adjacent to the points of contact of the bending ribs or beads therewith and between such ribs or beads."

[4] Where a patent contains both a broad and a narrow claim and suit is brought on the broad claim, we cannot construe into it a limitation not therein expressed, but which is expressed in the narrower claim and by which alone one is distinguished from the other. To do so would be making over the contract between the public and the patentee. *Bresnahan v. Tripp Co.* (C. C. A. 1) 102 Fed. 899, 900, 43 C. C. A. 48; *O'Rourke Co. v. McMullen* (C. C. A. 2) 160 Fed. 933, 939, 940, 88 C. C. A. 115; *National Co. v. American Co.* (C. C. A. 3) 53 Fed. 367, 370, 3 C. C. A. 559; *Lamson v. Hillman* (C. C. A. 7) 123 F. 416, 419, 59 C. C. A. 510; *Mast, Foos & Co. v. Dempster Co.* (C. C. A. 8) 82 Fed. 327, 333, 27 C. C. A. 191; *Duncan v. Cincinnati Co.* (C. C. A. 6) 171 Fed. 656, 663, 96 C. C. A. 400; *Sheffield Co. v. D'Arcy* (C. C. A. 6)

⁴ Twenty-five years ago practically all patents used this "rounding off" phrase; now not one in ten (see any current number of *Patent Office Gazette*). It is not to be supposed that patents are growing broader as their number increases.

⁵ For further discussion either in effect reaching, or at least supporting, our conclusion, see *Lake Shore R. R. Co. v. Carbrake Co.*, 110 U. S. 229, 235, 236, 4 Sup. Ct. 33, 28 L. Ed. 129; *Boynton Co. v. Morris Co.*, 87 Fed. (C. C. A. 3) 225, 226, 227, 30 C. C. A. 617; *Westinghouse Co. v. Stanley Co.* (C. C. A. 1) 133 Fed. 167, 182, 68 C. C. A. 523; *American Co. v. Hickmott Co.* (C. C. A. 9) 142 Fed. 141, 146, 73 C. C. A. 359; *Draper v. American Co.* (C. C. A. 1) 161 Fed. 728, 731, 88 C. C. A. 588.

194 Fed. 686, 691, 116 C. C. A. 322; *Scaife v. Falls City Co.* (C. C. A. 6) 209 Fed. 210, 214.

[5] The history of the application in the Patent Office furnishes no support for the conclusion that the roll flanges in the form shown are inherent in the first three claims. It is sufficient to say of these proceedings that, in so far as there is indication of any attempt to impose such a limited construction on these claims, the record shows that, as is so often the case, the examiner and not the applicant yielded. It is not necessarily of any importance that, when the examiner rejects a claim on reference to an earlier patent, the applicant thereupon amends the claim. Such a record is of importance and raises an estoppel against the patentee only when it additionally appears that the effect of the amendment was to narrow the claim so that it no longer depended in material part upon any theory of patentable novelty, upon which same theory the patentee afterwards attempts to support the validity or scope of his amended claim. Amendments which, when examined, are found to be mere matters of form, or which do not have a limiting effect in the particular which is involved in the later judicial inquiry, do not estop the patentee from receiving such a construction of his patent as will protect his actual invention, and so far as permitted by the claim language finally adopted. *Scaife v. Falls City Co.* (C. C. A. 6) 209 Fed. 210, and cases cited in notes 8 and 9, p. 217.

The first three claims were originally filed in the same form as when issued, except that there were added, by amendment, and by way of further description, the words "skewed" as to the rolls, "circumferential" as to the grooves or passes, "rifling" as to the beads or ribs, "for the pipes or tubes" after "passes," and "circumferentially" before "extending beads or ribs." Every change except the last was obviously immaterial, because the added words were already inherent in the claims; and the limitation to "circumferentially" extending beads was inserted to distinguish from a reference having beads, or something similar, longitudinal on the rolls. With this limitation defendants are not concerned, because they use "circumferentially" extending beads or their equivalent. It is true that these three claims were once rejected on *Denk*, above described; but *Fell* not only declined to make any change whatever in them because of this rejection, but insisted that the examiner had "misunderstood the reference," and that "applicant's method of rifling pipe is believed to be broadly new. It is believed he is entitled to the broad claims presented." He added in this letter:

"Furthermore * * * the reference does not show the walls of the passes arranged to support the article."

This sentence has no possible effect to limit these three claims to passes which have walls so arranged, not only because it is added as mere makeweight to the sufficient reasons already given, but also because it had special and appropriate application to the further claims which already contained this limitation, and which also had been rejected upon the *Denk* reference. When later these three claims and others were further rejected on reference to *Fife's* patent for corrugating tubes, above described, *Fell* amended these by inserting the pro-

vision that the grooves or passes should be circumferential. We have said above that this limitation already existed, and so Fell wrote:

"In fact, while claims 1, 2, and 3 have been amended for the purpose of making them more clear, the pertinency of the reference to any of the claims is not clear."

The remainder of his amendments made at this time, and in answer to this citation, refer to other claims, and cannot affect the first three. The claims were again rejected on reference to a patent which had rolls parallel with the pipe axis, and in which the spiral corrugations in the pipe were formed by the spiral corrugations in the mandrel. In answer to this reference Fell points out this distinction, and (again unnecessarily) inserts "skewed" with reference to his rolls. At the same time he made other comments, which might or might not have a limiting effect on other claims, but which could not affect these three.

Our review of these Patent Office proceedings satisfies us that they furnish no support for the theory of such limitation as will avoid infringement of claims 1, 2, and 3; their whole tendency is in the contrary direction.

The prior art has nothing closer than these earlier patents already discussed.

The decree below must be reversed, with costs in favor of appellant, and the usual decree for injunction and accounting entered as to claims 1, 2, and 3.

VOSE v. ROEBUCK WEATHER-STRIP & WIRE SCREEN CO.

(District Court, E. D. New York. July 18, 1914.)

1. COURTS (§ 290*)—FEDERAL COURT—SUIT TO REFORM PATENT LICENSE CONTRACT—CITIZENSHIP OF PARTIES.

A federal court is without jurisdiction of a suit to reform a contract purporting to grant licenses under certain patents, with a right of purchase, on the ground that the person executing such contract on behalf of complainant was without authority, where the parties are citizens of the same state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 832; Dec. Dig. § 290.*]

2. PATENTS (§ 211*)—SUIT FOR INFRINGEMENT—ESTOPPEL.

A complainant *held estopped* to maintain a suit to recover royalties under patents in addition to those specified in a contract under which defendant was operating, or damages for infringement, on the ground that the contract was executed without authority, where it was shown that she had ratified the contract by collecting royalties and demanding accountings thereunder.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 304-311; Dec. Dig. § 211.*]

In Equity. Suit by Maria E. Vose against the Roebuck Weather-Strip & Wire Screen Company. On final hearing. Bill dismissed on the merits as to one branch of the case and without prejudice as to another for want of jurisdiction.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

H. B. Philbrook, of New York City, for plaintiff.

Walter H. Dodd, of New York City, for defendant.

CHATFIELD, District Judge. The plaintiff in this action was the mother of one Clifton E. Vose, who patented a number of inventions with relation to metallic window casings and sash, and who, according to the testimony, disappeared suddenly on or about the 7th day of June, 1911. He had left his home in Brooklyn, where he lived with his mother and sisters, in the morning, to go to see A. M. Rapp, and then to Albany on business, and has not been seen since that time. His habits seem to have been more or less irregular; and some time previous to his death his mother, who, by herself or with the aid of his sisters, had advanced money to Vose, received an assignment (marked Exhibit 1 in this case) by which Vose transferred to his mother all his right, title, and interest in an application for letters patent then pending. This instrument was under date of April 18, 1903, and bears the signature of Clifton Vose. It is witnessed by his two sisters, and bears a statement in his mother's handwriting to the following effect:

"This paper claims patent No. 717,641, issued January 6, 1903, seven seventeen six forty-one, Maria E. Vose, mother of Clifton Vose, and owner of the above claims."

This instrument was received and recorded in the Patent Office on the 21st of March, 1913, in Liber E 92, page 89 of Transfers of Patents.

Patent No. 717,641 was issued upon the 6th of January, 1903, on an application filed December 6, 1901, and is one of the patents as to which infringement is claimed in this action.

Another paper, under date of March 2, 1904, purports to be an assignment of a patent for weather-strips, dated February 23, 1904, No. 752,729, and assigns the same to Maria E. Vose. This also is signed by Clifton Vose, witnessed by his two sisters, and bears the statement, "The patent here represented in this paper is owned and claimed by Maria E. Vose, mother of Clifton Vose." This statement is in Mrs. Vose's handwriting; and this paper was received and recorded on March 21, 1913, in Liber E 92, page 91 of Transfers of Patents. Patent No. 752,729, issued February 23, 1904, was on application filed February 11, 1903.

There is also involved in the suit a third patent, No. 814,893, of March 13, 1906, on an application filed August 7, 1903, as to which no assignment is presented, and as to which, upon the trial, no cause of action was sought to be based.

The testimony of both Mrs. Vose and her daughters is to the effect that Clifton E. Vose executed the assignment of April 18, 1903, for the purpose of transferring a patent which had been issued some three months previously, but as to which letters patent had not been received, although the paper purports to be an assignment of an application about to be made. It was claimed by the defendant on the trial that both the assignments refer to the same patent finally issued, viz., No. 752,729, for which the application had been made upon February 11, 1903, that is, prior to the date of the assignment of April 18. Subse-

quent to these assignments, Clifton E. Vose acted as agent for his mother, and also acted as owner of the patent rights which stood in his name, and made contracts with the Roebuck Weather-Strip & Wire Screen Company, which have been recognized and carried on by it, but which the plaintiff says have been nullified by failure to prosecute infringers, and have thus been treated as assignments rather than as licenses.

The present action is brought for an injunction against the infringement of these patents, and an accounting for royalty and patents, and for a reformation of the contract made between Vose and the Roebuck Company on February 11, 1911, with respect to the three patents above referred to. The purport of this contract was to license the defendant to use the three patents, upon payment of a royalty of \$1 per thousand feet for all weather-strip manufactured under the contract, with an accounting at the end of every three months and a right to purchase at any time for the sum of \$15,000.

The reformation of the contract desired was in effect to set aside or declare invalid the contract, in so far as it described patents Nos. 717,641 and 752,729, on the ground that they were not the property of Clifton E. Vose at that time, but had been previously assigned to his mother. Incompetency on the part of Vose is alleged; and the plaintiff further charges that the defendant had failed to prosecute for infringement persons who had used the said patents, although it had agreed by the contract to bring such actions. It is also alleged that the defendant has failed to account for and has failed to pay the royalties agreed upon.

[1] It appeared upon the trial that all of the parties to the action were residents of the same state, and that the United States had no jurisdiction to reform the contract. It was not an action "under the patent law," but was an action under state law with relation to a right in a patent. The bill must be dismissed, therefore, in so far as it seeks to reform the contract; and this carries with it the charge of the plaintiff that her son, as agent, or in so far as he represented her, had no title, was incompetent, and could not convey rights to the patents by assignment from himself as the patentee.

[2] The plaintiff urges that the so-called assignment was therefore no more than a license, that it was invalid in so far as it purports to be an assignment of the patent itself, and that the license rights could be conferred upon the defendant by an oral agreement. She thus seeks to escape the effects of section 4898, R. S. (U. S. Comp. St. 1901, p. 3387). She, therefore, contends that, even if the action to reform the contract cannot be heard, she could nevertheless act under the license conferred, and collect royalties without ratifying the contract and without estopping herself from showing a lack of authority in the person making the assignment, but who, in reality, was merely an agent of his mother, the plaintiff, in looking after the business with respect to her patents, and not in trying to assign or sell them. The defendant, on the other hand, presents testimony to show that Mrs. Vose collected certain sums as royalties, insisted upon accountings and made demands for payment upon the contract which had been entered into with her

son, and that she, therefore, has ratified and accepted it and thereby ratified the acts of her agent. It would seem, in so far as the right to use the patents under the contract or license, whichever it may be, was given by the plaintiff's son, who, admittedly, was allowed to act as agent, and in so far as she has attempted to collect royalties, she has ratified the contract at least to the extent that it does purport to constitute a license. The defendant, on the other hand, seems to have recognized the ownership of Mrs. Vose and waived any objection to the assignment. See Exhibit A.

Upon the testimony, it does not seem that Mrs. Vose has been necessarily estopped or put upon notice with respect to the portions of the so-called contract to which she objects, and as to which she has attempted to have the contract reformed. But even if the royalties were exceedingly small, or if the contract was to her disadvantage, yet when she assumed that her son, as agent, had made a contract licensing the defendant to use the patents, and when she collected and insisted upon the payment of royalties, without questioning the right of her son to make a license at those rates, she must be held estopped. The bill, in so far as it charges infringement of patent or failure to pay a reasonable or proper amount of royalty, must be dismissed upon this finding.

The defendant, therefore, may have a decree dismissing the bill in so far as it seeks payment of additional royalties or damages for infringement, upon the merits, and dismissing that portion of the bill to which the jurisdiction of the court was questioned, without prejudice to the bringing of any other action in another court with respect thereto.

CENTRAL BUILDING, LOAN & SAVINGS CO. v. BOWLAND, Internal Revenue Collector.

BELLEFONTAINE BUILDING & LOAN CO. v. McMAKEN, Internal Revenue Collector.

Nos. 1672, 1674.

(District Court, S. D. Ohio, W. D. May 11, 1914.)

TAXATION (§ 229*)—CORPORATION TAXES—EXEMPT CORPORATIONS—BUILDING AND LOAN ASSOCIATIONS.

That building and loan associations incorporated under the Laws of Ohio were authorized to borrow money from, or loan money to, nonmembers, did not deprive them of the quality of mutuality or place them on a par with banking corporations, nor deprive them of exemption from corporation taxation under Corporation Excise Tax Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 946), imposing an internal revenue tax on corporations organized for profit, and providing that it should not apply to domestic building and loan associations organized and operated exclusively for the mutual benefit of their members.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 369; Dec. Dig. § 229.*]

Action by the Central Building, Loan & Savings Company against Willis G. Bowland, as Collector of Internal Revenue for the Eleventh

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

District of Ohio, and by the Bellefontaine Building & Loan Company against William V. McMaken, as Collector of Internal Revenue for the Tenth District of Ohio, to recover certain corporation taxes assessed against plaintiff in each case, under Corporation Act Aug. 5, 1909, § 38. Judgment for plaintiff in each case.

L. F. Sater, of Columbus, Ohio, F. L. Wells, of Wellsville, Ohio, and Andrew J. Hess, of Sidney, Ohio, for plaintiff Central Building, Loan & Savings Co.

J. E. West, of Bellefontaine, Ohio, F. L. Wells, of Wellsville, Ohio, and Andrew J. Hess, of Sidney, Ohio, for plaintiff Bellefontaine Building & Loan Co.

Sherman T. McPherson, of Cincinnati, Ohio, for defendants.

HOLLISTER, District Judge. These cases were removed to this court by the defendants in the respective cases, the first from the Franklin common pleas, and the second from the Logan common pleas, and the records in each certified to this court. The respective plaintiffs had paid under protest the tax imposed by the act of Congress, Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 946), known as "special excise tax on corporations," and these suits were brought to recover the amounts paid. The defendant in each case, the collector of internal revenue to whom the tax was paid, hereinafter called the government, demurs for that the petition against him does not state facts sufficient to constitute a cause of action.

So much of the act as this controversy involves provides:

"Sec. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, * * * equivalent to one per centum upon the entire net income over and above five thousand dollars. * * * Provided, however, That nothing in this section contained shall apply to labor, agricultural or horticultural organizations, or to fraternal beneficiary societies, orders, or associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations, and dependents of such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual."

For the purposes of these demurrers, the plaintiffs are assumed, under the allegations in their respective pleadings, to have been organized under the Ohio Laws, as now found in 4 Page and Adams Annotated Ohio Gen. Code (1911) § 9643 et seq., under the title: "Division IV. Building and Loan Associations, Chapter 1. Organization and Powers."

Section 9643 reads:

"A corporation for the purpose of raising money to be loaned to its members, and others, shall be known in this chapter, * * * as a 'building and loan association,' or as a 'savings association.' Associations organized under the laws of this state shall be known as 'domestic' associations, and those organized under the laws of other states or territories, as 'foreign' as-

sociations. Associations may be organized and conducted under the general laws of Ohio relating to corporations, except as otherwise provided in this chapter."

Among the powers given Ohio domestic building and loan associations are:

"Sec. 9648. To receive money on deposits, and all persons, firms, corporations and courts, their agents, officers and appointees may make such deposits and stock deposits, but such corporation shall not pay interest thereon exceeding the legal rate. * * *

"Sec. 9649. To issue stock to members on such terms and conditions as the constitution and by-laws provide. Each member may vote his stock in whole or fractional shares, as the constitution and by-laws provide, but no person shall vote more than twenty shares in any such corporation in his own right, nor have the right to cumulate his votes. But every subscriber for stock in accordance with the constitution of the association, may vote the amount of stock so subscribed for, in no event to exceed twenty shares.

"Sec. 9650. To assess and collect from members and others, such dues, fines, interest and premium on loans made, or other assessments, as may be provided for in the constitution and by-laws. Such dues, fines, premium or other assessments shall not be deemed usury, although in excess of the legal rate of interest.

"Sec. 9651. To permit members to withdraw all or part of their stock deposits, at such times, and upon such terms, as the constitution and by-laws provide. Any member, however, who withdraws his entire stock deposit, or whose stock has matured, shall be entitled to receive all dues paid in and dividends declared thereon, less all fines or other assessments and less the pro rata share of all losses, if any have occurred.

"Sec. 9652. To permit withdrawal of deposits upon such terms and conditions as the association provides except by check or draft. But no such association shall be permitted to carry for any member or depositor any demand, commercial or checking account. Nothing in this chapter shall prevent members or depositors from withdrawing funds by non-negotiable orders.

"Sec. 9653. To cancel shares and parts of shares of stock upon which the credits have been withdrawn, or upon which loans have been repaid, and re-issue them as new stock."

"Sec. 9656. To borrow money, not exceeding twenty per cent. of the assets, and issue its evidence of indebtedness or other security therefor.

"Sec. 9657. To make loans to members and others on such terms, conditions and securities as may be provided by the association."

The allegations in the respective petitions which raise the question to be decided are, as to the first named plaintiff, "that plaintiff for the mutual benefit of all its members receives deposits from, and loans money to persons who are not members, said acts being duly authorized by the law of Ohio;" and, as to the second named plaintiff, "that since its organization said plaintiff has by its constitution provided that it is organized for the purpose of raising money to be loaned to its members and to others and for the purpose of receiving money on deposit from time to time to the extent necessary to meet the demand made on it by its members, depositors and others; that, since its organization, said plaintiff has by its by-laws provided for the carrying out of each of said purposes, and has, from time to time, received deposits upon which it paid to the depositors the amount of interest due thereon, in accordance with the rate and terms upon which the deposits were made; that notwithstanding the said provisions of its constitution and by-laws authorizing the same, it has not made any loans to others than

its members; and by virtue of the laws of the state of Ohio the plaintiff is, and at all times has been, authorized and empowered to make loans to persons who are not members and to receive deposits from persons who are not members and to pay interest on deposits made by such persons." The plaintiffs claim exemption from the tax under the proviso in the act. The government denies exemption on the ground, as to the first named plaintiff, that "the corporation makes loans to and receives deposits from other than members, and that accordingly in addition to its mutual features it does a business akin to a general banking business;" and, as to the second named plaintiff, that it is a corporation "organized for the purpose of raising money to be loaned to members and others, and that it is qualified to receive deposits or borrow funds from other than members," and, therefore, the government claims that these associations cannot be considered as organized and operated for the "exclusive benefit," or "exclusively for the mutual benefit," of their respective members. The government admits that the plaintiffs are domestic building and loan associations having features of mutuality between their members.

No claim is made by the government that under the Ohio laws different classes of capital stock may be issued, and for that reason there is a lack of mutuality between members, so that question may not be directly involved; but, since its discussion bears pertinently on the question to be decided here, some reference to it may be of value. It may be said that, even if the laws of Ohio empowered the directors to provide for different classes of stock, there are a number of cases to the point that the mutuality essential to such associations is not affected. *Latimer v. Investment Co.* (C. C.) 81 Fed. 776; *Manship v. Building & Loan Ass'n* (C. C.) 110 Fed. 845, 853; *Wilson v. Parvin*, 119 Fed. 652, 56 C. C. A. 268; *People v. Preston*, 140 N. Y. 549, 35 N. E. 979, 24 L. R. A. 57. The reason is that, even when the state laws do not give the power expressly, or the power is not necessarily to be inferred from them, to issue such stock, yet if there is nothing in the law to prohibit, and the issuing of such shares is for the purpose of obtaining the money which shall be used to promote the purposes of such association, such division into different classes of shares does not disturb the essential qualities of a "building association," such as that term is understood generally by the public and by legislators when enacting general laws on the subject, and a fortiori, when the power is expressly given.

While the description of associations of this kind, as set forth in some of the cases, may be accepted as correct, yet if what is done is only in furtherance of their purposes, and is not a departure from the essential principle underlying them, there would seem to be no objection to any conduct, otherwise legal, of the affairs of such associations having the same purposes in view. One such description is found in the language of Judge Minshall, in *Eversmann v. Schmitt*, 53 Ohio St. 174, 184, 41 N. E. 139, 141 (29 L. R. A. 184, 53 Am. St. Rep. 632):

"Mutuality is the essential principle of a building association. Its business is confined to its own members; its object being to raise a fund to be loaned among themselves, or such as may desire to avail themselves of the privilege. This is done by the payment, at stated times, of small sums, in the way of

dues, interest on loans and premiums for loans. Each shareholder, whether a borrower or nonborrower, participates alike in the earnings of the association, and alike assists in bearing the burthen of losses sustained."

It is said in *Rhodes v. Missouri Sav. & Loan Co.*, 173 Ill. 621, 629, 50 N. E. 998, 1000 (42 L. R. A. 93):

"A building and loan association is an organization created for the purpose of accumulating a fund by the monthly subscriptions or savings of its members, to assist them in building or purchasing for themselves dwellings or real estate, by loaning to them the requisite money from the funds of the society upon good security.' Endlich, in his work on Building Associations (section 283), speaking of the proper and legitimate purposes of the creation of such corporation, says: 'To all practical intents it may be said to be to enable a number of associates to combine and invest their savings to mutual advantage, so that, from time to time, any individual among them may receive, out of the accumulation of the pittances which each contributes periodically, a sum, by way of loan, wherewith to buy or build a house, mortgaging it to the association as security for the money borrowed, and ultimately making it absolutely his own by paying off the incumbrance out of his subscription. It is only so far as they serve these purposes and are confined to the objects necessarily involved therein that the acts of building associations fall properly within the powers granted. As soon as they transgress these limits they are *ultra vires*.'"

If what is done is within the power of corporations generally, and is not prohibited by law, and is in furtherance of the primary objects of building associations as understood generally and as above described, then it is not *ultra vires* and does not destroy the character of the building association as such.

In *Wilson v. Parvin*, 119 Fed. 652, 658, 56 C. C. A. 268, 274, Judge Lurton says much that is pertinent to this question, and also to the claim of the government in this case that the borrowing of money from nonmembers and loaning money to them deprives of its character what would otherwise be a building association within the meaning of the proviso in the act under consideration. The claim in that case was that the issuing of prepaid shares bearing a fixed dividend payable out of the profits, with a provision that payment of principal and dividends should be secured by pledge of notes and mortgages payable to the association, the right to vote being denied the holders of such shares and the proceeds thereof being placed in a fund to be loaned to borrowing members, was beyond the powers of such association; but it was held that the issuance of such shares was in effect but a form of borrowing. Judge Lurton, after stating that the laws of Tennessee did not forbid the issuing of such shares, says:

"If, then, the issuance of preferred shares with the consent of the members of a building and loan association is an act *ultra vires*, it must be because it is an act offensive to the object, plan, and general scheme of such corporations, and therefore not within the implied powers of this kind of an association. It is said, in some of the cases which deal with the scheme of such associations, that such shares are inconsistent with the mutuality of such organizations by introducing the mere investor as a factor, and that the loans made by such companies to installment members would be usurious, but for the supposed mutual contribution of all to the fund thus loaned and the equal participation of all, including the borrowing members, in the contributions arising from interest, premium, dues, and fines. It is also said that the scheme of such association only contemplates the payment of members in advance out of the fund resulting from the small periodical payments

from all the shareholders alike, and that there is in fact no lending or borrowing, but that the notes taken and the mortgage given by an advanced member are only to secure the periodical payments due from him until his stock is matured and his note and mortgage thereby canceled. * * * In order to 'advance members' there must be a fund out of which they may be advanced. The slow accumulations from subscribers paying only \$2 per share each month was doubtless found unsatisfactory to those it was intended to assist in the acquisition of homes by the aid of such companies. * * * The object in permitting these investment shares was plainly to assist those members of such associations who needed loans or advance to aid in procuring homes by inducing contributions from a special class of members who might be tempted by the promise of receiving as a dividend a larger return upon their money than otherwise admissible."

Directly to the point is *Herold v. Park View Bldg. & Loan Ass'n* (C. C. A.) 210 Fed. 577, 582, in which the Circuit Court of Appeals for the Third Circuit held that a building association which issued both prepaid and installment stock, the former being entitled to a fixed dividend payable only out of the earnings of the association, was entitled to exemption under this act on the ground that in operation there would be but a small class of privileged stockholders with rights superior to their fellows, and all would stand on a footing of substantial equality, which was all that was intended by the law; in which connection Judge McPherson said:

"Looking at the subject from as many points of view as possible, we are persuaded that Congress intended the word 'mutual' to mean 'substantially equal,' and that a building association is organized and operated for the mutual benefit of its members when they share in the profits on substantially the same footing."

But the only reason urged by counsel for the government, either in argument or in his brief, for denial to the plaintiffs the exemption they would otherwise admittedly have, is their power to borrow money from, or loan it to, others than members. He places a reliance on *Pacific Bldg. & L. Ass'n v. Hartson* (D. C.) 201 Fed. 1011, which does not seem to be justified. In that case, while the court found the excise tax applicable to building associations of the state of Washington and gave as one of the reasons for so holding that the associations had authority to loan funds to nonmembers, yet the judgment was also based on the provisions of the laws of that state for issuing preferred or guaranteed interest-paying stock, as well as for the retirement of any and all stock at the discretion of the directors. For these reasons the court was of opinion (1015) that the association under consideration could not be said to be—

"organized * * * exclusively for the mutual benefit of the members, no part of the net income of which inures to the benefit of any private stockholder or individual."

From this quotation it will be seen that the court tacked on to the clause in the proviso exempting domestic building associations the last clause in the proviso "no part of the net income of which inures to the benefit of any private stockholder or individual," which, upon analysis, would seem, with some degree of conclusiveness, to apply only to the clause in the proviso excepting corporations organized and operated exclusively for religious, charitable, and educational purposes, which

it immediately follows. That the last clause refers only to the kind of associations immediately preceding it is clearly shown by Judge McPherson in *Herold v. Park View Bldg. & Loan Ass'n* (C. C. A.) 210 Fed. 577, 578, whose reasoning on that point is adopted here. It is quite probable that if the court in the Washington Case had not considered the last clause in the proviso as applying to building associations, his conclusion would not have denied the exemption to the Washington association simply because of the power to loan money to non-members.

If it were permissible to look to the debates in Congress preceding the enactment of the law to ascertain the intention of Congress, it would be easy enough to discover a clear purpose to exempt such domestic corporations as are the plaintiffs. Congressional Record, 61st Congress, vol. 44, No. 91, p. 4264 et seq. But this is forbidden. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 318, 17 Sup. Ct. 540, 41 L. Ed. 1007, and cases cited. Debates may, however, be resorted to, says Chief Justice White—

"as a means of ascertaining the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted." *Standard Oil Co. v. United States*, 221 U. S. 1, 50, 31 Sup. Ct. 502, 512 (55 L. Ed. 619, 34 L. R. A. [N. S.] 834, Ann. Cas. 1912D, 734).

From the debates it may be gathered that much fraud had been perpetrated on gullible people by irresponsible companies calling themselves building associations operating at large in the United States, a situation not likely to arise in domestic associations organized under state laws and subjected to supervision by officers expressly empowered to that end. Without laying too great stress on this, however, one may look for some light on the intention of Congress to the laws of the various states permitting the creation of building associations, for necessarily such associations are "domestic," as distinguished from "foreign" corporations. The brief of counsel for the plaintiffs pertinently summarizes the laws of 34 states conferring powers on domestic building associations which involve dealings with other than members, in many of which are found provisions for borrowing money from, and loaning money to, nonmembers. This summary is assumed to be correct.¹

If the power to borrow and loan from and to others than members takes building associations having it out of the class entitled to ex-

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- ¹ "Cal. May borrow money. May insure the lives of its members and debtors.
 "Colo. May invest any portion of its funds not required by members, in loans on real estate or other securities. May negotiate for loans on long or short time and give note or bond therefor.
 "Conn. May borrow money. Loan surplus to other associations.
 "Del. Any person not a member may receive a loan of funds not needed by members.
 "Fla. May stipulate a rate of interest to be paid on stock. May build houses to rent or sell to persons not members.
 "Ga. May make loans to nonstockholders.
 "Idaho. May borrow money. May insure the lives of members and debtors.
 "Ind. May buy and sell or improve real estate in order to sell it to mem-

emption, then the building and loan associations of most of the states must pay the tax. Since Congress by using the adjective "domestic" necessarily had in mind associations formed under state laws, and since

- bers 'or to others for the benefit of members.' May loan money to others than stockholders 'for the benefit of stockholders.'
- "Kan.** May receive money on loan or on deposit 'for the accumulation and loan of funds for the erection of buildings and the purchase and sale of real estate for the benefit of its members.'
- "Me.** May receive deposits; money not needed by members to be invested in securities.
- "Mass.** Money not needed by members may be loaned to nonmembers.
- "Mich.** May receive loans and deposits from other persons, partnerships, and corporations. May make loans to persons, partnerships, and corporations who are members, as well as those who are not members.
- "Minn.** May issue guaranty stock or permanent stock, upon which exact dividends are guaranteed. May receive deposits and loan to nonmembers.
- "Mo.** Money not needed by members may be loaned to nonmembers.
- "Miss.** May loan to nonmembers.
- "Mont.** May collect money from depositors. May borrow money. May make loans to nonmembers and invest money in certain bonds, etc.
- "Nev.** May loan and invest money. May receive deposits and pay part of the earnings and part as interest to depositors.
- "Okla.** May loan to nonmembers.
- "N. H.** May loan money not needed by members to nonmembers upon approved securities.
- "N. J.** May loan to borrowers upon any plan agreed upon, including straight loans, and may loan to nonmembers.
- "N. M.** May loan money not needed by members to nonmembers.
- "N. Y.** May borrow money. May loan to nonmembers by investing in securities.
- "N. C.** May borrow money.
- "N. D.** May borrow money.
- "Ohio.** Receive deposits. May make loans to nonmembers and invest surplus in certain securities.
- "Pa.** May build houses and lease, mortgage, or sell the same to nonmembers for the benefit and at the pleasure of the stockholders. May borrow money.
- "R. I.** May issue guaranty stock.
- "S. D.** May borrow money to the extent of half its assets. May make loans to nonmembers.
- "Tenn.** May borrow money and issue notes or bonds therefor. May loan surplus money to nonmembers.
- "Va.** 'Shall have the right to lend to stockholders and to other persons, the monies accumulated from time to time and the right to purchase land or erect houses to sell, convey, lease, or mortgage the same at their pleasure, to their stockholders or others for the benefit of their stockholders.'
- "Wash.** 'The name "Building and Loan Association" shall include all corporations, societies, organizations and associations doing a savings and loan or investment business on the building society plan, whether mutual or otherwise.'
- "W. Va.** May purchase land, erect houses and sell, lease, mortgage or convey the same to stockholders and others, for the benefit of the stockholders.
- "Wis.** Same as Washington. May borrow money.
- "Wyo.** Loans may be made to others than members, if the by-laws so provide, at not less than the legal rate of interest, to be paid monthly at the same time and place as interest on loans made to members is paid. Sec. 11 is the same as Washington."

almost all such institutions have such powers under those laws, it may be said with some degree of certainty that Congress did not intend to deny them the exemption they otherwise would have simply because they had power to loan to persons not members, or to borrow from them.

Some light, too, is thrown on the question by a consideration of other taxing statutes. In the Income Tax Law of Aug. 27, 1894, c. 349, § 32 (28 U. S. Stat. at L. p. 556 [U. S. Comp. St. 1901, p. 2264]), exemption is given to "building and loan associations or companies which make loans only to their shareholders." And in the War Revenue Law of June 13, 1898, c. 448, § 17 (30 U. S. Stat. at L. p. 455 [U. S. Comp. St. 1901, p. 2297]), is the provision that "building and loan associations or companies that make loans only to their shareholders, shall be exempt from the tax herein provided." Whether Congress appreciated, when the Corporation Tax Law was passed, that language such as used in these laws did in them, and would in it, deprive almost all domestic building associations of the exemptions, we cannot know; but it may well be that by reason of such appreciation, the lawmakers in this act thought it best not to employ language which in its rigor would exclude the great majority of the institutions sought to be benefited by the exemption, and therefore made the test organization and operation "exclusively for the mutual benefit of their members."

There is nothing in the language of the Ohio statutes giving power to thus borrow or lend money which *ex vi termini* would deny to building associations in that state their essential quality. On the contrary, while it might be admitted that the plan of raising money by so borrowing would be a departure from the methods of accumulation by the small sums of members contributed weekly or monthly, yet if the ends of such associations are to provide a method by which people of small means can become the owners of a home, which otherwise they would not be able to accomplish, and that by borrowing from nonmembers funds to be made immediately available for those laudable purposes, and thus accelerate the process by which the purposes of the association are to be accomplished, such borrowing does not change the end, but only hastens its accomplishment. Nor would it seem that loaning money to nonmembers out of the funds accumulated in times of small demand (the power of borrowing is limited to 20 per cent. of the assets) would be foreign to the purposes of such associations, because at such times it would be in furtherance of the purposes of the association in that interest would be received on funds otherwise non-productive.

The laws of Ohio carefully distinguished between banks and building associations, even to the extent of prohibiting the latter, when adopting a corporate name, to use the words "bank," "banking," or "trust," or any one or more of them in combination. Section 9644, Ohio General Code. It may be conceded that lending money is one of the chief purposes of banking, and that borrowing money is a power and practice necessarily inherent in the business. But, no doubt, a manufacturing corporation, for instance, may borrow money for use

in its business, and loan surplus funds, using the interest in its business, without becoming a banker and without engaging in the banking business.

Justice Clifford divides banks, in the commercial sense, into three kinds:

"1, of deposit; 2, of discount; 3, of circulation. All or any two of these functions may, and frequently are, exercised by the same association; but there are still banks of deposit, without authority to make discounts or issue a circulating medium." *Bank v. The Collector*, 3 Wall. 495, 512, 513 (18 L. Ed. 207).

Under this definition every building association is a bank, since it receives deposits, and, indeed, lends money to its members and, in most of the states, to persons not members. But they are building associations nevertheless, whose profits inure exclusively to the members themselves, and whose power and practice of borrowing money from nonmembers and lending to the same are only incidental to the main purpose for which they are formed, and are beneficial to, and in furtherance of, that purpose.

A nonmember borrowing or lending receives no benefit from the building association as such, but only the same benefit which he would receive by dealing generally with his money in the market. So he in no sense participates in the association, or in its profits. This participation is the exclusive right of each of the members, and every member receives the same benefit accruing to every other member. By this method of acquiring additional income for the association, there is no disturbance of the mutuality of interest, which is the distinguishing feature of building associations; indeed, by indulging in it the essential principle to that end underlying building associations is maintained.

That borrowing money by a building association in the furthering of the purpose of its organization does not of itself change the character of the organization, nor destroy the mutuality between the members, which is its peculiar characteristic, has been held in a number of cases.

In the case of *Wilson v. Parvin*, 119 Fed. 652, 659, 56 C. C. A. 268, 275 (C. C. A. 6th), before referred to, it appears that a building association under the laws of Tennessee having authority to borrow money and to issue prepaid shares of stock bearing a fixed dividend, payable out of the profits, such shares being secured by pledge of notes and mortgages payable to the association, it was held that the issuing of such shares was in effect but a form of borrowing, "the lender receiving a limited dividend in place of interest and having no further interest in the association." While in that case the preferred shares represented the transaction of borrowing from that class of members and the power to borrow from nonmembers was not involved, yet the reason of the decision (in support of which Judge Lurton cited *Murray v. Scott*, 9 Appeal Cases, 519, in which an association had borrowed from nonmembers) was that the power to borrow money (119 Fed. 661, 56 C. C. A. 277), "to enlarge the lending fund, and to secure such loans by a preference over all shareholders and members, was recognized as a valid power by implication, and held to be a legitimate meth-

od of carrying out the ends and objects of the association," even when no such power had been either granted or prohibited.

The Circuit Court of Appeals in the Seventh Circuit in *Grommes v. Sullivan*, 81 Fed. 45, 46, 26 C. C. A. 320, 321 (43 L. R. A. 419), were of opinion that building associations have "implied authority to contract debts in the legitimate transactions of the business authorized," and may even give their negotiable notes evidencing the loan.

Judge Niles in *Manship v. Building Association* (C. C.) 110 Fed. 845, 852, says:

"The principal objections urged against treating the defendant association as a building and loan association seem to be that under its charter and by-laws it is authorized to borrow money and to issue different classes of stock, and it is specially urged that the power to borrow money and to issue guaranty and fixed maturity stock, or, in other words, stock which matures at a definite period, are inconsistent with the building and loan association plan, and that any association embodying and exercising such powers is not a building and loan association at all. I do not think that the power to borrow money and to issue different classes of stock, or the exercise of that power, deprives the defendant association of its character as a building and loan association."

And he fortifies his opinion by citations from numerous cases to which reference is here made. The reason underlying these decisions is that the power, and its exercise, is implied in the furtherance of the objects for which the association was created.

By an act of the Ohio Legislature authorizing corporations to issue preferred stock, which in effect were but certificates for loans with the option on the part of the lenders to become stockholders, it was held in the case of *Burt v. Rattle*, 31 Ohio St. 116, that such preferred stockholders were creditors only. The case bears on this only as illustrating the fact that the borrowing and lending nonmembers do not participate in any sense in the benefits and profits of a building association of Ohio. Judge Welch in that case, in speaking of the status of such preferred stockholders, says (129):

"The act denies them every element and attribute of ownership or actual membership. They have no right to vote, or to take any part in the possession or control of the concern. They gain nothing by its success, and lose nothing by its failure. They have no participation in either the profits or losses. They are strangers to the company, have no interest in it, and look alone to its *promise* and its *mortgage* for remuneration."

In *People v. Preston*, 140 N. Y. 549, 553, 35 N. E. 979 (24 L. R. A. 57), payments of dues in advance, and the allowance of a rebate for the time of payment in advance, were justified, because instead of being contrary to the purpose of building associations, they might be promotive of their purpose.

"If a wage earner has the money it may be wise to permit him to make the advance payments, and thus to save his money; and in this way, too, money is accumulated by the corporation more rapidly for loan to its members."

Judge Earl says in that case (140 N. Y. 554, 35 N. E. 980, 24 L. R. A. 57):

"Money must come into the treasury of one of these corporations from the small monthly dues very slow, and members desiring to borrow the money for the purchase or improvement of homes must wait a long time before they can

be accommodated with loans from money thus contributed, but if prepayment of dues is permitted the ability of the corporation to aid its members by loans is greatly facilitated, and the main purpose of the corporation is thus promoted."

And it was held that such practice did not defeat equality and mutuality among the members of the association. If, under such circumstances as these and the other cases heretofore cited on the effect of the issuing of different classes of stock upon mutuality among members of the association, that quality is not impaired, how can it be successfully claimed that the necessary mutuality is destroyed when money is borrowed or loaned from or to persons who in no event are interested in the profits or losses of the association, but to which they sustain the relation only of creditor or debtor, as the case may be?

Without prolonging the discussion further, reference may be made to *Building Association v. Cowley* (Tenn. Ch. App.) 52 S. W. 312, in which the borrowing of money by building associations to be loaned to its members did not constitute the association merely a banking institution, because there was nothing in the scheme to disturb its mutuality. And to the same point is *Building Association v. Heimbach*, 77 Minn. 97, 79 N. W. 609. See, also, *Thompson on Building Associations* (2d Ed.) § 275; *Endlich on Building Associations* (2d Ed.) § 297.

The conclusion is that building associations under the laws of Ohio, notwithstanding their power to borrow money from or loan money to nonmembers, are "organized and operated exclusively for the mutual benefit of their members," come strictly within the proviso giving them exemption from the tax in question, cannot be required to pay it, and the plaintiffs are entitled to recover the amounts paid by them under protest.

Demurrers overruled.

WILLIAM R. COMPTON CO. et al. v. ALLEN et al. (NICKERSON et al., Interveners).

(District Court, S. D. Iowa, Central Division. July 6, 1914.)

No. 13A.

1. COMMERCE (§ 40*) — SUBJECTS OF INTERSTATE COMMERCE — STOCKS AND BONDS.

Stocks, bonds, and securities are subjects of interstate commerce, and shipments and sales of the same between the states are interstate commerce.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 29, 30; Dec. Dig. § 40.*]

2. COMMERCE (§ 60*)—CONSTITUTIONAL LAW (§ 207*)—STATE REGULATION OF SALES OF STOCKS AND BONDS—CONSTITUTIONALITY—INTERSTATE COMMERCE.

Acts 35th Gen. Assem. Iowa, c. 137, commonly termed the "Blue Sky Law," which by its terms prohibits a citizen of a sister state owning and having stocks, bonds, certificates, or securities, although the same are listed on the exchanges of the country and have a well-established actual

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and salable value, from either bringing or sending them into the state for sale or negotiating for their sale to any person in the state unless he complies with the requirements of the act by obtaining from the Secretary of State and paying for a certificate as an investment company or a stockbroker and subjecting himself to its penalties, *held*, on an application for a preliminary injunction to restrain its enforcement, not within the police powers of the state as an inspection law, but unconstitutional and invalid as imposing a direct burden on interstate commerce, and as imposing burdens upon and denying privileges to citizens of other states which are not imposed upon, and which are granted to, citizens of Iowa.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 91-95; Dec. Dig. § 60;* Constitutional Law, Cent. Dig. §§ 625-648; Dec. Dig. § 207.*]

3. STATUTES (§ 184*)—CONSTRUCTION AND VALIDITY—POWER OF STATE TO ENACT.

The power of a state to enact a law must be determined from that which is sought thereby to be ordained or accomplished, and not from the title it bears.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 262; Dec. Dig. § 184.*]

In Equity. Suit by the William R. Compton Company, Breed, Elliott & Harrison, and McCoy & Co. against W. S. Allen, Secretary of State, and George Cosson, Attorney General of Iowa, with John Nickerson, Jr., and Leach & Co. as interveners. On motion for preliminary injunction. Motion granted.

Caldwell, Masslich & Reed, of New York City, Mayer, Meyer, Austrian & Platt, and Charles L. Powell, all of Chicago, Ill., and Clark, Byers & Hutchinson, of Des Moines, Iowa, for complainants and interveners.

George Cosson, Atty. Gen., of Des Moines, Iowa, for respondent.

Before SMITH, Circuit Judge, and McPHERSON and POLLOCK, District Judges.

PER CURIAM. This suit is brought by plaintiffs, corporate citizens, respectively, of the states of Missouri, Indiana, and Maine, against defendants, respectively, the Secretary of State and the Attorney General of the state of Iowa, to restrain the enforcement of an act of the General Assembly of that state, approved April 19, 1913 (Acts 35th Gen. Assem. c. 137), commonly termed the "Blue Sky Law," of that state, which provides as follows:

"An act to provide for the regulation and supervision of investment companies, and providing penalties for the violation thereof. [Additional to chapter one (1) title nine (ix) of the Code relating to corporations for pecuniary profit.]

"Be it enacted by the General Assembly of the state of Iowa:

"Section 1. Sale of Certain Stocks and Bonds Prohibited—Permits Granted by Secretary of State. That it shall be unlawful for any investment company or stockbroker or any representative thereof, either directly or indirectly, to sell or cause to be sold, offer for sale, take subscription for or negotiate for the sale in any manner whatsoever in this state, except as hereinafter provided, of any stocks, bonds or other securities of any kind or character, other than those expressly exempted from the provisions hereof, without a permit of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the Secretary of State as hereinafter provided. But nothing in this act shall be construed to prohibit the sale of bonds of the United States, or of the state of Iowa, or of municipal, county, school or drainage bonds, or of certificates issued by authority of the laws of the state of Iowa, or to prohibit banks from dealing in the various classes of securities now or hereafter authorized by law or to prohibit the sale of stocks, bonds or other securities at judicial sale or by administrators or executors, or bonds or notes secured by mortgage on real estate, provided that the amount of such lien and of all superior liens upon said real estate shall not exceed three-fourths of the actual cash value thereof.

"Sec. 2. Permits—How Obtained—Information—Documents—Fee. That before any investment company shall secure such permit, it shall be necessary for each and every such investment company to file in the office of Secretary of State, together with a filing fee of ten dollars (\$10.), the following papers, documents, etc., together with such other information and documents as said Secretary of State shall deem necessary in each case to wit:

"1. A copy of its Constitution and by-laws, or articles of copartnership or association.

"2. An itemized statement of its actual financial condition and the amount of its properties and liabilities.

"3. A statement showing in full detail the plan upon which it proposes to transact business.

"4. A copy of all contracts, bonds or other securities which it proposes to make with or sell to its contributors.

"5. Sample copies of all literature or advertising matter used or to be used by such investment company.

"6. If it shall be a foreign investment company, it shall file a copy of its charter which copy shall bear the certificate of the Secretary of State, or other state officer having custody of such records, that it is a true, complete and correct copy.

"All the above described papers shall be verified by the oath of a duly authorized member of a copartnership or association, if it be a copartnership or association, and by the oath of the president and secretary, if it be incorporated, provided that the Secretary of State shall have the power to require such officers to make affidavit to such other reports or information as he may call for.

"Sec. 3. Foreign Corporation—Service of Notice on Secretary of State. Every foreign investment company shall, before receiving a certificate as provided in section four (4) hereof, file in the office of the Secretary of State an agreement in writing (authenticated by the seal of said foreign investment company and by the signature of a member of a copartnership or company if it be a copartnership or company, or by the signatures of the president and secretary of the incorporated or unincorporated association, and shall be accompanied by a duly certified copy of the order or resolution of the board of directors, trustees or managers of the corporation, authorizing the said president and secretary to execute the same), that thereafter service of notice of any action or process of any kind against such foreign investment company, growing out of the transaction of any business of said company in this state, may be made on the Secretary of State, and when so made, such service of notice or process of any kind shall be valid, binding and effective for all purposes as if served upon the foreign investment company according to the laws of this or any other state, and waiving all claims or right of error by reason of such acknowledgment of service. Such notice or process with a copy thereof, may be mailed to the Secretary of State at Des Moines, Iowa, in a registered letter addressed to him by his official title, and he shall immediately upon its receipt acknowledge service thereof on behalf of the defendant foreign investment company by writing thereon, giving the date thereof, and shall immediately return such notice or process in a registered letter to the clerk of the court in which the suit is pending, addressed to him by his official title, and shall also forthwith mail such copy, with a copy of his acknowledgment of service written thereon, in a registered letter addressed to the person or corporation who shall be named or designated as such foreign investment company in such written instrument.

"The above provisions for the service of notice or process of any kind are merely additions to the general provisions of law relating to the service of notice or process, and are not to be construed to be exclusive.

"Sec. 4. Statement Filed—Examination—Permit. It shall be the duty of the Secretary of State to examine the statements and documents so filed and if he shall deem it advisable, he shall require such investment company to furnish him with further and more detailed information regarding the affairs of such investment company, and if he finds that such investment company is solvent; that its articles of incorporation or association, its constitution and by-laws, its proposed plan of business, and proposed contracts contain and provide for a fair, just and equitable plan for the transaction of business, he shall issue to such investment company a statement reciting that such company has complied with the provisions of this act and that such investment company is permitted to do business in this state. In no case shall the Secretary of State issue to such investment company or to its stockbrokers or agent thereof a permit to do business in this state unless, in his judgment, said investment company meets the requirements of this act.

"Sec. 5. Amendment of Charter, Articles of Incorporation, Constitution or By-laws Filed with Secretary of State. That no amendment of the charter, articles of incorporation, constitution or by-laws of any such investment company shall become operative until a copy of the same has been filed with the Secretary of State as provided in regard to the original filing of such papers, nor shall it be lawful for any such investment company to transact business on any other plan than that set forth in the statement required to be filed in section two (2) of this act, or to make any contract other than that shown in the copy of the proposed contract required to be filed by the provisions of said section, until a written statement showing in full detail the proposed new plan of transacting business and a copy of the proposed new contract shall have been filed with the Secretary of State in like manner as provided in regard to the original plan of business and proposed contract, and the consent of the Secretary of State obtained as to making such proposed new plan of transacting business and proposed new contract.

"Sec. 6. Certified Financial Statement—Fee—Failure to Report—Forfeit. That at the close of business of December 31st of each year, and at such other times as the Secretary of State may require, every investment company, domestic and foreign, shall file with the Secretary of State a statement properly verified by the officers of said company, which statement shall set forth its financial condition and the amount of its assets and liabilities and such other information concerning its financial affairs as the Secretary of State may require; said statement being for the information of the Secretary of State, and it shall not be open to public inspection, neither shall it be published, or used for private purposes. Each annual statement shall be accompanied by a filing fee of two dollars (\$2.00). Any investment company failing to file said statement for the preceding year by the first day of February of each year, or failing to file any other or special report herein required within thirty (30) days after receipt of request therefor, shall forfeit to the state of Iowa the sum of five dollars (\$5.00) per day until said statement is filed, or until its right to do business in this state is canceled; and unless said reports are filed within thirty (30) days from the time they are due the Secretary of State may cancel the right of said company to do business in this state.

"Sec. 7. General Accounts—How Kept—Open to Inspection. The general accounts of every such investment company, domestic or foreign, shall be kept in a businesslike and intelligent manner and in sufficient detail that the Secretary of State can ascertain at any time its financial condition; and such books of account shall at all times during business hours, except on Sundays and legal holidays, be open to stockholders and investors in said companies and to the Secretary of State or his duly authorized representatives.

"Sec. 8. General Supervision—Secretary of State—Powers—Examination Fee—Examiner's Expenses—Permit Canceled. The Secretary of State shall have general supervision and control as provided by this act over any and all investment companies, domestic and foreign, doing business in this state and not expressly exempted, and all such investment companies shall be subject

to examination by the Secretary of State or his duly authorized representative at any time the said Secretary of State may deem it necessary. The right, powers and privileges of the Secretary of State in connection with such examination shall be the same as is now provided with reference to examination of state banks; and such investment companies shall pay a fee for each of such examinations of not to exceed six dollars (\$6.00) for each day or fraction thereof spent by the said Secretary of State or his duly authorized representative while absent from the capitol in making such examination, and also the actual traveling and hotel expenses of said examiner, and upon failure or refusal of any such investment company to pay such fees upon the demand of the Secretary of State, or his duly authorized representative, the Secretary of State may cancel its right to do business in this state until such fee is paid.

"Sec. 9. Assets Impaired—Permit Canceled. Whenever it shall appear to the Secretary of State that the assets of any investment company doing business in this state are impaired to the extent that such assets do not equal its liabilities or that it is conducting its business in an unsafe, unfair, inequitable or unauthorized manner, or is jeopardizing the interests of its stockholders or investors in stocks, bonds or other securities by it offered for sale in this state, or whenever any investment company shall fail or refuse for a period of thirty days to file any papers, statements or documents required by this act without giving reasons therefor satisfactory to the Secretary of State, he shall at once cancel the right of said investment company to continue to do business in this state.

"Sec. 10. False Statements—Fraudulent Advertisements—Penalty. Any investment company or person who shall knowingly and willfully subscribe to or cause to be made any false statement or false entry in any book of such investment company, or exhibit any false paper with the intention of deceiving any person authorized to examine the affairs of such investment company, or shall knowingly or willfully make or publish any false statement of the financial condition of such investment company, or the stocks, bonds or other securities by it offered for sale shall be deemed guilty of a felony; and upon the conviction of any such investment company of such felony it shall be fined not less than one hundred dollars (\$100.) nor more than ten thousand dollars (\$10,000.), and the Secretary of State may forthwith cancel the right of said investment company to transact business in this state; and upon the conviction of a person of such felony he shall be fined not less than one hundred dollars (\$100.) nor more than ten thousand dollars (\$10,000.), and he may be imprisoned for not more than ten years, or by both such fine and imprisonment in the discretion of the court.

"Sec. 11. Persons Failing to Comply—Penalty. Any stockbroker, agent or other person, unless expressly exempted from the provisions of this act, who shall sell or attempt to sell the stocks, bonds or other securities of any investment company (domestic or foreign), which has not complied with the provisions of this act, or whose permit has been canceled under the provisions of this act or who shall do or attempt to do business for any such investment company, which has not complied with the provisions of this act, or who shall upon demand refuse to exhibit his duly registered certificate of registration received from the Secretary of State, or who shall violate any of the other provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined for each of such offenses not less than one hundred dollars (\$100.) nor more than five thousand dollars (\$5000.), or by imprisonment in the county jail of not more than ninety (90) days, or by both such fine and imprisonment in the discretion of the court.

"Sec. 12. Collection of Fees—Record of Receipts and Expenditures—Clerks, Deputies—How Appointed—Salaries—How Paid. All fees herein provided for shall be collected by the Secretary of State and by him turned into the state treasurer on the first secular day of each month; and the Secretary of State shall keep a record of the receipts and expenditures incurred in carrying out the provisions of this act. The Secretary of State is hereby authorized to appoint such clerks and deputies as the executive council deem actually necessary to carry this act into full force, and effect; but none of whom shall be related by blood or marriage to such Secretary of State. The compensation of

such clerks and deputies shall be fixed by the executive council. Before the salary and expenses of any such clerk or deputy shall be paid, a detailed and itemized statement of account shall be prepared by such claimant and duly verified, which verification shall aver that such claim is just, reasonable and wholly unpaid and that the amount therein stated has been expended by such claimant. When said claim has been approved by the Secretary of State and audited and allowed by the executive council, it shall be paid by a warrant drawn by the auditor of state upon the state treasurer, and there is hereby appropriated out of any money of the state treasury, and not otherwise appropriated, an amount sufficient to meet said salaries and expenses.

"Sec. 13. Appeal from Decision of Secretary of State—Time—How Made. Any investment company, domestic or foreign, or any stockbroker, which shall be denied a certificate to transact its business in this state or whose certificate shall be revoked by the Secretary of State in pursuance of this act, or any interested citizen of this state, shall have the right to appeal to the executive council of this state from any decision of the Secretary of State relating to the provisions of this act, within twenty (20) days from the entry of such decision by serving notice of such appeal upon the secretary of the executive council, and such appeal shall be heard and determined by the executive council under such rules and regulations as they may prescribe.

"Sec. 14. Agents—When—How Appointed—Expiration and Revocation of Permit—Fee—Standard Securities. Any investment company which has complied with the provisions of this act and received from the Secretary of State a certificate authorizing it to offer its securities for sale in this state may appoint one or more stockbrokers or agents to act for it; but no such stockbroker, except under the provisions of the next section, or agent, or any other person, shall directly or indirectly, do any business for said investment company in this state until he shall first register with the Secretary of State and file with such officer his written appointment and authority from said investment company to act as its stockbroker or agent and receive from him a certificate showing that such investment company has complied with the provisions of the law and that such person is authorized to act for it. All such certificates shall be subject to revocation by the Secretary of State, and unless so revoked shall expire on the first day of July each year. A charge of one dollar (\$1.00) shall be made by the Secretary of State for each certificate issued to each stockbroker or agent.

"Sec. 15. Stockbroker—Permit—Standard Securities—Lists—Semimonthly Report—Investigation of Stockbroker and Stocks—Expenses—Fee—Bond—Forfeiture. The Secretary of State may issue to any stockbroker who has been a resident of the state during the last preceding six (6) months an annual permit, which permit shall entitle such stockbroker to handle such stocks, bonds or other securities in the state of Iowa as are known to be standard, or are well known to be safe and legitimate investments, or such as are found by investigation of the Secretary of State to be safe and legitimate stocks, bonds or other securities; provided, however, such stockbroker shall file on the first and fifteenth day of each month a detailed list of the stocks, bonds or other securities on hand for sale and also all of those sold by him during the preceding half month and not previously reported; provided further that said Secretary of State shall have authority to prohibit a stockbroker from handling any of such issues at any time or to cancel said stockbroker's permit at any time he decides that said broker is not handling such securities as he deems safe and legitimate investments. But the Secretary of State shall not issue such annual permit to any stockbroker until he has first satisfied himself by special investigation as to the character and responsibility of such stockbroker and as to the character of the class of stocks, bonds and other securities handled by such stockbroker; and also as to his reputation for handling such stocks, bonds and other securities as the Secretary of State shall deem to be safe and legitimate investments. In the event the Secretary of State shall make any investigation provided for under the provisions of this section the expense incurred thereby shall be born (borne) by the stockbroker so investigated. He shall also pay a fee of fifty dollars (\$50.) to the Secretary of State for each of said annual permits, which permit, unless sooner revoked by the Secretary of State shall expire on the first secular day of July

of each year. If said permit is issued after the first of January of any year, the fee shall be reduced one-half. Before being granted such permit by the Secretary of State the stockbroker shall give a bond in the penal sum (sum) of five thousand dollars (\$5000.) to the state of Iowa, conditioned upon a strict compliance with this act, which bond shall be approved by the executive council and filed with the Secretary of State. Said bond shall be forfeited by a violation of the terms or conditions of this act, or by a conviction for such violation, and the Attorney General of this state may institute suit in the name of the state of Iowa in any court of competent jurisdiction for a forfeiture thereof at any time within two years from the time the cause of action accrues; provided that if it appears such violation was not intentional and no fraud was shown only so much of said bond shall be forfeited which shall be equal to the amount of damages sustained.

"Sec. 16. Bona Fide Owner Resident of State—Disposing of Securities—Registration of Securities—Fee. Nothing in this act shall be so construed as to prohibit the bona fide owner of any stocks, bonds or other securities, who is at the time a resident of this state, from selling, exchanging or otherwise disposing of the same when not made in the course of continuing or repeated transactions of a similar nature, or when the said securities, including negotiable promissory notes, have been issued or given for goods, wares or merchandise purchased or dealt in by the issuer in the ordinary course of his business, or when sold, exchanged or otherwise disposed of to a bank, trust company, insurance company, building and loan association, or to a stockbroker duly authorized to transact business within this state, provided that the same are sold by said owner in good faith and not for the purpose of evading the provisions of this act; and the Secretary of State may authorize in writing any such bona fide owner of any stocks, bonds or other securities to sell in this state any other securities not included in the provisions set forth in the preceding portion of this section; provided, however, that it shall be made to appear to the satisfaction of the Secretary of State that such stocks, bonds or other securities are safe and legitimate investments, and that they were acquired and held by the owner in good faith, and not for the purpose of evading the provisions of this act, and that said owner desires in good faith to dispose of said securities; but before such authorization shall issue the owner of such securities shall register, in a book kept for that purpose by the Secretary of State, the stocks, bonds and other securities desired to be sold, giving the character of the security, the par value thereof, the date of issue, and any other data concerning the same which the Secretary of State may require. A certificate fee of one dollar (\$1.00) shall be charged for each such authorization.

"Sec. 17. Permit—Bold Type—Securities Not Recommended by Secretary of State—Advertisement. That each and every certificate or permit granted by the Secretary of State under the provisions of this act to any investment company or to any stockbroker, agent or representative thereof or to any other person, shall have printed across its face in bold type the statement: 'The Secretary of State in no wise recommends the stocks, bonds or other securities offered for sale by this (investment company, stockbroker, agent, representative or person, as the case may be)'; and any investment company or any stockbroker, agent or representative thereof or any person who shall refer to such certificate or permit in any advertisement or printed matter of any kind shall also print in said advertisement or printed matter, with equal prominence, the statement: 'The Secretary of State in no wise recommends the stocks, bonds, or other securities herein referred to.'

"Sec. 18. Terms Defined. In the construction of this act the following definitions shall be followed, unless such construction would be inconsistent with the manifest intent or repugnant to the context of the statute:

"1. That the name 'investment company' as used in this act shall include every corporation or concern, however constituted, now or hereafter organized, which shall sell or cause to be sold or offered for sale, take subscriptions for, or negotiate for the sale of any stocks, bonds or other securities of any kind or character to any person or persons in the state of Iowa. But nothing in this act shall be construed to make the provisions thereof apply to state, savings, private or national banks, loan and trust companies, local building and

loan associations, or to the sale of real estate under bond or contract where the actual transfer of title thereto is contingent upon the future payment or considerations, or corporations not organized for profit.

"2. The name 'domestic' as used in this act shall apply to those corporations or concerns incorporated or organized under the laws of Iowa or having their principal place of business in the state of Iowa; and the word 'foreign' shall apply to those corporations or concerns organized under the laws of another state or having their principal place of business outside the state of Iowa.

"3. The name 'stockbroker' as used in this act shall include every person, set of persons, association, company, copartnership or corporation, who shall deal in stocks, bonds or other securities covered by this act, or who shall sell, offer or negotiate for the sale, in the state of Iowa, of any stocks, bonds or other securities covered by this act, or who shall underwrite or purchase such securities and resell them to any person or persons in the state of Iowa at a commission or profit.

"4. The name 'agent' as used in this act shall include any persons who shall act for any investment company or stockbroker, offering for sale, taking subscriptions for, or negotiating for the sale of, or selling any securities for any investment company or stockbroker, either as an employé on a salary basis or for a commission or who shall execute, issue, sell, offer or negotiate for sale, any contract, bond or other instrument, by the terms of which title to real estate located outside the state of Iowa is to be transferred upon the completion of certain payments or the performance of certain conditions therein specified; provided that if it appears such violation was not intentional and no fraud was shown only so much of said bond shall be forfeited which shall be equal to the amount of damages sustained.

"Sec. 19. Acts in Conflict Repealed. All acts and parts of acts in so far as they are in conflict with this act are hereby repealed.

"Approved April 19, A. D. 1913."

In this suit, by leave of court, John Nickerson, Jr., a natural citizen of the state of Missouri, and A. B. Leach & Co., a copartnership, with its principal place of business in the city of New York, composed of Arthur B. Leach and James B. Campbell, citizens of the state of New York, and Ferry W. Leach and George C. Olmstead, citizens of the state of Illinois, have intervened, praying the same relief. A restraining order was granted by the presiding judge of the court, and, this suit being one in which the injunctive relief sought is the life of the case and against the legislative action of a state, the application for an interlocutory injunction pendente lite was submitted to and stands for decision in accordance with the provisions of section 266 of the Judicial Code. Act March 3, 1911, c. 231, 36 Stat. 1162 (U. S. Comp. St. Supp. 1911, p. 236).

The grounds of attack made against the constitutional validity of the act may be briefly summarized, as is done by defendants, as follows: (a) The act offends against the fourteenth amendment by depriving persons of property without due process, and denies the equal protection of the laws and abridges the privileges and immunities of citizens of the United States; (b) that it offends against the commerce clause of the federal Constitution; (c) that it grants privileges and immunities to citizens of Iowa denied to citizens of other states; (d) that it is a delegation of legislative and judicial power; (e) that the act was not regularly passed.

While courts of justice may not concern themselves with the wisdom or policy of a law the validity of which is challenged on constitutional grounds, such consideration being alone addressed to the

lawmaking power, yet, it may safely be observed in this case, the purpose of the act under consideration as declared by the Attorney General of the state, namely, to protect the humble, honest citizens of the state, unlearned in the intricacy of business affairs as conducted at this day from being plundered and despoiled of their small earnings and property, acquired through years of patient toil, by the alluring machinations and the deceptive, misleading, and fraudulent devices which the unscrupulous, cunning, and deceitful "Get-Rich-Quick-Wallingfords" of our day practice, is a most laudable obligation and important duty of the state. And if this state, in its attempted compliance with such just obligation to its citizenship, be not found, by a careful study and analysis of the act in question and a reasonable and rational comparison of its provisions when ascertained and understood with the organic law of the nation or state, to have clearly and certainly violated some fundamental principle thereof established by the people for their mutual protection from invasion by the lawmaking power, it is the clearly defined and well-recognized duty of this court to uphold the act and allow the people, in the manner authorized by the organic law of the state, to modify or repeal it, if on fair trial it be found vicious or harmful in actual operation.

Viewed in this light, and as the case as now presented arises only on an application for a temporary order restraining the enforcement of the act until final decree on full hearing, many grounds of invalidity are presented which need not be fully considered or ruled. Concerning the power of the state to regulate or control by its laws the operations and dealings of "investment companies," as that term is usually employed and understood, whether such companies are created under the laws of this state, or are created under the laws of foreign states, and make application for the privilege of engaging in business within this state, little of doubt arises and nothing need be said.

Again, as to the manner of the passage of the act of which complaint is made, whether the enrolled bill shall be held as final and conclusive evidence of its contents will not be considered or ruled on this hearing. Such subject-matter is so entirely a matter of state policy and concern in the enactment of its laws, an orderly course of judicial procedure in the administration of justice dictates the wisdom, where possible, as in this case, of leaving that question to the determination of the highest judicial tribunal of the state, which is in the end the final arbiter, untrammelled and untouched by any opinion of this court, for, as we are advised, this identical question is pending therein for decision.

Coming now to a consideration of the act for the purpose of determining whether it does in express terms and undoubted meaning and intent contravene any provision of the organic law of the nation or this state, it is seen to undoubtedly prohibit any person or citizen, natural or corporate, of any foreign state, from selling or offering for sale, in person or through another, in any manner or way whatever, any stocks, bonds, or other securities or obligations, of every kind and nature, to any person within this state, unless the provisions of

the act are first complied with, under heavy penalties. That is to say, by its express terms the act prohibits a citizen of a sister state of this country, owning and having stocks, bonds, certificates, or securities, although the same are listed on the exchanges of the country and have a well-established actual and salable value, from either bringing or sending the same into this state for sale unless he first meets the exactions of this law, or by so doing subjects himself to its penalties. Nor may he enter upon and conduct negotiations looking to or consummating a sale of his property by correspondence through the mails of the country, either personally or through his agent, without compliance with the provisions of the act or abiding its penalties.

[1] Can it be a state of this Union, under our Constitution, possesses the power to punish the doing of such customary, everyday transactions unless the conditions, exactions, regulations, and restrictions imposed by this law be first met and performed? That the act in express terms and by inclusive definitions employed therein does so ordain cannot be gainsaid or denied. That such is the effect and purpose of the act in controversy was not disputed by the able Attorney General of the state on the argument of this cause. That the transportation of such articles of personal property from one state to another for the purpose of barter, sale, and delivery constitutes not only commerce among the states of this country, but a very large and important element of such commerce in the magnitude of business transacted and the amounts of money involved, is self-evident. The District Court for the Eastern District of Michigan, ruling this identical question in *Alabama & N. O. Transp. Co. v. Doyle* (D. C.) 210 Fed. 173, said:

"We cannot doubt that stocks and bonds are now the subject of interstate commerce, and that shipments and sales of them, between the states, are interstate commerce. We do not find that this has been expressly held in any authoritative decision, but, in the present development of commerce, it would be regarded as obvious, save for the argument based upon *Nathan v. Louisiana*, 8 How. 73, 12 L. Ed. 992 (involving foreign bills of exchange), and *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357 (involving insurance contracts)."

In the *Lottery Cases*, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492, it was held by a divided court even lottery tickets, which have no absolute value whatever, either in form or fact, but have merely a contingent, speculative, and gambling value, were held to be the subject of interstate commerce when transported from one state into another. While the soundness of this view was assailed by vigorous dissent on the part of almost one-half the court, yet, as shown by the review of authorities made in the dissenting opinion, no reason is left for doubt but that negotiable securities, corporate shares, promissory notes, corporate and municipal bonds, absolute in form, are the subjects of interstate commerce, and would have been so declared by the members of the court joining in the dissent. In the opinion in that case, Mr. Justice Harlan said:

"What is the import of the word 'commerce' as used in the Constitution? It is not defined by that instrument. Undoubtedly the carrying from one state to another by independent carriers of things or commodities that are ordi-

nary subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce."

Under the many decisions from the Supreme Court since that of *Nathan v. Louisiana*, supra, holding foreign bills of exchange, and *Paul v. Virginia*, supra, holding insurance policies, not subjects of interstate commerce, we have no doubt but that court, when presented with the question, will declare such securities and property rights, negotiable and otherwise, as are sought to be regulated by the act in question, are proper subjects of interstate commerce.

[2] That the act in question, in prescribing the only terms and conditions on which complainants and interveners, citizens of foreign states, may transact the business of disposing of their property within the borders of this state, does impose a burden on interstate commerce needs no comment further than a reading of the act itself, for, by the law, it is placed within the power of officers of the state to absolutely prohibit such business transactions. And it would further seem, from the briefs and arguments for defendants in the case, in thus far there is no substantial disagreement with the view taken, for the insistence made by defendants is not that the act in question does not impose a burden on those dealing in securities in this state, but rather that the burden so imposed is of such nature the state may lawfully prescribe it under its reserve powers even on interstate commerce; that is to say, under its police power, to enact inspection or license laws for the purpose of preventing the imposition of fraudulent practices on its citizens. A reading of the act in question will disclose its requirements, exactions, prohibitions, and penalties are leveled against all persons, corporations, and aggregations of individuals, by whatever name or nature known (except a few favored citizens of the state), who, by definitions made a part of the act itself, are gathered into two general classes under the name of "investment companies" and "stockbrokers," and the power to regulate the business of all by definition so classified in their business dealings in stocks, bonds, certificates, securities, etc., within the state, extends even to absolute prohibition thereof, unless compliance with the requirements of the act be made to the satisfaction of officials of the state charged with the enforcement of the law. With the power of the state to so classify by definition all individuals, whether natural or artificial, and all aggregations of individuals by whatever name known, we are not concerned at this time. The question here presented is, Does the power of the state extend to the regulation, control, and prohibition of interstate commerce in such subjects as are involved in this act under its reserved right to inspect for the public good?

[3] While the act is neither in form nor title styled an inspection act, the title thereto being merely, "An act to provide for the regulation and supervision of investment companies and providing penalties for the violation thereof," such fact is thought to be of no great moment, for the power to enact the law must be determined from that which is sought thereby to be ordained or accomplished, and not from the title it bears. *Henderson et al. v. Mayor of N. Y. et al.*,

92 U. S. 259, 23 L. Ed. 543; *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 855; *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 32 Sup. Ct. 784, 56 L. Ed. 1197. While under authority of the foregoing cases, and many others, such as *Plumley v. Mass.*, 155 U. S. 462, 15 Sup. Ct. 154, 39 L. Ed. 223; *Crossman v. Lurman*, 192 U. S. 189, 24 Sup. Ct. 234, 48 L. Ed. 401; *McLean v. Denver & Rio Grande R. R. Co.*, 203 U. S. 38, 27 Sup. Ct. 1, 51 L. Ed. 78; *Delamater v. South Dakota*, 205 U. S. 93, 27 Sup. Ct. 447, 51 L. Ed. 724, 10 Ann. Cas. 733; and *Savage v. Jones*, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182, the power of the state to provide for the inspection of legitimate subjects of interstate commerce moving as such, to charge a reasonable fee therefor, and to even prohibit the importation of such articles, commodities, and products as do not conform to the test applied is undoubted, yet it must be held the scope of such inspection laws is not without its limitation as applied to the nature of the person, article, or thing designed by the law to be inspected and the manner and method of the inspection to be employed. In *People v. Compagnie Gen. Transatlantique*, 107 U. S. 59, 2 Sup. Ct. 87, 27 L. Ed. 383, the state of New York attempted by legislation to provide for the inspection of immigrants coming from foreign countries into the ports of that state. There was no doubt but that such inspection was reasonably necessary and was promotive of great public good in preventing the spread of both physical ailments and moral diseases. The question presented was the power of the state to provide such inspection by its law. Mr. Justice Miller, delivering the opinion of the court, said:

"In addition to what is said above it is apparent that the object of these New York enactments goes far beyond any correct view of the purposes of inspection law. The commissioners are 'to inspect all persons arriving from any foreign country to ascertain who among them are habitual criminals, or pauper lunatics, idiots, or imbeciles, * * * or orphan persons, without means or capacity to support themselves and subject to become a public charge.' It may safely be said that these are matters incapable of being satisfactorily ascertained by inspection. What is an inspection? Something which can be accomplished by looking at or weighing or measuring the thing to be inspected, or applying to it at once some crucial test. When testimony or evidence is to be taken and examined, it is not inspection in any sense whatever."

Conceding, therefore, to the fullest extent, the reserve power of the state to provide for the inspection of all such articles and commodities as foodstuffs for man or beast, drugs, medicines, products, compounds, and the like, moving in interstate commerce where inspection thereof is not already provided by national laws, and when, as stated by Mr. Justice Miller, some crucial test is established and may be applied, such as weighing, measuring, analyzing, and the like, it is apparent no such standard or test is or can be established under the act in question, but the test to be applied thereunder must and does rest upon evidence taken, examined, and weighed. It must be held the subjects of interstate commerce therein sought to be regulated and controlled are not only burdened by the act, but are directly burdened thereby, and that such articles are not the subject of state inspection laws. As bearing on this question see *Alabama*

& N. O. Transp. Co. v. Doyle, *supra*; International Text-Book Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649; Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1, 84 C. C. A. 167.

Again the citizenship of this country is dual in its nature. We owe allegiance to two sovereigns, our country and our state. In turn we are entitled to that measure of protection which each under its Constitution and laws may afford us. Our national Constitution prohibits any state from granting immunity from punishment and regulation by law to its citizens which it denies to citizens of other states. The mere reading of the act in question makes entirely clear the contention of complainants and interveners that it does impose burdens upon and denies privileges to citizens of other states which are not imposed upon and which are granted to citizens of Iowa. That such favoritism of the law of a state to its citizen subjects as this act grants cannot be successfully defended, no matter how laudable the purpose sought to be accomplished thereby may be thought to be, would appear settled by numerous authoritative decisions. *St. L. & San Francisco Railway v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567; *Covington & L. Turnpike Road Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560; *Cotting v. Kansas City Stockyards Co., etc.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92; *Chicago, M. & St. P. Ry. Co. v. Westby*, 178 Fed. 619, 102 C. C. A. 65, 47 L. R. A. (N. S.) 97; *Butler Bros. Shoe Co. v. United States Rubber Co.*, *supra*.

The view taken, as heretofore expressed, renders any lengthy discussion of this important question, or any discussion whatever of other objections made by complainants and interveners to the validity of the act, on this application for a mere temporary order, unnecessary. Such matters can be thoroughly considered and ruled on final decree. Meanwhile the temporary order applied for must be granted, on such terms as to form and bond required to be given, and on such orders as to an appeal, if one shall be prayed, as the presiding judge of this court may be advised are proper.

It is so ordered.

HUMBERT v. CHOPY et al.

(District Court, D. Colorado. August 17, 1914.)

No. 6170.

WORK AND LABOR (§ 9*)—RECOVERY ON QUANTUM MERUIT—EFFECT OF EXPRESS CONTRACT.

Defendants were interested in oil lands which, with other lands, it was proposed to put into a corporation to be organized by defendants and others. Plaintiff, an experienced civil and mining engineer, was employed by defendants to examine the lands as to the probability of their containing oil in commercial quantities, make a report thereon, and aid defendants in negotiating for certain of the lands; defendants agreeing to pay him a specified amount in the capital stock of the proposed company.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Plaintiff performed the contract, but without his knowledge defendants negotiated with other parties for the purpose of acquiring such lands to be put into a different corporation, which was brought about and largely financed upon the report and information furnished by plaintiff, and from the organization of which defendants made a large profit. *Held*, that while ordinarily when there is a special contract covering the rendition of services which are not to be compensated in money, but in corporate shares, the remedy for nonperformance is an action for damages for breach of the special contract, defendants having, by their own acts, put it beyond their power to comply with the special contract, and having made use of plaintiff's services in carrying out a plan in breach of the contract, plaintiff was entitled to rescind and sue on quantum meruit for his services.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 23-24; Dec. Dig. § 9.*]

At Law. Action by Pierre Humbert, Jr., against Edmond Chopy and others. On demurrer to the complaint. Demurrer overruled.

Wm. H. Dickson, of Denver, Colo., for plaintiff.

James B. Grant, Wm. V. Hodges, and Mason A. Lewis, all of Denver, Colo., and C. W. Burdick, of Cheyenne, Wyo., for defendants.

LEWIS, District Judge. It appears from the complaint that the plaintiff is a civil and mining engineer; that in February, 1911, he started from Paris, France, to examine and report upon certain supposed oil-bearing lands in the state of Wyoming, at the request of the defendants; that he did at once proceed to his destination and there examine the lands in question and make report to the defendants, and that immediately thereafter he proceeded, at the instance of the defendants, to San Francisco for the purpose of there interviewing and attempting to negotiate with certain parties for obtaining lands which they owned in said supposed oil fields for the defendants, for all of which services the plaintiff was to be compensated by the defendants and reimbursed for traveling and other expenses which he might reasonably incur.

This action is to recover such compensation and expenses incurred, and the pleader has stated his case in four separate counts. The last and fourth count is for the recovery of traveling and other expenses only, incurred by the plaintiff. The third count is for the recovery of the reasonable value of services rendered by the plaintiff in going to San Francisco to interview and negotiate with parties owning lands in said oil fields. The second count is for the reasonable value of plaintiff's services in going from Paris to Wyoming and there examining and reporting upon the character of the lands as to oil-bearing qualities. These three last causes of action are clearly in *indebitatus assumpsit* under the common counts and are well stated. They will not be further noticed.

Consideration will be given to the demurrer to the first cause of action set out in the first count. This count alleges that the plaintiff is a civil and mining engineer, with large experience in the examination of mining and oil properties; that the defendants were interested in 480 acres of land in the Salt Creek oil fields, Natrona county, Wyoming,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and Henshaw and Fitzhugh also owned a large acreage in the same vicinity, all of which lands were to be put into a corporation to be organized by the defendants and others, having a capital stock of \$5,000,000; that the defendants in February, 1911, requested the plaintiff to go from Paris, France, to Wyoming, and examine said lands as to the probability of their containing oil in commercial quantities, to make a thorough and comprehensive examination of said oil fields and report thereon to the defendants, and that plaintiff also aid the defendants in carrying on negotiations for obtaining lands owned by said Henshaw and Fitzhugh, and that for his services so to be rendered the defendants would pay the plaintiff \$200,000 of the capital stock in said proposed company, and would also pay his traveling and other expenses incurred on said trip; that plaintiff went to Wyoming and made extensive exploration and examination of said lands in said oil fields for the purpose of ascertaining the probable existence of oil of such quality and quantity as would justify development, and made comprehensive and detailed reports to the defendants of what he found in that respect; that he also negotiated with Henshaw and Fitzhugh for the purpose of obtaining their lands for the defendants to put into said proposed company, and made a trip to San Francisco for that purpose; that while the plaintiff was so engaged the defendants, without the knowledge of plaintiff and secretly, were carrying on negotiations with other parties for the purpose of acquiring the same lands and other lands to be put into another corporation to be organized by the defendants and others, and that in aid of such purpose the defendants secretly made use of the reports so sent to them by the plaintiff on the character and oil-bearing qualities of said lands, and the defendants with others did, while the plaintiff was so engaged, organize another company, which took over said lands, with a capital stock of \$10,000,000, in which latter company the defendants were given a large interest in stock and have profited in the sum of \$500,000; that said latter company was brought about and financed largely upon the report and information furnished by the plaintiff as aforesaid, and that the defendants in the organization of said latter company and its acquisition of the property that was to be put into the company as above referred to, have put it beyond their power to comply with their agreement with the plaintiff. The plaintiff alleges in this count that his services so rendered were reasonably worth the sum of \$75,000, for which, and expenses necessarily incurred by him, he seeks judgment.

It is conceded that this count is on quantum meruit under the common count also; but inasmuch as the count further discloses that there was a special contract covering the subject of services to be rendered by the plaintiff and by which it appears those services were to be compensated, not in money but in corporate shares, it is claimed that assumpsit will not lie, and that plaintiff's only remedy is for damages on breach of the special contract. In support of this contention on argument of the demurrer the defendants cited as authorities: *Bradley v. Levy*, 5 Wis. 400; *Weart v. Hoagland*, 22 N. J. Law, 517; *Osterling v. Cape May Hotel Co.*, 82 N. J. Law, 650, 83 Atl. 887; *Meyers v. Schemp*, 67 Ill. 469; *Mitchell v. Gile*, 12 N. H. 390.

These authorities support the defendants' position, and others might be added: *Wilkins v. Stevens*, 8 Vt. 214; *Bernard v. Dickens*, 22 Ark. 351, in which case it is said, on the authority of *Greenleaf*:

"If the mode of payment was any other than in money, the count must be made on the original contract."

And *R. R. Co. v. Pressley*, 45 Miss. 66, 71:

"Where there is a special agreement to pay for goods, or services, in any other way than in money, it must be specially declared upon."

However, the *Vermont Case*, *supra*, in so far as expressions there found support the contention of the defendants, may be considered obiter, for the facts there dealt with disclose a barter in which the articles named were given an agreed value in the contract. There are many cases like it: *Elkinton v. Fennimore*, 13 Pa. 173; *Taplin v. Packard*, 8 Barb. (N. Y.) 220; *St. Louis Co. v. Soulard*, 8 Mo. 665; *McKinnie v. Lane*, 230 Ill. 544, 82 N. E. 878.

The contention is sound if the contract be still open, that is, if the defendant has not repudiated his obligation and is able to perform; but the law, when applied to the facts here, is the other way. It appears that the defendants put it beyond their power by their own acts to comply with the contract on their part. They kept the plaintiff in the field, rendering the service which he agreed to render, and while he was thus engaged they were carrying on a plan which, if consummated (and which was later consummated), would render it impossible for them to perform. They made use of his services for the purpose of carrying out this latter plan, knowledge of which they withheld from him. Under these facts the plaintiff had a right to elect to rescind the contract and sue on quantum meruit for what he had done. *Perkins v. Hart*, 11 Wheat. 237, 6 L. Ed. 463; *Ankeny v. Clark*, 148 U. S. 345, 353, 13 Sup. Ct. 617, 37 L. Ed. 475; *Smiley v. Barker*, 83 Fed. 684, 688, 28 C. C. A. 9; *Canada v. Canada*, 6 Cush. (Mass.) 15; *Buffkin v. Baird*, 73 N. C. 283; *Cadman v. Markle*, 76 Mich. 448, 43 N. W. 315, 5 L. R. A. 707; *Haigh v. Association*, 19 W. Va. 792, 802.

The principle is stated in *Ankeny v. Clark*, *supra*, thus:

"It is an invariably true proposition that whenever one of the parties to a special contract not under seal has, in an unqualified manner, refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may, on doing so, immediately sue on a quantum meruit for anything he had done under it previously to the rescission."

In the *Canada Case*, *supra*, the defendant agreed to compensate the plaintiff for his services to be rendered by leaving to him his farm on the death of defendant. After the plaintiff had partly executed the obligations on his part the defendant conveyed away his farm so that he put it out of his power to execute the contract on his part. The plaintiff was permitted to recover on quantum meruit for services rendered.

In the *Cadman Case*, *supra*, the plaintiff was to receive corporate stock for services to be rendered by him. The defendant broke the contract, and the plaintiff was permitted to recover on quantum meruit.

It is said in *Bannister v. Read*, 1 Gilm. (Ill.) 99, quoted with approval in *Baston v. Clifford*, 68 Ill. 67, 70, 18 Am. Rep. 547:

"Although one party to a contract may not alone rescind it, he may, nevertheless, by neglecting or refusing to perform it on his part, place it in the power of the other party, where he is not also derelict, to avoid it, or not, at his pleasure. The breach of one party may, in such case, be treated by the other as an abandonment of the contract, authorizing him, if he chooses to do so, to disaffirm it; and thus the assent of both parties to the rescission of the contract is sufficiently manifested—that of the one by his neglect or refusal to perform his part of the contract, and of the other by his suing, not for such breach, but for the value of any act done or payment made by him under the contract, as if it had never existed."

The demurrer is directed to each and all of the counts. It is not good as to any of them, and will therefore be overruled.
It is so ordered.

UNITED STATES v. PRIMROSE COAL CO.

(District Court, D. Colorado. April, 1914.)

No. 5655.

1. PUBLIC LANDS (§ 120*)—SUIT FOR CANCELLATION OF PATENTS—EVIDENCE CONSIDERED.

In a suit by the United States for the cancellation of patents to public land issued under Timber and Stone Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545], on the ground that when the entrymen made application to purchase they knew the lands were coal lands and chiefly valuable as such, and fraudulently made the applications and supported the same by false affidavits, it was shown that as to two of the three entries a coal filing was made in opposition and treated as a contest; that when the entrymen made their proofs the government by direction of the Commissioner of the General Land Office was represented by counsel, who cross-examined the applicants and their witnesses, and examined other witnesses as to the character of the land; that as to all the entries successive coal filings had previously been made on the land and abandoned; that after the proofs were taken a special agent was sent to personally examine the land, and on his report that it was chiefly valuable for timber the patents were issued. *Held*, that such evidence was insufficient to sustain the allegations of the bill, although several years later it was found that there was coal on the land, perhaps in paying quantities.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. § 120.*]

2. PUBLIC LANDS (§ 106*)—VALIDITY OF PATENTS—CONCLUSIVENESS OF FINDINGS OF EXECUTIVE DEPARTMENT.

Where the Land Department after full investigation has determined that land sought to be acquired under the Timber and Stone Act was subject to entry thereunder, and accepted the applications and issued patents therefor, such findings of fact are conclusive and the decision of the department final.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301, 302; Dec. Dig. § 106.*]

Suit by the United States against the Primrose Coal Company. Decree for defendant.

Frank Hall, Sp. Asst. Atty. Gen., for the United States.

P. J. Dugan and Miles Saunders, both of Pueblo, Colo., for defendant.

LEWIS, District Judge. [1] This is a suit to cancel three patents issued to three separate entrymen on the ground, as claimed, that all of the lands were known coal lands when entered but were unlawfully acquired under the Timber and Stone Act. The entrymen were Guy T. Nash, Hosea B. King and Anna Lillie. The basis of the suit, shortly stated, is that each of the entrymen knew at the time of their respective applications to purchase that the lands were coal lands and chiefly valuable as such; that with this knowledge they each fraudulently made application to purchase under the Timber and Stone Act; that they made false affidavits themselves and procured the two supporting witnesses as to each entry to likewise make false affidavits as to the character of the lands; that they did not make their entries for their own use and benefit but for the use and benefit of the defendant herein, and that there was a conspiracy between the defendant and the entrymen, and others, to thus fraudulently acquire from the government coal lands known by the entrymen and the defendant to be such, and that the purpose of the conspiracy was accomplished by an imposition upon, and a deception of, the land officials in this manner.

Guy T. Nash made his application to purchase the 160 acres in his entry on April 8, 1899, and Hosea B. King made his application on the same day. June 20th of that year was fixed by the register as the day on which proof should be offered by the applicants for the purpose of showing that the lands sought were more valuable for timber or stone than other purposes. Before the day arrived for submitting proofs one John James filed a coal declaratory statement in which he claimed the right to enter a part of the lands in the Nash and King entries as coal lands, and on June 19th, the day before the time set for taking proofs in the Nash and King entries, the Commissioner of the General Land Office wired the register and receiver as follows:

"Do not issue final certificates on timber land applications of Guy T. Nash and Hosea B. King. Notify Hendershot when proofs are taken."

Hendershot was one of the field agents in the Land Department. About a dozen coal filings had theretofore been made on the Nash tract by entrymen and each abandoned, and one had been made on the King tract theretofore and abandoned. On June 20th, the day set for the proofs, Nash and King each appeared with their supporting witnesses, and each claimant and his witnesses made the required affidavits which were filed with the register, and thereupon each applicant and his two supporting witnesses and two other witnesses, to wit, W. S. Bayles and Joseph Ray, were subjected to oral examinations as to the character of the lands in the two entries, Mr. Dugan appearing as counsel for the applicants and Mr. Hendershot as counsel for the government. Copies of the record of this testimony were introduced in evidence, and they disclose that each witness was examined and cross-examined at length as to the character of the lands in each entry, both as to indications of probable coal deposits therein as well as to their value for the timber

thereon. These examinations extended into the next day. The coal filing of James was treated as a contest against the King and Nash entries. These entries remained in suspense and the government had its special agent Hendershot, and also its special agent O'Brien, make personal examinations of the two tracts and transmit their reports thereon to the Commissioner. Each of these agents reported that he had made a personal examination of each tract and had found that there were no indications of coal upon the lands and that they were most valuable for the timber. Hendershot had theretofore reported that the lands were coal in character, but he made a second examination, and in his latter report he said that he had been misled in his first report for the reason that he was not at first correctly informed as to the lines and corners of the tracts. The Commissioner by letter of June 5th, 1901, advised the register and receiver of the contents of the reports made by Hendershot and O'Brien, and in his letter said:

"In view of the facts being as stated in the said reports, above referred to, it would appear that the said application for the above tract was a bona fide application for the timber and stone thereon and not for the alleged coal, that is not shown to be on the said tract."

The Commissioner transmitted with his letter the final proofs that had been offered by the applicants and directed the register and receiver to take action on the merits of the entries.

The register and receiver, acting on the direction so given by the Commissioner, issued final certificates to Nash and King on their entries in June, 1901.

In July, 1901, Nash conveyed the lands in his entry to the defendant coal company in consideration of shares of its stock of value, according to the proof, of about \$1,250.00, and in September, 1901, King for like consideration conveyed the lands in his entry to the defendant company. The patents for these two tracts each bears date April 5, 1905. At the time of these conveyances King and Nash were both members of the board of directors of the defendant, and one or both were officers of that company.

2. Anna Lillie made her application to purchase 160 acres, under the Timber and Stone Act, on May 25, 1901. The register fixed August 23rd following as the day on which to offer proof to show that the land was more valuable for its timber or stone than for other purposes. On that day she appeared and filed her required affidavit called "Testimony of Claimant." She was also subjected to what purports to be an oral cross examination, copy of which was introduced at the final hearing. Her supporting witnesses, whose affidavits were taken at that time, were James Lillie and George H. Kennedy, and in addition to their required formal affidavits they were likewise subjected to oral examination. Kennedy testified that he was at that time in the employ of the defendant company which had a mine about a mile and a half from the Lillie tract. Each witness was examined fully as to the character of the land, both as to coal indications and its value for the timber on it. Receiver's receipt was not issued to Anna Lillie for her tract until August, 1904, and her patent bears date February 10th, 1905.

From a certified copy of a letter from the Commissioner it appears

that after the final proof was taken in the Lillie entry the receipt and certificate were withheld pending an investigation by a special agent of the office of the Commissioner. The record at the local office had been transmitted to the Commissioner of the General Land Office and was there considered in connection with the agent's report. Excerpts from the report of the special agent found in this letter, among other things, contain this:

"Said lands are chiefly valuable for the timber thereon." "It is further stated that the claimant, who is a colored woman, resides in Pueblo, Colorado, and has so resided for many years. She has the reputation of saving her earnings and it is believed she has the necessary money as a result of her own accumulations wherewith to pay for said lands. The special agent further states that after a due and diligent search he is unable to find any contract of sale involving the title to said land; that there is no evidence whatsoever that the entry was made for the use and benefit, in whole or in part, of any other person, firm or corporation, or that the same has not been made in entirely good faith. Special agent recommends that the application be passed to entry and subsequently to patent." "After a careful consideration of the entire record and the agent's report, his recommendations are concurred in."

After the final certificate was issued on this entry Anna Lillie conveyed the land to Guy T. Nash for a consideration of \$500.00 which the proof shows was paid to her, and some two years later Nash conveyed the lands in this entry to the defendant coal company for a stock consideration.

3. There is no proof that the moneys paid for the lands by each of the three entrymen were not respectively their moneys, but on the contrary there is some proof that each entryman paid his own money for his tract. Neither is there any testimony whatever tending to show that the defendant coal company had anything to do, directly or indirectly, with any of these entries at the time they were made or at any time until its purchases from the respective entrymen.

If we were to look at the situation surrounding these lands, especially the Nash and King entries, at the time of the trial of this case and for a few years theretofore, a rational conclusion from the proof would be that they are chiefly valuable for the supposed deposits of coal therein. They are within what is now generally known as a well-defined coal field. Coal mines have been opened on lands adjoining the Nash and King entries and show deposits of some coal in those entries; but the situation in that respect is vastly different from what it was more than 13 or 15 years ago when these entries were made.

In addition to the coal filings on the King and Nash tracts, which had been abandoned as above noted, there had also been coal filings on the Lillie tract and they were abandoned. At the time of each of these entries there was, to say the least, great uncertainty in the minds of those who were familiar with these lands as to whether or not there was coal upon them. With this condition in mind there may be a basis for a suspicion that each of these entrymen indulged a hope, at the time of their respective entries, that coal might some day be found, but this is far from finding in the record any substantial proof that each of the entrymen knew at the time they made their application to purchase under the Timber and Stone Act that the lands were chiefly valuable for

their coal deposits and were known by them to be coal lands, and that thus they each perpetrated a fraud upon the government. Neither the act under which the entries were made, nor the coal land act contemplates such fortuitousness. The Timber and Stone Act only requires in this respect that no valuable deposit of gold, silver, cinnabar, copper or *coal* exists on the land "as deponent verily believes." And the following section of that act (section 3) does not contemplate that the applicant shall assure the known character of the land, but that he shall only present "satisfactory evidence" that the land is of the character which it is claimed to be.

The fraudulent character of these entries, upon the part of the entrymen as charged in the bill, is not sustained by the proof.

[2] 4. But aside from what has been said, and conceding, for present purposes, that the lands were believed by the entrymen to contain coal deposits, I think the bill must be dismissed for another reason: The proceedings by the Land Department in connection with these entries show beyond any doubt that the question as to whether or not the lands in each entry were coal in character, was directly involved in each entry. In the Nash and King entries that question was specifically presented by the contest of James who sought to have the timber and stone entries of Nash and King cancelled and to acquire the lands himself under the Coal Land Act (Act March 3, 1873, c. 279, 17 Stat. 607). At a hearing of that issue the government was represented by counsel, and witnesses were interrogated specifically as to that fact. The Commissioner then, before acting, had a personal inspection of the lands made by representatives from his office for the purpose of determining whether the lands were coal in character or whether they were chiefly valuable for the timber upon them. On the testimony taken at the hearings on the King and Nash entries, together with the reports of two special agents who personally examined the land, the department reached the conclusion that the lands were properly subject to entry under the Timber and Stone Act. The same proceeding, substantially, was had by the department as to the Lillie entry. The conclusion was also reached that the lands she applied for could be entered under the Timber and Stone Act.

The questions of fact involved here in all of these entries as to whether the lands in each instance were coal in character, were involved in the inquiry by the department while these entries were pending. On that inquiry it was determined as a fact that the lands were not coal in character and could not be entered as such.

"The appropriate officers of the Land Department have been constituted a special tribunal to decide such questions, and their decisions are final to the same extent that those of other judicial or quasi judicial tribunals are." *Vance v. Burbank*, 101 U. S. 514, 25 L. Ed. 929; *U. S. v. Throckmorton*, 98 U. S. 66, 25 L. Ed. 93; *Steel v. Smelting Co.*, 106 U. S. 450, 1 Sup. Ct. 389, 27 L. Ed. 226; *Baldwin v. Starks*, 107 U. S. 465, 2 Sup. Ct. 473, 27 L. Ed. 526; *Sanford v. Sanford*, 139 U. S. 647, 11 Sup. Ct. 666, 35 L. Ed. 290; *Bishop of Nesqually v. Gibbon*, 158 U. S. 166, 15 Sup. Ct. 779, 39 L. Ed. 931; *Whitcomb v. White*, 214 U. S. 15, 16, 29 Sup. Ct. 599, 53 L. Ed. 889.

The bill will be dismissed. It is so ordered.

In re GELLER.

(District Court, D. New Jersey. August 25, 1914.)

1. **BANKRUPTCY (§ 297*)—JURISDICTION OF COURTS—TERRITORIAL LIMITATION.**
A bankruptcy court of one district cannot, by service of process outside of that district, obtain jurisdiction to order a nonresident, who is not a party to the proceedings, to deliver property to a trustee.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 413; Dec. Dig. § 297.*]
2. **BANKRUPTCY (§ 88*)—PARTIES TO PROCEEDINGS—WITNESSES.**
The appearance of a nonresident as a witness in bankruptcy proceedings, in obedience to a subpoena, does not make him a party to the proceedings.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 58, 98, 104, 109-112; Dec. Dig. § 88.*]
3. **BANKRUPTCY (§ 170*)—ATTORNEYS' FEES—RE-EXAMINATION BY COURT.**
Bankr. Act July 1, 1898, c. 541, § 60d, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3446), authorizing the re-examination by the bankruptcy court of fees paid by the bankrupt to an attorney in contemplation of bankruptcy, does not apply to fees paid to an attorney by assignees, under a general assignment made by the bankrupt prior to the bankruptcy proceedings.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 267, 271; Dec. Dig. § 170.*]

In the matter of Isadore Geller, bankrupt. On petition to review order of referee. Reversed.

Clifford L. Newman and David H. Bilder, both of Paterson, N. J., for trustee.

Henry Waldman, of New York City, for respondent Kadane.

HAIGHT, District Judge. On a petition presented by the trustee in bankruptcy, an order was made by the referee, to whom the above matter had been referred, directing Joseph C. Kadane, a resident of the state of New York, to show cause why he should not be directed to turn over to the trustee certain moneys of the bankrupt, which he had collected. A copy of the order to show cause and petition were served upon Kadane in the Southern district of New York. Upon the return of the order to show cause, Kadane appeared specially to challenge the jurisdiction of the court. His objections were overruled by the referee, and an order was made directing him to forthwith pay the money to the trustee, subject to any lien that he might have thereon for services as an attorney; the amount to be determined upon application to the referee.

[1] It is to review this order that the matter is now before the court. As grounds for reversal, it is urged that the referee had not obtained jurisdiction over Kadane, because the order to show cause was not served upon him within the territorial limits of this district, and that the referee had no authority to make the order, in a summary proceeding, because Kadane was an adverse claimant. The view which I entertain makes it unnecessary to consider the second of these grounds. It has been expressly decided, in the following

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cases, that courts of bankruptcy have no jurisdiction to compel, by summary order, one who resides in another district, and who is served with process outside of the territorial limits of the court making the order, and who has not otherwise become a party to the proceedings, to deliver property in his possession, belonging to the bankrupt, to the trustee in bankruptcy. *In re Waukesha Water Co.*, 116 Fed. 1009 (D. C. E. D. Wis.); *In re Alphin & Lake Cotton Co.*, 131 Fed. 824 (D. C. E. D. Ark.); *Staunton v. Wooden*, 179 Fed. 61, 102 C. C. A. 355 (C. C. A., 9th Cir.); *In re Rathfon Bros.*, 200 Fed. 108 (D. C. W. D. Mich.); *In re Farrell (In re Heintz)* 201 Fed. 338, 119 C. C. A. 576 (C. C. A., 6th Cir.). The question presented in each of these cases was identical with that now under consideration. Whatever doubt may have existed as to the inference to be drawn from the decision of the Supreme Court in *Babbitt v. Dutcher*, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969, has been, I think, dispelled by the decision of the same court in *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, at page 311, 32 Sup. Ct. 96, at page 101 (56 L. Ed. 208). In the latter case Mr. Justice Day said:

"In the opinion in *Babbitt v. Dutcher* it was pointed out by Mr. Chief Justice Fuller, speaking for the court, that the jurisdiction of the bankruptcy courts, under the act of 1898, was limited to their respective territorial limits, and was in substance the same as that provided by the act of 1867 [Act March 2, 1867, c. 176, 14 Stat. 517], giving such courts jurisdiction in their respective districts in matters of proceedings in bankruptcy. The necessary deduction from these cases is to deny to the District Courts jurisdiction such as was sought to be asserted in this case by the issuing of an injunction against one not a party to the proceedings, and which undertook to have effect in the distant jurisdiction outside the territorial jurisdiction of the District Court. Under the act of 1898, as expounded in the two cases in 216 U. S., *supra* (referring to *Babbitt v. Dutcher*, and *In re Elkus*), the injunction might have been sought in the District Court of the United States, in the District of Missouri, where personal service could have been made upon the *Beekman Lumber Company*."

In that case the District Court, where the bankruptcy proceedings were pending, attempted to enjoin the prosecution by the *Beekman Lumber Company*, a creditor of the bankrupt, of a suit in a state court located outside of the territorial limits of that District Court. The injunction was made *ex parte*, and the question of service of process outside of the territorial limits of the court was not directly before the court. Mr. Justice Day, however, said (222 U. S. 311, 32 Sup. Ct. 101, 56 L. Ed. 208):

"Such proceedings could only have binding force upon the lumber company if jurisdiction were obtained over it by proceedings in a court having jurisdiction, and upon service of process upon such creditor."

These remarks, taken in connection with those above quoted, demonstrate conclusively, I think, that it was the opinion of the Supreme Court that even had process been, in the first instance, served upon the lumber company outside of the territorial jurisdiction of the court making the order, the order would have been invalid. This necessarily negatives the idea that jurisdiction was obtained in this case by a service of process outside of the territorial limits of this court.

As respects jurisdiction, there is no difference in principle between

enjoining one from prosecuting a suit which would interfere with the due administration of a bankrupt's estate, and ordering one to turn over to a trustee, for administration under the Bankruptcy Law, property of a bankrupt which is held by the former. If a bankruptcy court of one district cannot, by service of process outside of that district, obtain jurisdiction to enjoin a nonresident of that district from prosecuting a suit, it certainly cannot, by the same means, obtain jurisdiction to order a nonresident to deliver property. As opposed to this view, I am referred to the following extract from the opinion of the Circuit Court of Appeals of the Eighth Circuit in *Thomas v. Woods*, 173 Fed. 585, 97 C. C. A. 535, 26 L. R. A. (N. S.) 1180, 19 Ann. Cas. 1080, viz.:

"Upon the filing of a petition in bankruptcy, all property held by or for the bankrupt is brought within the custody of the court of bankruptcy, and, upon adjudication, that court is vested with jurisdiction to determine all liens and interests affecting it. This jurisdiction is coextensive with the United States."

The cases cited in support of this statement are: *In re Wood & Henderson*, 210 U. S. 246, 28 Sup. Ct. 621, 52 L. Ed. 1046; *In re Granite City Bank*, 137 Fed. 818, 70 C. C. A. 316; *In re Muncie Pulp Co.*, 151 Fed. 732, 81 C. C. A. 116; *Guardian Trust Co. v. Kansas City S. Railway Co.*, 171 Fed. 43, 96 C. C. A. 285, 28 L. R. A. (N. S.) 620; *Dempster v. Waters-Pierce Oil Co. (In re Dempster)* 172 Fed. 353, 97 C. C. A. 51. I do not think that these remarks warrant the construction contended for. The question presented in *Thomas v. Woods* was not one of jurisdiction over the person; the contention was that the district court of Kansas had no jurisdiction to make an order respecting property situated in another district. *In re Wood & Henderson* dealt only with the effect of 60d of the Bankruptcy Act, which provides for a re-examination of fees paid to attorneys in contemplation of bankruptcy proceedings. The scope of the decision is limited to cases coming strictly within the provisions of that section of the act. *Acme Harvester Co. v. Beekman Lumber Co.*, *supra*. The question presented for determination in *Re Granite City Bank* related to the power of the court to make an order regarding the sale, free from liens, of property of the bankrupt located in another district. The report of *In re Muncie Pulp Co.* does not indicate that the jurisdiction of the court was questioned, or whether there had been service of process within the territorial limits of that court. The order directed that a suit be stayed. The case is not an authority, if the parties against whom the order was made were not served with process within the district. *Acme Harvester Co. v. Beekman Lumber Co.*, *supra*. *In re Dempster* held that there was no ancillary jurisdiction in courts of bankruptcy. This has been authoritatively overruled. No question as to jurisdiction of courts of bankruptcy was before the court in *Guardian Trust Co. v. Kansas City S. Railway Co.* It was held in *Robertson v. Howard*, 229 U. S. 254, 261, 33 Sup. Ct. 854, 856 (57 L. Ed. 1174), that a bankruptcy court, in which the bankruptcy proceedings were pending, could order a sale by a trustee of property of the bankrupt situated outside of the territorial limits of the court. Chief Justice White said:

"The legal title to the certificates (which were treated as real estate in another district) being in the trustee, and he being within the jurisdiction of the court and subject to its orders, that tribunal could lawfully exert its powers over him, without regard to where the land was situated."

This is in effect, I think, what was intended to be expressed in *Thomas v. Woods*. The distinction between that class of cases and the one to which the case at bar belongs is vital; one relates to jurisdiction over the subject-matter, and the other to jurisdiction over the person. The court may have jurisdiction over the subject-matter, but be powerless to act because it has not obtained jurisdiction over the person. As was said in *Toland v. Sprague*, 12 Pet. 328, 9 L. Ed. 1093 (speaking of the jurisdiction of the Circuit Court):

"Whatever may be the extent of their jurisdiction over the subject-matter of suits, in respect to persons and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any Circuit Court to have run into any state of the Union; it has not done so."

The same may be said with equal force of the courts of bankruptcy. Congress has limited their jurisdiction to "within their respective territorial limits." I think it entirely clear, therefore, both upon reason and authority, that jurisdiction to make the order in question was not obtained by service of process outside of the territorial limits of this court. This does not mean that a bankruptcy court is without jurisdiction in this case, because, if summary proceedings are proper, ancillary proceedings may be instituted in a bankruptcy court of the jurisdiction in which the respondent resides. *Babbitt v. Dutcher*, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; *In re Elkus*, 216 U. S. 115, 30 Sup. Ct. 377, 54 L. Ed. 407; Act June 25, 1910, c. 412, 36 Stat. 838 (U. S. Comp. St. Supp. 1911, p. 1491).

[2] It is urged that, if the court had not obtained jurisdiction over Mr. Kadane by service of the rule to show cause in the manner above stated, it had, nevertheless, obtained jurisdiction, because he appeared at an examination under section 21a of the Bankruptcy Act, and was there represented by an attorney. The record discloses that he was subpoenaed as a witness and testified as such. The minutes of the meeting at which he was examined, reciting the appearances, contains the following: "Mr. Henry Waldman representing witness, Mr. Kadane." It also appears that Mr. Waldman objected to a question asked the witness. This took place before the order to show cause was made. Under the circumstances, there was not such a general appearance as under the general rule would give the court jurisdiction over his person. He was in no sense then a party to the proceedings; he was merely a witness.

[3] It is also contended that the referee's order may be sustained on the authority of *In re Wood & Henderson*, supra, upon the theory that part of the money which the order directs Kadane to turn over to the trustee is held by him for alleged attorney's fees. The money was not paid to Kadane by the bankrupt "in contemplation of the filing of the petition by or against him * * * for services to be rendered." The money was paid to him by insurance companies, by virtue of an assignment made by the bankrupt to two

of his creditors for the benefit of all his creditors. Kadane was first employed by the assignees and conducted the negotiations and proceedings which brought about the collection of the money. The fact that it might have occurred to the bankrupt, when he made the assignment, that proceedings in bankruptcy might thereafter be instituted either by or against him, and that the attorney to whom the collection of the moneys was intrusted might deduct his fees therefrom, coupled with the fact that he afterwards attempted to do so, cannot be considered as a payment in contemplation of the filing of a petition in bankruptcy, such as is within the purview of section 60d. *Tripp v. Mitschrich* (C. C. A.) 211 Fed. 424. In addition, the referee did not presume to act under section 60d. He made no attempt to re-examine the transaction and fix a reasonable fee, but he ordered the respondent to turn over all moneys, subject to any lien for services, to be thereafter determined. If he was acting under section 60d, he was required to fix the fee, and then the trustee could institute appropriate proceedings to collect the excess, if any. In *re Wood & Henderson*, supra.

My conclusion, therefore, is that the referee was without power to make the order complained of, and it will accordingly be reversed.

STATE OF MISSOURI *ex rel.* BARKER, Atty. Gen., *v.* CHICAGO & A.
R. CO. SAME *v.* KANSAS CITY SOUTHERN RY. CO. SAME *v.*
CHICAGO, M. & ST. P. RY. CO.

(District Court, W. D. Missouri, W. D.)

Nos. 4181, 4188, 4190.

1. COURTS (§ 282*)—FEDERAL COURTS—JURISDICTION—FEDERAL QUESTION.

Where pending litigation to determine the validity of the Missouri maximum freight rate law (Laws 1905, p. 102, as amended by Laws 1907, p. 171) and the Missouri two-cent passenger rate law (Laws 1907, p. 170), defendant railroad companies continued to charge the pre-existing higher rates, and after the laws had been sustained by the United States Supreme Court the state instituted suits against the railroad companies to recover the excess freight rates so charged during the interim for the benefit of the shippers who had been overcharged, such suits did not involve a federal question, so as to confer federal jurisdiction, on the theory that because the suits were based on the statute there was necessarily a claim involved that such statutes are not violative of the federal Constitution.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 820-824; Dec. Dig. § 282.*]

2. REMOVAL OF CAUSES (§§ 32, 52*)—GROUNDS—DIVERSITY OF CITIZENSHIP—SEPARABLE CONTROVERSY.

Where, after the sustaining of the Missouri maximum freight rate law (Laws 1905, p. 102, as amended by Laws 1907, p. 171) and the two-cent passenger rate law (Laws 1907, p. 170) by the United States Supreme Court, the state in its sovereign capacity instituted suits against certain railroad companies to recover overcharges by the maintenance of the pre-existing rates in the interim, for the benefit of shippers who had been overcharged, there was no such diversity of citizenship or separable con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

troversy as justified a removal of the actions to the federal court, especially under a petition failing to name the parties for whom the action was brought, or to show their diverse citizenship, or that their claims were of the jurisdictional amount.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 75, 102, 103, 105; Dec. Dig. §§ 32, 52.*]

3. REMOVAL OF CAUSES (§ 49*)—SEPARABLE CONTROVERSY—FRAUD.

Where a plaintiff elects to declare a cause of action sued on to be joint, defendant cannot compel plaintiff to make it separable in order to confer federal jurisdiction, unless there has been fraud in the joinder in order to defeat federal jurisdiction or confer unwarranted jurisdiction on that court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 95-99; Dec. Dig. § 49.*]

Actions by the State of Missouri, on the relation of John T. Barker, her Attorney General, against the Chicago & Alton Railroad Company, against the Kansas City Southern Railway Company, and against the Chicago, Milwaukee & St. Paul Railway Company. On pleas to the jurisdiction, and motions to remand to the state court. Sustained, and causes remanded.

John T. Barker, Atty. Gen., of Jefferson City, Mo., William M. Fitch, Asst. Atty. Gen., of Jefferson City, Mo., and James P. Gilmore, of Tulsa, Okl., for relator.

Scarritt, Scarritt, Jones & Miller, of Kansas City, Mo., for defendant Chicago & A. R. Co.

Lathrop, Morrow, Fox & Moore, of Kansas City, Mo., for defendant Kansas City Southern Ry. Co.

Fred S. Hudson, of Chillicothe, Mo., for defendant Chicago, M. & St. P. Ry. Co.

VAN VALKENBURGH, District Judge. In 1905 the Legislature of the state of Missouri passed an act known as the "Maximum Freight Rate Law" (Laws 1905, p. 102), and in 1907 amended said act (Laws 1907, p. 171) and passed what is commonly known as the "Two-Cent Passenger Rate Law" (Laws 1907, p. 170); said laws providing for a reduced freight and passenger rate, respectively, in the state of Missouri. The defendant railroads sued out writs of injunction enjoining the operation and enforcement of these laws, which injunctions were made permanent by decree on final hearing. Meantime the railroads continued to charge and receive the rate exacted before the passage of said laws. Upon appeals to the Supreme Court of the United States, that court ordered the injunctions dissolved and the bills dismissed without prejudice, holding upon the record that said rate laws were valid and in effect. The state, at the relation of the Attorney General, brings suits to recover the excess charged and paid while the injunctions were in force. The defendant railroads have removed the cases to this court, and plaintiff has filed pleas to the jurisdiction and motions to remand.

In No. 4188 the Kansas City Southern Railway Company is a Missouri corporation, and the removal is based solely upon the al-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

leged existence of a federal question. In the other two cases, in addition to this point, defendants rely upon diversity of citizenship and separable controversies. The briefs of the immediate parties have been reinforced, on behalf of defendants, by that of the Atchison, Topeka & Santa Fé Railway Company, which is interested in a similar controversy arising in the Eastern judicial district of this state.

[1] The briefs have been read and attentively considered. I am clearly of opinion that no federal question is involved. The suits are not brought on the bond, nor for any damage accruing from the injunction as such. They seek merely to recover alleged overpayments of rates and charges made under practical duress, and in violation of the terms of what has now been adjudged to be valid state regulation. Litigation of the same or similar questions, or of rights growing out of adjudications in federal courts, is not confined to federal jurisdictions. In this connection it has been suggested that "pleading by plaintiff of the maximum rate statutes of Missouri and his reliance thereon is a claim of the validity of said statutes, and the pleading thereof invokes the sanction of the fifth and fourteenth amendments of the Constitution of the United States," and that consequently there inheres in the pleading, by necessary implication, claim of the validity of the statute; that this means that said pleaded statutes do not deprive one of his or its property without due process of law, and hence do not violate, but on the contrary invoke the sanction and protection of, the fifth and fourteenth amendments to the Constitution of the United States. If this be true, any suit founded upon a state statute necessarily involves a federal question by implication, and all such litigation would be automatically, upon suggestion, transferred from state to federal jurisdictions. The statement of such a necessarily far-reaching result reveals the infirmity of this contention.

[2] Nor do I think that either diversity of citizenship or separable controversy, within the purview of the removal statute, is disclosed. We must take the case as made by plaintiff in its pleading; but one party plaintiff is named, and there can be no question, under the decisions, that that is the state of Missouri, and not the Attorney General. The statute authorizes the Attorney General to prosecute actions on behalf of the state. This pleading is in the usual form for that purpose; a form which has by analogy received the approval of the Supreme Court of the United States. The petition claims and seeks to recover for the state a large sum of money alleged to have been paid out for excess charges; so that the state appears as a real and substantial party to the controversy. In addition to this, a recovery is sought for the benefit of any shipper who desires to come in and avail himself of the recovery. If the state has the right to recover for the shippers in this way, it is no less the sole party to the suit, whether as trustee or otherwise; and in neither capacity does diversity of citizenship exist. Furthermore, no parties are named as plaintiffs, and no such shippers become parties until they present their claims. Consequently, as the case now stands, for ju-

risdictional purposes, there is but one party plaintiff, and that is the state of Missouri. But even though we concede the contention that other parties are contemplated, and may be treated as existing, they are nowhere named. The petition for removal does not name them, nor their residence, nor show that their claims are above the jurisdictional amount. Therefore no such a case of diversity of citizenship as would confer jurisdiction upon this court is disclosed, and the plea must fail on this ground.

[3] Again, if it be conceded that such parties are, in effect, before the court, and that the controversies between them and the defendants would ordinarily be separable, nevertheless the removal statute contemplates separable controversies in case of two or more defendants. Where parties having separable interests voluntarily join as plaintiffs, the case is not otherwise than it would be if they were compelled to unite. They may exercise their election to declare the cause of action joint; and while the joinder may be defeated in a trial of the cause, the misjoinder, if it be one, cannot confer the right of removal. Such seems to be the universal holding. The Supreme Court has repeatedly announced that, from the standpoint of removal, a defendant cannot compel a plaintiff to make separate a cause of action which he has elected to declare as joint, unless there has been fraud in the joinder in order to defeat the jurisdiction of the federal court, or to confer unwarranted jurisdiction upon that court. In this case no fraud is alleged nor specifically set out, as required. On the face of things no fraud can be inferred. By joining resident shippers as plaintiffs, it could not have been intended to defeat the jurisdiction of the federal court, because that is the only act that could possibly confer that jurisdiction, the state itself being immune. On the other hand, the state has not sought to confer jurisdiction upon this court by fraudulent means, for it is expressly denying the jurisdiction of this court. So that no question of fraud is presented.

It may be that the court to which such objections are properly addressed will decide that any such joinder is improper, that the state cannot recover for the individual shippers, and that no recovery can be had except upon the injunction bond; but these are considerations that concern the merits, and not the question of removability. Such matters not being present for determination, I express no opinion whatever concerning them.

It follows that the pleas and motions must be sustained, and the cases remanded to their several state jurisdictions. It is so ordered.

SCHUEDE v. ZENITH S. S. CO.

(District Court, N. D. Ohio, E. D. June 3, 1914.)

No. 8694.

1. ADMIRALTY (§ 1*)—JURISDICTION—NATURE AND SCOPE.

In view of article 3, § 2, of the Constitution, extending the power of the federal courts "to all cases of admiralty and maritime jurisdiction," which practically adopted the general law of admiralty as the law of this country, such general law in force when the Constitution was adopted, and not modified by act of Congress, has the same force and is to be treated with the same consideration as must be given to statutes on the subject, and rights given thereby cannot be modified by state enactment.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 1-17; Dec. Dig. § 1.*]

2. ADMIRALTY (§ 2*)—JURISDICTION—SAVING OF COMMON-LAW REMEDY.

Judicial Code (Act March 3, 1911, c. 231) § 24, subsec. 3, and section 256, subsec. 3, 36 Stat. 1091, 1160 (U. S. Comp. St. Supp. 1911, pp. 136, 234), which saves to suitors against the exclusive jurisdiction of admiralty "in all cases the right of a common-law remedy when the common law is competent to give it," does not give a suitor who has a right of action growing out of a maritime contract the right to go into a law court to find a new remedy; but he may employ a common-law forum, if one is found competent to work out the rights involved in his contract.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 18-28; Dec. Dig. § 2.*]

3. MASTER AND SERVANT (§ 250¼, New, vol. 15 Key-No. Series)—PERSONAL INJURIES—RIGHT OF ACTION—INJURIES TO SEAMAN—WHAT LAW GOVERNS.

The provisions of the law maritime as to the relation of a seaman to his employment are part of the substance and obligations thereof, which cannot be modified by state law; and in case of an injury to a seaman in the course of his employment the maritime law determines his rights in an action to recover therefor, to the exclusion of the law of the state where the injury occurred and the suit is brought, whether it is brought in a state or in a federal court.

At Law. Action by George Schuede against the Zenith Steamship Company, removed from state court. On motion to strike out parts of answer. Denied.

Newcomb, Newcomb & Chapman and Frank M. Cobb, all of Cleveland, Ohio, and W. J. Mahon, of New York City, for plaintiff.

Goulder, Day, White & Garry, of Cleveland, Ohio, for defendant.

KILLITS, District Judge. The plaintiff, at the time of the injury of which he complains, was a wheelsman upon the Saxona, a vessel then enrolled and licensed to navigate the Great Lakes, and owned by the defendant, a Minnesota corporation. In the petition the plaintiff refers his injury to defective rigging and to an improvident order made while the vessel was moored to a dock in the river at Cleveland, in waters within the jurisdiction of maritime law. The Genesee Chief, 12 How. 443, 13 L. Ed. 1058.

This action was begun at law in the state court, and was removed to this court because of diversity of citizenship. The proposition before the court requires the same determination as if the case were

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

still in the state court. Defendant pleads that plaintiff's employment, in the course of which he was injured, was under a maritime contract, and that his rights of recovery in such an action as this are determinable by the incidents of such a contract. Averments of the answer in this behalf are made the subject of a motion to strike out, and thereby the question is raised whether in the trial of this action the defendant may demand the application of the maritime law respecting the rights, duties, and liabilities of master to seaman and the relation of fellow servant and the force to be given to the principle of contributory negligence, or whether the action is to be controlled by the Ohio Employers' Liability Act (section 6244 et seq., General Code). Involved in the questions of construction are the provisions of paragraphs 3, respectively, of sections 24 and 256 of the Judicial Code of the United States (Act March 3, 1911, section 711, R. S. U. S. [U. S. Comp. St. 1901, p. 577]), for a saving to suitors against the exclusive jurisdiction of admiralty "in all cases the right of a common-law remedy, when the common law is competent to give it."

It is clear that plaintiff could have proceeded in admiralty for an injury arising in the course of such employment either in rem or in personam, in which case his rights would be determinable only by the principles of the maritime law; and it seems, therefore, to be the contention of his counsel that, because of the language quoted above from the Judicial Code, he has the option of entering the state court and at law there work out his rights by the law of the forum, enjoying whatever advantages he believes the state law offers to one complaining of injuries received in his master's service. It must be conceded that the plaintiff's employment was under a maritime contract. *Gabrielson v. Waydell*, 135 N. Y. 1, 31 N. E. 969, 17 L. R. A. 228, 31 Am. St. Rep. 793; *Cornell Steamboat Co. v. Fallon*, 179 Fed. 293, 102 C. C. A. 345. Both the general admiralty law and its statutory modifications treat, and have always treated, those engaged as seamen with particular favor, and the law in admiralty defines with particularity the reciprocal duties and responsibilities of owner and crew, master and seaman. *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760.

[1] We agree with counsel for defendant that the principles of the general maritime law in force in the United States and not the subject of specific enactment by Congress are to be treated as if actually on the statute books. This must be construed to be the effect of section 2, article 3, of the Constitution, extending the power of the federal courts "to all cases of admiralty and maritime jurisdiction," thus practically adopting the general law of admiralty as the law of this country, and such general law in force when the Constitution was adopted and not modified by act of Congress has the same force and is to be treated with the same consideration which must be given to statutes upon the subject. *Murray v. Chicago & Northwestern Railroad Co.* (C. C.) 62 Fed. 24; *The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654. A state may not pass any act which abridges or enlarges the responsibilities or duties of maritime law. Rights in

admiralty cannot be affected by state enactment. *The Moses Taylor*, 4 Wall. 411, 18 L. Ed. 337; *The Hine v. Trevor*, 4 Wall. 555, 18 L. Ed. 451; *The Lottawanna*, supra; *Butler v. Boston Steamship Co.*, 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017; *Workman v. New York*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314.

[2] But for the exception in the act of 1879 (section 711, R. S.), carried into the present Judicial Code, allowing suitors recourse to a competent common-law remedy, it would seem that the citations above, asserting the controlling force of general and statutory maritime law, indicate the necessity to overrule the motion before the court. To advance that saving clause as a reason why the plaintiff may escape what he may assume to be the disadvantages incident to his maritime contract and seek the advantages of the state law in his suit in a state court upon such a contract is, in our judgment, to misapprehend what is meant in this provision by the word "remedy." It must be observed, as suggested by Justice Field, in *The Moses Taylor*, supra, quoted approvingly in *The Glide*, 167 U. S. 606, 617, 17 Sup. Ct. 930, 42 L. Ed. 296, that what is saved to a suitor "is not a remedy in the common-law courts, but a common-law remedy"; that is, as we paraphrase it, the suitor who has a right of action growing out of a maritime contract may not go into a law court to find a new remedy, but he may employ a common-law forum, if one is found competent to work out the rights involved in his contract.

[3] In the case before us, the maritime law is not so favorable to the plaintiff touching the range of defense to his action as would be the Ohio law; but those defenses which he seeks to avoid are incidents to and, as against him, liabilities of his contract. They help define his contract of employment, and hence, although employable against him in defense, are no part of the remedy, as that term is used in the saving clause of the Code. The clause "leaves open the common-law jurisdiction of the state courts over torts committed at sea" (*The Hamilton*, 207 U. S. 398-404, 28 Sup. Ct. 133, 52 L. Ed. 264), and, in our judgment, does nothing else. The extent of liability for such a tort to be enforced in a common-law jurisdiction is to be restrained by the law which created the relation in which it was committed. This is the position taken by the court in *Gabrielson v. Waydell*, supra. It is precisely the distinction drawn in cases dealing with conflicts between the *lex loci contractus* and the *lex fori*, well illustrated in the case of *Heaton v. Eldridge*, 56 Ohio St. 87, 46 N. E. 638, 36 L. R. A. 817, 60 Am. St. Rep. 737, enforcing the principle that:

"Contracts receive their sanction from the law of the place where they are executed and to be performed, and their interpretation is controlled by that law; but the remedy upon the contract will be administered according to the law of the place where the remedy is sought."

The Supreme Court of Ohio held that the statute of frauds may, in an action in this state, be pleaded against the enforcement of a contract made in Pennsylvania, where no such statute was in force against the contract, because the defense did not affect the obligations under the contract, but their enforcement only. In *Davis v.*

Morton, 5 Bush (Ky.) 160, 96 Am. Dec. 345, set-off against the maker was allowed against the remote indorsers of a note made in Tennessee, but sued on in Kentucky, because the Kentucky law of set-off, in the court's judgment, belonged rather to the remedy than to the substance. In *Downer v. Chesebrough*, 36 Conn. 39, 4 Am. Rep. 29, it was held that the *lex fori* controlled the remedy upon a contract, but the *lex loci contractus* governed its obligations.

As we look at it, the provisions of the law maritime as to the relation of a seaman to his employment are part of the substance and obligations thereof, which cannot be modified by state law, even through recourse to the saving clause of the Code. The question before the court has apparently never been specifically passed upon by a court of higher jurisdiction than ours, so far as we know; but, so far as the force of the expression of the Judicial Code granting this saving to suitors has been discussed at all by the Supreme Court of the United States, it has been consistent entirely with the position which we take, as is seen by citation above from *The Hamilton* and *The Moses Taylor*. An earlier case is that of *Steamboat Co. v. Chase*, 16 Wall. 532, 534, 21 L. Ed. 369, in which it was urged that the saving of a right to enter the state courts was not applicable to a case where the right of action which might have been enforced in admiralty was not created by a state statute enacted subsequent to the passage of the Judiciary Act. The court says:

"Questions of the kind (such as we have before us here) cannot arise in suits in rem to enforce maritime liens, as the common law is not competent to give such a remedy, and the jurisdiction of the admiralty courts in such cases is exclusive. Such a question can only arise in personal suits, where the remedy, in the two jurisdictions, *is without any substantial difference*. Examined carefully, it is evident that Congress intended by that provision to allow the party to seek redress in the admiralty if he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy. Properly construed, a party under that provision may proceed in rem in the admiralty if a maritime lien arises, or he may bring a suit in personam in the same jurisdiction or he may elect not to go into admiralty at all, and may resort to his common-law remedy in the state courts, or in the Circuit Courts of the United States if he can make proper parties to give the Circuit Court jurisdiction of his case."

In *The Belfast*, 7 Wall. 624, 644, 19 L. Ed. 266, Justice Clifford uses this language:

"Undoubtedly most common-law remedies in cases of contract and tort, as given in common-law courts, and suits in personam in the admiralty courts, *bear a strong resemblance to each other*, and it is not, perhaps, inaccurate to regard the two jurisdictions * * * *as concurrent*."

Again, the same Justice, in *Steamboat v. Chase*, in the opinion from which we have just quoted, calling attention to the fact that "different systems of pleading and modes of proceeding and different rules of evidence prevail in the two jurisdictions," says that the "state Legislatures may regulate the practice, proceedings, and rules of evidence in their own courts," which, when the action is at law in a federal court, shall, as far as applicable, become rules of decision.

It seems impossible to resist the conclusion that these justices are conceding nothing more than the right of a suitor to enter a state

court at law to have there his demands heard and determined according to the practice, procedure, and rules of evidence in that jurisdiction, and for no other purpose, and that they do not construe the provision as giving the suitor, with that option, an enjoyment of a change in the character and measure of his demands, and of the responsibilities and defenses of his master, under the contract underlying the action, a change due to the fact that between admiralty and at law in the state jurisdiction there is a diversity of incidents attaching to employment. Otherwise, Justice Clifford could not have said, accurately, that the remedies in the two courts are "without any substantial difference," or that they have such a "strong resemblance to each other" that they may fairly be regarded "as concurrent," nor would Justice Field have distinguished between "a remedy in the common law" and "a common-law remedy."

In construing a statute, it is the duty of the court to avoid, if it is reasonably possible, that interpretation which works out inequality, inconvenience, or absurdity. A construction involving consistency, equality, and convenience of those affected, and consonance with the spirit of the law generally, is preferred of a statute, unless the language is plainly an obstacle thereto.

The plaintiff proceeds on the theory that the law of Ohio applies against the Minnesota corporation, and the Ohio jurisdiction attaches in the present case, because the accident happened in an Ohio tributary to the Lakes. There may be some doubt whether it is not the law of the Saxona's home port and the jurisdiction of Minnesota which control, if there is no federal law applying (*Thompson Towing & Wrecking Association v. McGregor*, 207 Fed. 209, 124 C. C. A. 479); but, assuming that plaintiff's contention is right, then two consequences follow his construction of the saving clauses in sections 24 and 256 of the Judicial Code, both provocative of inconvenience, inequality, inconsistency and almost absurdity:

First. The defendant, for torts on contract committed by it of precisely the same character, and upon servants of precisely the same class, would be subject to as many varieties of responsibility, and would be compelled to vary its defenses as the laws pertaining to the incidents of service differ in the several places of accident. There are eight state jurisdictions bordering upon the waters in which the Saxona plies, and it is conceivable that eight seamen of the same class each might meet in his employment with an injury substantially of the same class in a port of each of such jurisdictions, each claimant enjoying a common right of recovery under the maritime law or a different right under the local law.

Second. A seaman would enjoy the option of a uniform contractual right under the law maritime, or to vary under local laws the incidents of the contract as he proceeds from port to port and as he had occasion to invoke such rights. In Buffalo his contract would be one thing; in Cleveland, if the Ohio law differs from that of New York, it would have another phase; to change its color again in Detroit, Milwaukee, Duluth, Chicago, and Michigan City, if the laws of their several jurisdictions, respectively, offered peculiarities.

These conditions, with all their inconveniences and inequalities and unnecessary burdens, are not compelled by the language of the saving clause in question, and should be avoided in construing that provision.

It seems reasonable to urge an analogy between the law maritime respecting the incidents of a seaman's employment as of general and exclusive application when it comes to a determination of the employer's responsibility for an injury in line of duty, and the federal law relating to the liability of carriers by railroad to their employes (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]). Before the act was passed, an action by an injured employe was governed by the law of the jurisdiction in which the cause thereof arose. Congress had not legislated upon a subject within its power; hence the states were privileged to apply their own laws. Now the federal law fixing the limits and controlling the rights and liabilities of the parties must be applied to the exclusion of the local law, although a state forum may be entered for a remedy. *Erie Railroad Co. v. Welsh*, 89 Ohio St. —, 105 N. E. 189.

In the case of a cause of action for an injury incurred in the course of a maritime employment, to avoid the manifest inconveniences and inequalities involved in plaintiff's interpretation of the saving clause in question, it is not only reasonable, but well within the language of the law, to require whichever court, state or federal, is entered to work out a remedy, to enforce the general and uniform law maritime under which the contract of employment was made.

We are not in conflict with the long line of cases cited and examined, dealing with deaths resulting from marine torts, and in which state laws are applied in proceedings in admiralty as well as in actions at law in state and federal courts. It is worthy of note that in all these cases, from one of the earliest (*Steamboat Co. v. Chase*, supra) to the latest (*The Hamilton*, supra, and *Thompson, etc., v. McGregor*, supra), the application of state laws is sustained, not because such laws can be utilized in all cases when a suitor prefers to enter a state court, but because, "where no remedy exists for an injury in the admiralty courts, the fact that such courts exist and exercise jurisdiction in other causes of action leaves the state courts as free to exercise jurisdiction in respect to an injury not cognizable in the admiralty as if the admiralty courts were unknown to the Constitution and had no existence in our jurisprudence" (*Steamboat Co. v. Chase*, supra). In admiralty no remedy exists for a death resulting from a marine tort. In *Cornell Steamboat Co. v. Fallon*, 179 Fed. 293, 102 C. C. A. 345, Circuit Court of Appeals, Second Circuit, a death case, action at law under the New York modification of Lord Campbell's Act, it was pointed out that decedent, a seaman injured in the service of his vessel, had he lived to sue either at law or in admiralty, would have had his rights determined by the law maritime affecting his contract of employment, whereas his administratrix was privileged to use the state law.

A careful reading of *Murray v. Pacific Coast Steamship Co.* (D. C.) 207 Fed. 688, District Court of the Western District of Washington,

discloses that, while the question now before this court there arose, it was not found necessary to decide it. Nor do we find *Stoll v. Pacific Coast S. S. Co.* (D. C.) 205 Fed. 169, decided by the same court, necessarily inconsistent with our position here.

Our conclusion is that the Ohio Employers' Liability Act, commonly known as the "Norris Act," is not applicable to a maritime contract of employment, and that the motion to strike out should be overruled.

THE A. A. RAVEN.

(District Court, E. D. Pennsylvania. August 22, 1914.)

No. 4.

COLLISION (§ 91*)—STEAM VESSELS MEETING—VIOLATION OF PASSING AGREEMENT.

A collision at night on the Delaware river between the government dredge Delaware which was slowly working upstream to the eastward of the center of the channel and the steamship Raven going down with the ebb tide in the center of the channel when signals for passing port to port were exchanged *held* due solely to the fault of the Raven which, instead of keeping her course or bearing to starboard, swung to port and struck the Delaware at a point some 300 feet to the east of the middle of the channel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 187-192; Dec. Dig. § 91.*]

In Admiralty. Suit for collision by the United States as owner of the steam dredge Delaware against the steamship A. A. Raven, O. J. Chalsen, master. Decree for libelant.

Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa., for libelant.

Harrington, Bigham & Englar, of New York City, and Conlen, Brinton & Acker, of Philadelphia, Pa., for respondent.

DICKINSON, District Judge. Special findings of facts and conclusions of law as reached in this case are filed herewith. The case turns wholly upon the facts. The legal conclusions are merely formal.

An outline statement of the main facts may be given in short compass. The dredge Delaware is used in the work of the deepening of the channel of the Delaware River and Bay. The steamship Raven plies between the port of Philadelphia and New Orleans. They collided on the night of December 5, 1913, about 9 o'clock p. m. The dredge was steaming up the river and the Raven down. The tide was on the ebb; the conditions of wind and weather quiet. Both vessels were within the limits of the Liston Range. They collided at a point near the eastern edge of the channel about opposite black channel buoy No. 3, below Liston Point, in the state of Delaware. The dredge at the time had her tanks full and was engaged in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

work of what is called "agitating." The thing done is stirring up the loose bottom sediment so that it may be carried downstream. Not considering tide effect the Delaware was moving at a speed of about 5 miles and the Raven 9 or 10 miles per hour. The flow of the tide was at the rate of about $2\frac{1}{2}$ miles. The Raven showed the usual and conventional lights. The Delaware showed, in addition, special lights unauthorized by law and condemned by the judgment of seafaring men. The only color of authority for their use is a regulation of the office of the United States engineers which had adopted the lights as a special signal to be displayed by dredges when at work. The main purpose was to indicate when other vessels should pass them on the one side or the other or indifferently on either side. The lights as displayed meant that the Delaware might be passed either to starboard or to port. They were therefore neutral, and the conditions as to lights the same as if none were shown. It would doubtless be better to show no such lights, because they would be strange and therefore confusing to any one uninformed as to their special meaning. The Raven, however, knew of their use and the purpose of it.

Thus stand the general facts upon which all witnesses are agreed. The controverted facts will appear in such discussion of the case of which there may be need.

It would be easy to take a view of this case upon which the mind could rest satisfied except that it involves convicting the navigators of one vessel or the other of almost unbelievable culpability. Starting with the proposition that the case as presented by the libelant rests upon a finding of the mismanagement of the Raven so gross as to defy credence in the accusation, the proctors for the respondent have built up a theory accounting for what occurred which is most enticing. One criticism to which it is open, however, is that it involves a finding of culpability on the part of the Delaware just as staggering. This criticism is anticipated and met by another theory which accounts for and explains the negligence of the navigators of the dredge. Another criticism to which the respondent's theories are exposed is that they are largely without evidential support, and where there is testimony to support them in part, the testimony is contradicted and the weight of the whole evidence is against the respondent.

The case for the libelant is clear and soon told. The ship channel is 600 feet wide. The range lights give a line up and down mid-channel. The dredge was proceeding in a course to the eastward of this line. The Raven was directly on the range. That the expected course of each vessel was to hold her course or bear to starboard is manifest. The Delaware bore to starboard and the Raven held her course. In passing, each vessel would have had the other on her port bow. The Raven blew her whistle, indicating this. The Delaware answered. The boats should then have passed port to port. The positions of the vessels presented no element of the danger of a collision and suggested none. The space separating the course of each was then about 300 feet. The Raven was following the middle line of the channel and the Delaware was east of this course,

and, having ported her helm, was bearing eastward. With the relative position of ship and dredge, such as described, the Raven put her helm hard to starboard. She had a fairly strong ebb tide under her, and was going over the ground at least 12 miles per hour. The water was smooth. Measured along the range line to a point opposite the point of collision she was 1,000 feet away. The lateral distance was then about 350 feet. She did not slow down, and under the conditions of speed, tide and water prevailing, she swung around on an arc which brought her bow in meeting with the port side of the dredge about 15 feet aft of her stem. With a few feet more the Raven would have cleared the dredge. Such were the movements of the Raven up to this time. In the meantime the Delaware was doing what she could to avoid the collision, which became imminent as soon as the Raven changed her course. The dredge sounded a danger signal, ordered her engines full speed astern to check her headway, and then put her helm hard to port and followed this with her starboard engine astern and port engine ahead. She had been going through the water at a speed of five miles per hour. At this speed with the tide against her, her helm ported, and her engines working as described, she would swing to starboard almost as on a pivot. The result of this movement of each vessel was to push them clear of each other. The tug Gettysburg, with two barges in tow, and several fathoms of line out to her nearest barge, was going up the river about 1,000 feet eastward of the point of collision. The Raven swung so far to the eastward that collision with this first barge was threatened, and indeed seemed imminent, but was avoided by the Raven being swung back into the channel.

This account of what happened is supported by the testimony of those aboard the dredge, the Gettysburg and her two barges, and is consistent with and corroborated by the position of the vessels at and after the collision. These facts compel a finding in favor of the libellant.

It would be interesting, but give undue length to this opinion, to discuss the theory of the collision advanced by the proctors for the respondent, and by which they account for it by throwing the whole blame upon the Delaware and fully exculpating the Raven. The findings of facts which we have felt obliged to reach dispose of the theory by leaving it without any facts for its support.

A decree in favor of the libellant, with an allowance to it of costs, may be prepared and submitted. We have not found the amount of damage, because we have been relieved of this duty by an arrangement between counsel.

In re BOOTH.

(District Court, N. D. New York. 1914.)

BANKRUPTCY (§ 336*)—CLAIMS—AMENDMENT—FILING.

Where an attorney for certain labor claimants acquiesced in a referee's return of the claims because the proof was insufficient, and had sought to cure the defects by filing his own affidavit, which the referee refused to receive, the defects being substantial and no steps to refile having been made until more than a year thereafter, the claimants' right then to amend and refile was barred.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 523, 524; Dec. Dig. § 336.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Raymond M. Booth. Petition to review a referee's order denying the petition of Patrick Burns for leave to file an amended proof of claim. Affirmed.

Del B. Salmon, of Schenectady, N. Y., for petitioner Burns.
G. V. Schenck, of Albany, N. Y., for trustee.

RAY, District Judge. On or about November 27, 1912, and after some preliminary talk and correspondence, the attorney for certain persons (some 35 or 36), including Burns, sent to the referee the labor claims of his clients, which were returned by the referee as informal, imperfect, not made out according to law, etc. The referee refused to file them. The attorney under date of December 9, 1912, then wrote:

"Your letter of November 29th and the suggestions therein made have been very carefully considered by me. I agree with you in every respect, however, I find that it will be almost impossible for me to have the proofs re-executed, and am sending you an affidavit made by myself supplying the data required, which I trust will be acceptable as supplemental to the proofs as originally executed.

"The facts, of course, are as stated in the proofs as read in conjunction with my affidavit, and it would seem to me that there can be no resulting inconvenience to trustee or creditors should my affidavit be sufficiently explicit to furnish all the data required. If satisfactory kindly advise me.

"Thanking you again for your many courtesies in the matter, I am."

The referee replied:

"While I should be glad to accept the affidavit submitted by you in the Booth matter as covering the objection to the thirty-six claims which I have heretofore returned to you for correction, it is quite impossible for me to do so. I am sorry to impose upon you the trouble of presenting all the claims in the required form, and I should be glad to suggest some short method by which the necessary result may be obtained; nevertheless the law demands that each claim shall be complete and perfect and in such plain and accurate terms as will enable any party in interest to determine for himself exactly what the claim represents and what its merits are. Accordingly I herewith return your affidavit."

The claims as made were retained by the attorney. Same were not amended or corrected or returned to the referee. The administration of the estate proceeded in due course, and these claimants,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

including Burns, were not represented and made no further move in the matter of proving their claims or having them allowed.

In May, 1914, more than a year after adjudication, the petitioner filed his petition and presented a so-called amended claim for Burns, making a test case, asking that such amendment be allowed and the amended claim filed. This, and I assume the others, are labor claims, and it is alleged they are preferred or entitled to priority under subdivision 4, § 64, of the Bankruptcy Act (July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]).

The referee denied the motion to file the so-called amended claim on the ground of laches, and that no proof of claim had been filed within the year allowed for filing claims. It seems to me, notwithstanding the equities involved, that the attorney for these claimants acquiesced in the return of the claims unfiled, and conceded that they were not entitled to be filed, and that the matter stood as though no proofs of claim at all had been sent to the referee until long after the time to present and file proofs of claim had expired, and that the referee was without power to grant the prayer of the petition of Burns to file the alleged amended claim in 1914.

Claims, to be entitled to filing, must contain certain averments, state certain facts, and, clearly, if a claim is refused filing and is returned and the claimant acquiesces in the return and permits the year to go by before filing either new or amended proofs, he cannot, in the absence of fraud, be allowed to come in and file thereafter. Here there was no fraud. The referee gave notice of the defects, refused to file and gave notice, refused to accept an affidavit as an amendment and gave notice of that action, and the creditor took no action until more than a year thereafter. It seems to me clear that the application came too late and that the order of the referee must be affirmed. The defects in the proofs of claim offered were not formal merely, but went to the validity of the claim itself. This was conceded, and the matter remained in this condition with no claim in behalf of Burns on file while meetings of creditors were being held, action taken, and a dividend declared.

Order affirmed.

CHICAGO, M. & ST. P. RY. CO. v. OLD COLONY TRUST CO. et al. †

(Circuit Court of Appeals, Eighth Circuit. July 29, 1914.)

No. 4103.

1. RAILROADS (§ 91*)—CROSSING OTHER RAILROADS—VALIDITY AND CONSTRUCTION OF AGREEMENT.

An electric railroad company, desiring to cross with its line the track and right of way of a steam railroad, entered into a contract with the railroad company by which it was given the right without charge to make a grade crossing at its own expense, with a provision that in case the railroad company should lower its grade, for which it had already made plans, the rights granted should cease and determine, but the electric company should be granted the right to build and maintain an overhead crossing at its own expense and in accordance with plans to be approved by the chief engineer of the railroad company. *Held*, that the contract did not terminate on the lowering of its tracks by the railroad company, but only the right of the electric company to a grade crossing; that it was not ultra vires on the part of the electric company, void as against public policy, nor inequitable, and bound the electric company to make the overhead crossing at its own expense.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 249-259; Dec. Dig. § 91.*]

2. RAILROADS (§ 89*)—NATURE OF RIGHT OF WAY—CROSSING AGREEMENTS—"INTEREST IN LAND"—"PRIVATE PROPERTY."

A railroad right of way is an interest in the land having the substantiality of a fee, and is private property, even to the public, in all else but an interest and benefit in its use. It cannot be appropriated by another in whole or in part, except on payment of compensation, and a contract by which one railroad company is given the right to build over the existing tracks and right of way of an older line is based on a valuable consideration.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 234-239; Dec. Dig. § 89.*]

3. RAILROADS (§ 89*)—CROSSING AGREEMENTS—VALIDITY UNDER IOWA STATUTES.

While Code Iowa 1897, § 2020, gives a railroad company the right to cross the line of another company, it does not give such right without the payment of compensation, and section 2063 expressly recognizes the right of the two companies to contract with respect to such crossing by providing that, if they cannot agree upon the terms, the existing road may apply to the District Court for relief.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 234-239; Dec. Dig. § 89.*]

4. RAILROADS (§ 90*)—CROSSING OTHER RAILROADS—COST OF CROSSINGS—EFFECT OF LOWERING GRADE.

An operating railroad, by changing its grades or putting in double tracks, does not thereby become the junior road in relation to another road, constructed after its own, whose tracks cross its right of way, so as to impose on it the burden of paying the cost of a new crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 240-248; Dec. Dig. § 90.*]

5. RAILROADS (§ 89*)—CROSSING AGREEMENTS—VALIDITY AND EFFECT.

A contract by which an electric railroad company was given the right to make a crossing over the right of way and tracks of an existing steam railroad was not one required to be recorded by the laws of Iowa, nor one which imposed any lien upon the property of the electric company, and where it was legal under the laws of the state, and in terms provided that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
216 F.—37 † Rehearing denied November 2, 1914.

It should be binding on the successors and assigns of the parties, it is valid as against subsequent mortgagees of such company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 234-239; Dec. Dig. § 89.*]

Appeal from the District Court of the United States for the Southern District of Iowa; Smith McPherson, Judge.

Suit in equity by the Old Colony Trust Company and others against the Ft. Dodge, Des Moines & Southern Railroad Company. From a decree entered on its petition of intervention, the Chicago, Milwaukee & St. Paul Railway Company appeals. Reversed.

J. C. Cook, of Cedar Rapids, Iowa (John N. Hughes and C. R. Sutherland, both of Cedar Rapids, Iowa, and H. H. Field, of Chicago, Ill., on the brief), for appellant.

James C. Davis, of Des Moines, Iowa (S. R. Dyer, of Boone, Iowa, and George E. Hise, of Des Moines, Iowa, on the brief), for appellees.

Before HOOK and CARLAND, Circuit Judges, and REED, District Judge.

CARLAND, Circuit Judge. On June 4, 1910, the Ft. Dodge, Des Moines & Southern Railroad Company, hereinafter called the Electric Company, was placed in the hands of receivers by the Circuit Court for the Southern District of Iowa, in actions commenced therein by the Old Colony Trust Company and the American Trust Company, to foreclose as trustees for bondholders two certain mortgages, dated June 24, 1907. Pending the receivership and on July 5, 1913, the Chicago, Milwaukee & St. Paul Railway Company, hereafter called the St. Paul Company, on leave granted, filed in the court below an intervening petition, asking relief as against the Electric Company, and its receivers, relative to a certain contract entered into between the St. Paul Company and the Electric Company, September 5, 1906. This petition was answered by the two Trust Companies and the receivers. The Trust Companies and the receivers also filed supplemental bills asking affirmative relief, with reference to the provisions of the contract. The petition came on for hearing, and the court, after considering the pleadings and proofs, denied the relief asked for by the St. Paul Company, and granted affirmative relief against it as hereinafter stated. The St. Paul Company appeals.

The facts which condition the rights of the parties as they appear from the record are substantially as follows:

In 1881 and 1882 the St. Paul Company built a line of railroad across the state of Iowa, extending its Illinois lines from a point at Savannah, Ill., across the Mississippi river, through Huxley, Iowa, to the city of Council Bluffs, on the western boundary of Iowa, and it is now operating said line of railroad, and at all times since 1882 has operated the same. Said line of road was a single-track road, with sharp curves and steep grades. The deed which conveyed the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

right of way to the St. Paul Company through the town of Huxley, after describing the right of way, contained the following language:

"Do hereby grant, bargain, sell and convey unto the said company, for all purposes connected with the construction, use and occupation of said railway, the right of way over and through the following described tract of land in Story county, Iowa, described as follows, to-wit: * * * To have and to hold the same in fee simple, absolute, unto the said company, its successors and assigns, forever."

In 1906, the Electric Company projected an extension of its railroad from Boone, by way of Des Moines Junction, to Des Moines, which would cross the St. Paul Railroad at Huxley. Negotiations were had between the St. Paul Company and the Electric Company with reference to the proposed crossing. Mr. Blake, who was general manager of the Electric Company, represented it in these negotiations. At the hearing in the court below Mr. Blake testified as follows:

"I cannot recall when I first knew that the Milwaukee Company contemplated lowering the grade of its tracks through Huxley, or when my attention was first called to the matter of changing the grade; but it was one of the requirements in the contract, and I knew of that fact prior to the time the contract was made. In the letter I stated that I had heard that they were likely to lower their tracks at that point some time, and in case they did so in a year or two or three or more, the contract should necessarily read that we build over them at that point. They required that provision in all the negotiations. They would not consider a contract otherwise. I did not understand how much they proposed lowering their grade or track. I do not remember having a conversation with Mr. Foster or Mr. Laas with regard to it. I did know that the lowering of the track was in contemplation, but did not know the exact amount of lowering."

As the result of the negotiations a contract was made and entered into by and between the St. Paul Company and the Electric Company, the material portions of which, so far as this controversy is concerned, are as follows:

"This agreement, made this 5th day of Sept., A. D. nineteen hundred and six, by and between the Chicago, Milwaukee & St. Paul Railway Company, hereinafter called the 'St. Paul Company,' and the Ft. Dodge, Des Moines & Southern Railway Company, hereinafter called the 'Electric Company,' witnesseth:

"That the St. Paul Company, in consideration of the sum of one dollar to it paid by the Electric Company, the receipt whereof is hereby acknowledged, and in further consideration of the performance by the Electric Company of all its covenants and agreements herein contained, hath granted and by these presents doth grant unto the Electric Company the right to construct, maintain and operate a single track electric railway over and across the right of way and main track of the St. Paul Company, at a point near the town of Huxley, in the state of Iowa, which said point is marked 'A' on the plat hereto attached, marked 'Exhibit A,' and made a part hereof.

"It is mutually understood and agreed that, whenever the St. Paul Company shall elect to lower the present grade of its track at the point of crossing aforesaid, all the rights hereby granted shall cease and determine; and the Electric Company, its successors, assigns, grantees and lessees, shall and will, upon receiving ten days' notice in writing so to do, at its own sole costs and expense, take up and remove said crossing; and the St. Paul Company shall and will thereupon grant to the Electric Company the right to construct (at such point as may be mutually agreed upon) and thereafter maintain and use a bridge or crossing structure, carrying the track of the Electric Company over and above the right of way and present main track of the St. Paul Company,

and over and above such other track or tracks as the St. Paul Company may hereafter elect to lay at the point of said crossing; it being understood and agreed that such bridge or crossing structure is to be erected and maintained at the sole expense of the Electric Company, and in strict accordance with such plans and specifications as the chief engineer of the St. Paul Company may prescribe. * * *

"Lastly. The grants, covenants, stipulations and agreements hereof shall extend to and be binding upon the respective successors and assigns of the parties hereto, whether so herein expressed or not."

The contract contained other provisions, and among those an agreement on the part of the Electric Company that, whenever its line of railroad should cease to be operated exclusively as an electric line for the carriage of passengers only, it would furnish and erect at its own expense, at its point of crossing, safety appliances commonly known as an interlocking and derailling system. There is no controversy over this part of the contract. The line did cease to be operated exclusively for the carriage of passengers, and the interlocking and derailling system was constructed as agreed. It became, however, useless by reason of the lowering of the tracks of the St. Paul Company as hereinafter stated. In 1902 a survey was made and a profile prepared by the St. Paul Company for an improvement of its entire line across the state of Iowa, by eliminating curves and reducing grades. The profile and plan provided for the lowering of the tracks of the St. Paul Company at Huxley to the extent of 13 or 14 feet. In 1912 the St. Paul Company was actively engaged in the prosecution of the improvement of its line in accordance with the profile and plan of 1902, and as the work progressed towards Huxley, and on June 13, 1912, it served on the receivers of the Electric Company a notice that it had elected to change the grade of its track at the point of crossing, and requesting them to take up and remove the tracks of the Electric Company constituting the crossing, as provided in the agreement of September 5, 1906. The receivers declined to comply with the notice, alleging that neither they, the bondholders, nor trustees were bound by the agreement. Whereupon the St. Paul Company intervened in the foreclosure suit by petition as above stated.

In its petition the St. Paul Company tendered the receivers a right of way for the construction of a temporary track west of the established crossing in order to detour the trains of the Electric Company and to provide for their operation without interruption during the lowering of the grade. A preliminary hearing of the questions in controversy was had on July 20, 1912, and in pursuance thereof the District Court made an order permitting the St. Paul Company to proceed with its work, upon the condition that it should, at its own expense, construct a temporary track and crossing of its railroad for the use of the Electric Company, according to a plan and conditions described. The order provided that all expenses incurred from time to time in providing temporary tracks, crossings, etc., should be paid by the St. Paul Company, and that the question of who should ultimately bear the whole or any portion of such expenses as between the parties under the agreement of September 5, 1906, or under the laws of Iowa, should thereafter be determined by the court. Pur-

suant to this order the St. Paul Company constructed a temporary detouring track and crossing on a right of way provided by it, and the trains of the Electric Company were diverted over the same, while the St. Paul Company proceeded with the lowering of its grade past the crossing. The traffic of the Electric Company was then shifted to the original location, crossing the cut on a wooden bridge, and the St. Paul Company proceeded with the excavation past the crossing of the temporary detour line, which work was pending at the time of the final hearing in the court below. The cut made by the St. Paul Company in lowering its track on its right of way at Huxley was about $131\frac{1}{2}$ feet, which would require an elevation of the Electric Company's road of about 12 feet, making a clearance of 23 feet. The estimated cost of the overhead bridge, consisting of a steel girder spanning two main tracks of the St. Paul Company and approaches, made of piling and earth fills, is \$14,000. The cost of the temporary detouring track constructed to provide for the traffic of the Electric Company during the work, was \$4,500. The traffic of both roads continued without interruption during the work.

After a final hearing on September 1, 1913, the court below entered a judgment and decree, holding that the rights granted in the agreement of September 5, 1906, ceased and determined on the election of the St. Paul Company to change its grade; that the agreement was void as against public policy, unfair, and inequitable; that, not having been recorded, it was not binding upon the mortgagees or bondholders, who, it was found, were purchasers for value, without notice, actual or constructive, of the agreement; that the St. Paul Company, in changing the grade of its railroad and constructing two main tracks at the point of crossing, was practically building a new railroad, and thereby became a junior line, so far as the crossing was concerned; that all expenses incurred in the construction of the temporary track, crossing, etc., in order to provide for the traffic of the Electric Company without interruption, should be borne by the St. Paul Company, as well as all the expense of the elevation of the Electric road and the construction and maintenance of the permanent overhead crossing. The decree also adjudged that the St. Paul Company should construct and maintain, in perpetuity, the overhead crossing for the use of the Electric Company, which overhead crossing should be of such strength and capacity as to sustain and carry cars and trains of the Electric Company over the same; that the St. Paul Company should pay the expense of elevating the track of the Electric Company, in order to secure a sufficient clearance over the tracks of the St. Paul Company, and should construct the approaches, the grade of which should not exceed 1 per cent.

[1] Enough has been said to make it clear that there is no question here of the right of the Electric Company to cross the tracks of the St. Paul Company, whether we look to the contract or to the laws of Iowa. The question for decision is as to which company shall bear the expense. As the parties made a contract which dealt with this subject, we will first consider whether that contract is binding upon the parties. It is first claimed that the crossing contract

terminated when the St. Paul Company elected to change its grade. The following language of the contract is relied upon to accomplish this result:

"It is mutually understood and agreed that, whenever the St. Paul Company shall elect to lower the present grade of its track at the point of crossing aforesaid, all the rights hereby granted shall cease and determine."

If the contract ended with the language quoted there would be force in the suggestion; but the contract proceeds, and grants to the Electric Company the right to construct and thereafter maintain and use a bridge or crossing structure, carrying the track of the Electric Company over and above the right of way and present main track of the St. Paul Company, and over and above such other track or tracks as the St. Paul Company may hereafter elect to lay at the point of crossing. Such bridge or crossing structure to be erected and maintained at the sole expense of the Electric Company. The right to cross at the old grade is terminated by the giving of the notice of election to lower the grade, but the right to cross by an overhead bridge or crossing structure is granted after grade is lowered. When the whole context and object of the contract is considered, it clearly appears that it was only the right to cross at grade that was terminated by giving the notice of election to lower the grade.

Second, it is claimed that the contract is void as ultra vires the Electric Company, and against public policy as the performance of the conditions of the contract would prevent the company from performing its duties as a common carrier. There is certainly no merit in this contention. The whole work of making a new crossing has been completed practically in accordance with the contract without interruption of business on the part of the Electric Company, and it is certainly not ultra vires or against public policy for a common carrier to bear the expense of constructing its own crossing over the tracks of another carrier. Moreover, it is the highest public policy that one should perform his lawful contracts.

Third, it is next urged that the contract is without consideration and void, as the only right granted to the Electric Company is a right given by the laws of Iowa independent of contract. Section 2020 of the Iowa Code is quoted in support of this contention:

"And such corporation [railway] may construct and carry its railway across, over or under any railway, canal or water course, when it may be necessary in the construction of the same, and in such cases it shall so construct its crossings as not unnecessarily to impede the travel, transportation or navigation upon the railway, canal or stream so crossed. Said corporation shall be liable for the damages occasioned to any person injured by reason of said crossing."

We do not see how the section of the Code quoted helps the Electric Company in any way in regard to the present controversy. The statute says:

"And such corporation [Electric Company] may construct and carry its railway across, over or under any railway, canal or water course, when it may be necessary in the construction of the same."

This language certainly contains no warrant for saying that the Electric Company can carry its railway across, over, or under the tracks of the St. Paul Company at the expense of the latter. Again, in order that this section of the Code may be held to be valid legislation, it must be construed with reference to the fundamental law of Iowa and of the United States, prohibiting the taking of private property for public use without just compensation; and section 18 of the Iowa Constitution provides that this compensation must be first made or secured to be made to the owner as soon as the damages shall be assessed by a jury. If this be the law, there is no authority anywhere to assess the damages for taking of private property for a public use, except a jury duly impaneled, as provided by law and the Constitution, unless the parties themselves can agree upon the same.

[2] The next question to be considered is: What is a railroad right of way from a property viewpoint? To answer this question we need only cite the following language from the Supreme Court of the United States in *Western Union Telegraph Co. v. Penna. R. R. et al.*, 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517:

"A railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement. We discussed its character in *New Mexico v. United States Trust Co.*, 172 U. S. 171 [19 Sup. Ct. 128, 43 L. Ed. 407]. We there said (page 183) that, if a railroad's right of way was an easement, it was 'one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it corporeal, not incorporeal, property.' And we drew support for this from a New Jersey case, in which state the rights of way in the case at bar are situated. We quoted *N. Y., Susquehanna & Western Railroad v. Trimmer*, 53 N. J. Law, 1, 3 [20 Atl. 761], as follows: 'Unlike the use of a private way—that is, discontinuous—the use of land condemned by a railroad company is perpetual and continuous.' And it is held in Pennsylvania 'that a railway company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietors of it.' *Philadelphia & Reading Railroad Co. v. Hummell*, 44 Pa. 375 [84 Am. Dec. 457]. It is 'a fee in the surface and so much beneath as may be necessary for support. * * * But, whatever it may be called, it is, in substance, an interest in the land, special and exclusive in its nature.' *Pennsylvania Schuylkill Valley R. R. Co. v. Reading Paper Mills*, 149 Pa. 18 [24 Atl. 205]; *Philadelphia v. Ward*, 174 Pa. 45 [34 Atl. 458]; *Railway v. Peet*, 152 Pa. 488 [25 Atl. 612, 19 L. R. A. 467]. A railroad's right of way has, therefore, the substantiality of the fee, and it is private property, even to the public, in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or part, except upon the payment of compensation. In other words, it is entitled to the protection of the Constitution, and in the precise manner in which protection is given. It can only be taken by the exercise of the powers of eminent domain, and a condition precedent to the exercise of such power is, we said in *Sweet v. Rechel* [159 U. S. 380, 16 Sup. Ct. 43, 40 L. Ed. 188], that the statute conferring it make provision for reasonable compensation to the owner of the property taken. This condition is expressed with even more emphasis in *Cherokee Nation v. Southern Kansas Ry. Co.*, supra [135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295]."

The following authorities support this view: *City of Albia v. C. B. & Q. R. Co.*, 102 Iowa, 624, 71 N. W. 541, 543; *M. & St. L. R. Co. v. C. R. G. & N. W. Ry. Co.*, 114 Iowa, 502, 87 N. W. 410; 3 *Elliott on Railways* (2d Ed.) §§ 1119, 1126; *Townsend v. M. C. R. R. Co.*, 42 C.

C. A. 570, 101 Fed. 757; Elkins E. Ry. Co. v. W. M. R. Co. (C. C.) 163 Fed. 724, 733, 735, affirmed 186 Fed. 1022, 108 C. C. A. 557; L. S. etc., R. R. Co. v. C. & W. I. R. R. Co., 97 Ill. 506; O. C. R. Co. v. L. & N. R. Co. (Ky.) 94 S. W. 22; W. & S. L. R. Co. v. P. T. Co., 56 W. Va. 18, 48 S. E. 746; M. & C. R. Co. v. B. S. & T. R. Co., 96 Ala. 571, 11 South. 642, 18 L. R. A. 166; State v. N. P. Co., 49 Wash. 78, 94 Pac. 907; B. & L. R. Co. v. S. V. Ry. Co., 2 Cal. App. 546, 84 Pac. 298, 304.

[3] It necessarily results that the laws of Iowa did not grant to the Electric Company all that the contract did. The St. Paul Company by virtue of the contract waived its right to compensation for the taking of its property, and for the purposes of determining whether there was any consideration for the contract this court or the court below cannot say what the amount of such compensation should be. Taking into consideration the result of the trial below, the damages are very considerable to the St. Paul Company. Further than this, by section 2063 of the Iowa Code it is provided, if the companies in regard to any new crossing cannot agree upon the terms thereof, then the existing road may apply to the District Court for relief, thus recognizing the right of the companies to agree upon the terms on which a crossing may be made.

We are clearly of the opinion that the waiver by the St. Paul Company of the right to compensation, regardless of the amount of such compensation, was a good consideration for the contract.

[4] It is next claimed that by the effort to improve its road by the St. Paul Company it became the junior road in relation to the Electric Company, and therefore must deal with the Electric Company in order to pass through the town of Huxley. The establishment of such a doctrine might prevent any substantial improvement on the part of a senior road, which certainly would be against public policy, and we find no warrant in law for such a position. P. & C. R. Co. v. S. W. Ry. Co., 77 Pa. 173; St. L., I. M. & S. Ry. Co. v. Ft. S. & V. B. Ry. Co., 104 Ark. 344, 148 S. W. 531, 537; Lehigh & New England R. Co. v. Del., L. & W. R. Co., 240 Pa. 401, 87 Atl. 709; L. S. & M. S. Ry. Co. v. N. Y. & St. L. Ry. Co., 8 Fed. 858; S. R. Co. v. P. S. & N. R. Co., 203 Pa. 176, 52 Atl. 88; State ex rel. N. C. Ry. v. N. P. Ry. Co., 49 Wash. 78, 94 Pac. 907; State ex rel. Northern Pacific Railway Co. v. Railroad Commission of Wisconsin, 140 Wis. 145, 121 N. W. 919; B. & A. R. R. Co. v. Cambridge, 159 Mass. 283, 287, 34 N. E. 382; A. A. & N. M. R. R. Co. v. D., L. & N. R. Co., 62 Mich. 564, 29 N. W. 500, 4 Am. St. Rep. 875; West Jersey & S. R. Co. v. Atlantic City & S. T. Co., 65 N. J. Eq. 613, 622, 56 Atl. 890.

[5] It is next urged that the Old Colony Trust Company and the American Company occupy the position of innocent purchasers, and that therefore the lien of the mortgagees given to secure the bonds of the Electric Company is superior to any rights of the St. Paul Company growing out of the contract of September 5, 1906, and the failure to record the contract is urged in support of this position. The contract was not an instrument that required to be recorded by the laws of Iowa. It was simply a contract allowing the Electric Company to

cross the tracks of the St. Paul Company without any expense whatever, except the expense of constructing its own crossing. It created no lien upon the right of way of the Electric Company. It was simply a contract providing for the operation of the two roads at the point in question, and by its very terms was to extend to and be binding upon the respective successors and assigns of the parties thereto. It was clearly a legal contract, not in conflict with the laws of the state of Iowa or the public policy thereof, and seemingly in line with the statutes of that state regulating the matters concerning which the contract was made.

The cost of constructing the temporary crossing by means of a detour track west of the main crossing was not mentioned in the contract, but we do not see why such work should not have been in contemplation of the parties at the time the contract was entered into, as the Electric Company knew that the lowering of the grade of the St. Paul Company was a part of its policy; in fact, it was mentioned in the contract, but, as there was no specific agreement about it, it remains to be adjusted by the trial court under its powers as a court of equity in managing the receivership.

The decree below, therefore, will be reversed, and the case remanded, with instructions to adjust the rights of the parties in accordance with the contract of September 5, 1906, so far as it covers the same, and make such other disposition of the matters involved between the parties as law and justice may require.

DURAND & CO. et al. v. HOWARD & CO. et al.

(Circuit Court of Appeals, Second Circuit. July 30, 1914.)

No. 298.

1. RECEIVERS (§ 110*)—SUITS AGAINST RECEIVERS—DISCRETION OF COURT TO PERMIT.

It is generally a matter within the discretion of the court whether it will determine for itself claims of or against a receiver of its appointment or will allow them to be litigated elsewhere.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 195-197; Dec. Dig. § 110.*]

2. LANDLORD AND TENANT (§ 112*)—FORFEITURE OF LEASE FOR DEFAULT IN RENT—WAIVER BY LANDLORD.

Where, after the appointment of receivers for a corporation, the landlord of the premises in which it conducted its business came into court and procured an order requiring the receivers to elect by a certain date whether they would adopt or renounce the lease, pursuant to which they elected to adopt the lease, such action by the landlord was a recognition that the lease was still in force, and a waiver of the right to declare a forfeiture for prior defaults in payment of rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 343-349; Dec. Dig. § 112.*]

Hand, District Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of New York.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The complainants, citizens and residents of the state of New Jersey, filed a bill in the District Court for the Southern District of New York against the defendant, a corporation organized and existing under the laws of the state of New York.

The bill alleged that the defendant was engaged in business in New York City and that its assets were largely in excess of \$100,000; that it owed approximately \$140,000 to more than 150 creditors; that it did not have sufficient money to meet its obligations as they fell due and was not able to borrow the money necessary for such purpose; that it was indebted to complainants in certain specified amounts; that unless a receiver was appointed certain creditors would obtain a preference over other creditors; and that the assets, consisting of jewelry and silver, would be sacrificed at half their value and great injury result to creditors. It therefore asked for the appointment of a receiver. The defendant filed an answer admitting the truth of the allegations contained in the bill and joined in the prayers thereof.

On January 6, 1914, the cause came on to be heard upon the bill and answer, and the court appointed Samuel Strasbourger and Nathaniel S. Corwin temporary receivers. The receivers were authorized to take possession of all the property, business, assets, and effects of the defendant, "and to run, manage, and operate the said property in such manner as will in their judgment produce most satisfactory results, and to preserve the same in proper condition, and to protect the title and possession and to secure and develop the business of the same." They were also authorized to pay the necessary expenses of operating the property. All persons were "enjoined and restrained from selling, transferring, disposing of, or in any manner interfering with any of the property of the defendant company, or from taking possession of or in any way interfering with any part thereof, or from in any manner obstructing or interfering with the possession or management of any part of the said property."

On January 30, 1914, the appointment of the receivers was made permanent, and all creditors were required to file their claims with the receivers on or before February 16, 1914, "or they may be excluded from the benefit of these proceedings."

On January 30, 1914, the landlords asked the court to fix a time within which the receivers should decide whether they would adopt or renounce the lease held by the defendants. On February 9, 1914, the receivers were required on the application of the landlord to elect on or before March 4, 1914, whether they would assume and adopt on behalf of the estate of the defendant the lease of the premises 624 Fifth avenue in the city of New York and dated January 18, 1911, between the executrix and executor of Henry S. Redmond, deceased, and Equitable Trust Company as trustee under the will, as lessors, and the defendant, as lessees, or whether they would renounce the same. And on March 3, 1914, the court, acting upon the recommendation of a committee appointed by the creditors and upon the facts as set forth by them, authorized the receivers "to affirm the lease," and an order was entered declaring that the receivers "be and they hereby are authorized to assume and adopt on behalf of the estate of the defendant and as such receivers the lease of the premises" describing them. And on March 4, 1914, the attorney for the receivers notified the attorneys for the landlord that they assumed and adopted the lease and that "the adoption of the lease is made pursuant to the request of the creditors' committee and upon the authority of the court in the above action upon application of the aforesaid creditors' committee."

The other material facts are stated in the opinion of the court.

Cadwalader, Wickersham & Taft, of New York City (Cornelius W. Wickersham, of New York City, on the brief), for appellants.

Philip W. Russell, of New York City (Edmund L. Durkin, of New York City, on the brief), for receivers.

Before COXE and ROGERS, Circuit Judges, and HAND, District Judge.

ROGERS, Circuit Judge (after stating the facts as above). The question which this cause presents is as to the right of a landlord to proceed against chancery receivers for the forfeiture of a lease because of default made by the lessee in the payment of rent, which lease has been adopted by the receivers appointed over the estate of the lessee. After the receivers notified the landlords, on March 4, 1914, that upon the authority of the court they had adopted the lease, they received a communication, also dated March 4, 1914, which read as follows:

"On behalf of the lessors, we hereby return this notice on the ground that it is void and of no effect, and on the further ground that there is now due and unpaid the rent due from July 12, 1913, to January 6, 1914, with accrued interest, and that there is also due and unpaid the rent which accrued for the month of February, with interest from the 12th day of February, 1914 to date, and that there could be no such ratification nor adoption until said defaults are made good, on the further ground that even admitting that such notice, adoption, or assumption were valid, that then and in that event the said receivers are now in default under the terms of said lease."

On March 6, 1914, the landlords petitioned the court for an order directing the receivers to remove from and vacate the premises or pay the petitioners all past due rent, amounting to \$8,694.37, with interest, and in the event of the failure to pay the same that the petitioners be authorized "to take such steps as may be proper, including proceedings instituted in the Municipal Court of the City of New York, or any other court, to compel said receivers to remove from, vacate, and give up said premises, and to dispossess them therefrom." As a matter of fact the rent due from the receivers during the time they have had possession of the property has been paid and all arrears of rent are such as are owing from the lessees, Howard & Co.

The petition was heard on March 25, 1914, and was denied. It was denied on three grounds: (1) That a landlord is not entitled, as a matter of right, to back rent as a condition of the affirmance by receivers in equity of a lease; (2) that if the landlords have such a right, they had waived it in this case; (3) that so far as the application is one addressed to the discretion of the court, that discretion should not be exercised in the landlords' favor.

The power of a court of equity to appoint a receiver has long been recognized as one of as great utility as any which belongs to the court. It is exercised to prevent fraud, or to save the subject of litigation from material injury, or to rescue it from inevitable destruction. A receiver is appointed when it appears necessary to do so to preserve the property and give adequate protection to the rights of the parties interested in it. This was the purpose of the court in the appointment of the receivers in this cause. The intention was to prevent injury to creditors by a slaughter of the assets through forced sales and also to prevent a preference among creditors. This may well be kept in mind in passing upon the question which is presented. The receivers have not been appointed for the benefit of any particu-

lar party, but upon a principle of justice and for the benefit of all parties interested. These receivers are the representatives of the court and of all the parties in interest. They have been put into the possession of this property because the interests of justice can in this way be best secured. The receivers are but the arm and the hand of the court, a part of the machinery of the court to work out the ends of justice. The property of which they have the possession is in custodia legis. It is elementary that the receivers have only such power and authority as are given them by the court and that they cannot be sued touching the property in their charge without the court's consent.

It being conceded that where property is in the hands of receivers no action can be brought against the receivers without the consent of the court appointing them, it is said it is not usual for the court to refuse leave unless it is perfectly clear that there is no foundation for the demand. Ordinarily this is true, and if the question is whether the property which a receiver has taken into his possession as being the property of A. is the property of A. or in reality belongs to B., who is claiming it, there may be no sufficient reason why the court should not allow that question to be determined in a suit against the receiver, unless the court can see upon the facts stated that B.'s claim is clearly without merit. But that is not the question in this case. There is no dispute here as to whether the lessees, Howard & Co., got a good title under their lease. The question is whether, having obtained a concededly good title under the lease, the lessors will be permitted by a court of chancery to forfeit the lease, after it has been adopted by the receivers, for a default which is not the default of the receivers, but of the lessees, who failed to pay all the rent due before the receivers took possession. The lessees insist that unless the receivers pay the arrears of rent they must surrender the premises. They insist that receivers have no right to assume a lease unless all arrears of rent are paid. If that be the law, then the court must authorize a preference in favor of the lessor creditors or else surrender the lease; and whichever course the court adopts would work to the prejudice of the body of the creditors, and nullify in some degree the purpose of the court in the appointment of the receivers. Either the court must give a preference to the lessors by compelling the payment of the entire amount of their claim, or else it must deprive the other creditors of the benefit which will accrue to all by allowing the receivers to continue carrying on the business in the old and accustomed place. If this is a matter which rests within the discretion of the court appointing the receivers, we cannot say that that discretion has been improperly exercised in this case.

[1] It is generally considered to be a matter within the discretion of the court whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. In *Porter v. Sabin*, 149 U. S. 473, 479, 13 Sup. Ct. 1008, 1010, 37 L. Ed. 815 (1893), the Supreme Court, speaking through Mr. Justice Gray, said:

"When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the

court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it. *Wiswall v. Sampson*, 14 How. 52, 65 [14 L. Ed. 322]; *Peale v. Phipps*, 14 How. 368, 374 [14 L. Ed. 459]; *Booth v. Clark*, 17 How. 322, 331 [15 L. Ed. 164]; *Union Bank v. Kansas City Bank*, 136 U. S. 223 [10 Sup. Ct. 1013, 34 L. Ed. 341]; *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 297 [10 Sup. Ct. 1019, 34 L. Ed. 408]. It is for that court, in its discretion, to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit, as in its judgment may be most beneficial to those interested in the estate. Any claim against the receiver or the corporation the court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself the determination of; and no suit, unless expressly authorized by statute, can be brought against the receiver without the permission of the court which appointed him. *Barton v. Barbour*, 104 U. S. 126 [26 L. Ed. 672]; *Texas & Pacific Railway v. Cox*, 145 U. S. 593, 601 [12 Sup. Ct. 905, 36 L. Ed. 829]."

See, also, *Werner v. Murphy* (C. C.) 60 Fed. 769; *Kennedy v. Indianapolis, etc., R. Co.* (C. C.) 3 Fed. 97; *Klein v. Jewett*, 26 N. J. Eq. 474; *Gunning v. Sorg*, 214 Ill. 616, 73 N. E. 870; *Stephens v. Augusta Tel., etc., Co.*, 120 Ga. 1082, 48 S. E. 433; *Reed v. Axtell*, 84 Va. 231, 4 S. E. 587.

In refusing its consent to allow a suit to be brought in the state courts the court had all the facts before it, and it came to the conclusion that the right which the landlords seek to enforce against the receivers did not exist. When a court can see from the facts stated that the so-called right is not a right, it is not even called upon to exercise its discretion and determine whether or not it will permit a suit to be brought in another court against its receivers, thereby exposing them to the costs of a needless and fruitless litigation at the expense of the creditors.

[2] Was the court in error in holding that a landlord is not entitled as a matter of right to back rent as a condition of the affirmance by chancery receivers of a lease? Counsel called attention to a paragraph in the lease which reads as follows:

"That the said tenant will not assign, transfer, or make over this lease, or any of the covenants, terms, or conditions thereof, or any part thereof, to any person or persons, corporation or corporations, without the consent in writing of the said landlords, first had and obtained, under penalty of forfeiture and damages."

It is said that the landlords have not consented in writing or otherwise to any assignments of the lease to the receivers. But they themselves came into court and asked to have a time fixed when the receivers would determine whether they would accept or renounce the lease. And we do not regard the covenant against assignment as at all material for two reasons. The first is that such a covenant is not broken when the assignment is not voluntary, but is done by operation of law. *Taylor on Landlord and Tenant*, § 408. In this case there has been no voluntary assignment of the lease by the lessors. The second is that there has been no assignment whatever either voluntary or involuntary of the lease. The chancery receivers are not assignees of the lease. By their appointment they acquired no title. They only ob-

tained a right to the possession of the property as the officers of the court. *Keeney v. Home Ins. Co.*, 71 N. Y. 396, 27 Am. Rep. 60; *Stokes v. Hoffman House*, 167 N. Y. 554, 559, 60 N. E. 667, 53 L. R. A. 870.

Then attention is called to the fact that the lease provides that if default is made in the payment of the rent, or any part thereof, it shall be lawful for the landlords to re-enter the demised premises and repossess and enjoy the same as in their first and former estate. The Common Pleas Court of New York in *Hasbrouck v. Stokes*, 13 N. Y. Supp. 333 (1891), decided that when a voluntary assignee for the benefit of creditors accepted a lease held by the assignor, which had become subject to forfeiture by such assignor's breach of the covenant to pay rent, the lessor could maintain summary dispossession proceedings against the assignee. In that case Judge Pryor said:

"It is said, however, that the assignee, not being liable for the rent, cannot be dispossessed for the fault of his assignor. But the inference is a non sequitur. By express provision of the Code (section 2231) an undertenant may be summarily removed, and yet an undertenant is not liable for rent to the landlord. By virtue of the statute, if not by express provision in the lease, it was a condition of the original demise that a breach of the covenant for rent should expose the term to forfeiture at the option of the landlord. If for default in payment of rent the assignee may not be dispossessed, then he is in a better position than his assignor; and, furthermore, he holds by a tenure to which the lessor has never assented. The assignee was under no obligation to accept the lease, but, having accepted it, he takes it cum onere—i. e., with liability to forfeiture for arrears of rent. True, that since his liability for rent is only because of privity of estate, that liability is only for payment of rent accruing while his estate subsists; but it does not follow that the landlord may not recover the land of him for condition broken by his assignor. * * * Upon default in payment of rent, the statute plainly gives the landlord a right to reclaim his land from the lessee, or whoever holds under him. Indeed, the words of the statute are, 'the lessee or his assigns,' and 'assigns' is the equivalent of 'assignees.'"

If the principle adopted in the foregoing case is correct as applied to the facts existing in that case, and as to that it is not necessary to express any opinion, it does not follow that it governs the case at bar. An assignee for the benefit of creditors differs in important respects from a receiver appointed by an equity court. He holds the title to the property and derives it directly from his assignor and not from the court. His possession is not always the possession of the court and the property he holds is not necessarily in custodia legis. He is not an officer of the court and does not derive his powers from the court, but from the deed of his assignor and the statute law of the state. See *Adler v. Ecker* (C. C.) 2 Fed. 126 (1880); *Lehman v. Rosengarten* (C. C.) 23 Fed. 642 (1885); *Lapp v. Van Norman* (C. C.) 19 Fed. 406 (1884). Such is his status except where the statute law of a particular state has changed it. The rules which govern an assignee are not necessarily applicable to a chancery receiver who holds no title, is an officer of the court and derives his powers from the court, and is simply holding possession for the court pending a settlement of the estate.

An assignee for the benefit of creditors, if he elects to accept a lease belonging to his assignor, becomes by such election an assignee

of the lease, holds the title, and becomes personally liable on the covenant to pay rent. But it is not so in the case of a chancery receiver. A chancery receiver takes no title to the leasehold estate, but has mere possession as an officer of the court. This has been expressly decided by the New York Court of Appeals in *Stokes v. Hoffman House*, 167 N. Y. 554, 60 N. E. 667, 53 L. R. A. 870 (1901). In that case the court also held that no privity of estate could be created between a chancery receiver and the lessor by which the receiver could become liable as assignee of the term upon a covenant to pay rent. The acceptance of the lease imposed, according to that decision, no legal liability upon the part of the receiver to pay rent, but gave to the lessor merely an equitable claim to have the rent paid as a part of the reasonable expenses of the receiver in carrying on the business.

Now it is perfectly evident that the mere appointment of a chancery receiver does not affect title, and it is equally evident that acceptance of a lease by a receiver acting under the authority of a court in accepting it does not and cannot invest the receiver with title. Equity acts only in personam. A decree in equity never divests a title at law, except in pursuance of a statute expressly conferring the authority. But it is not necessary for us to inquire whether, after a receiver has been appointed and a court of equity has taken possession of the property pending a settlement of an insolvent estate, a landlord has a right to forfeit the lease as against the receivers. If we assume that the right exists, and we are not to be understood as intimating that we doubt its existence, we think the facts of this case are such that the landlords are not at this time entitled to come into court to assert it.

Where a right of re-entry is reserved in a lease in case of failure of the lessee to perform a covenant on his part, an acceptance by the lessor of rent accruing after a breach of the covenant, with knowledge on his part of such breach, is a waiver of the forfeiture and an affirmation of the lease. *Conger v. Duryell*, 90 N. Y. 594 (1882). So if a landlord, after a forfeiture has been incurred, proceeds to make a distress for rent previously due, the right to re-enter is waived because by distraining he recognizes the relation of landlord and tenant and the lease as still existing. *Zouch v. Willingale*, 1 H. Bl. 311; *Jackson v. Allen*, 3 Cow. (N. Y.) 220.

As we understand the law, it is that the landlord is unable to assert his right of re-entry or his right of forfeiture if, with knowledge of the tenant's default, he thereafter does any act which recognizes the tenancy as still subsisting or the lease as still in force. When the landlords came into court on January 30, 1914, and asked the court to fix a time within which the receivers should decide whether they would adopt or renounce the lease, and when they again appeared on February 9th for the same purpose, they recognized the lease as still in full force, as much so as though they had distrained at that time for the rent. For if the lease was not then in full force and effect, and if there was not an existing tenancy, there could be no lease for the receivers to adopt. By that act the receivers waived

their right to insist upon the forfeiture. The default in the payment of rent for which they now seek to forfeit the lease occurred prior to January 6, 1914. There has been no default since that time. Moreover, the acceptance by the lessors of the rent called for by the terms of the lease, and which has been paid in full ever since the receivers assumed possession, must also be regarded as a recognition of the continued existence of the lease. The money paid each month is the exact amount of rent the lease called for. In view of all the facts we must then conclude that after the last default occurred the landlords recognized the lease as still in existence, and having done so they are not now at liberty to set it aside for the prior default.

The decree is affirmed.

HAND, District Judge (dissenting). The majority of the court in this case does not, as I understand it, question the proposition, though they do not decide it, that, if a receiver in insolvency proceedings accepts a lease on which back rent is due, he takes subject to existing defaults upon conditions subsequent in the term. I should be sorry if any doubt were thrown upon that, and there is no intention, if I am right, to do so. The gravamen of the decision is this: By asking the court to compel the receivers to make their election the landlords recognized the lease as still in existence, and that recognition was a waiver of their right of forfeiture. A landlord may by his conduct waive a breach of condition either for failure to pay rent or for anything else. Thus a distress even for rent accruing before the default will waive the breach and toll the re-entry, because distress is a remedy which lies only against a tenant and presupposes that the term still endures. *Stuyvesant v. Davis*, 9 Paige (N. Y.) 427; *Jackson v. Sheldon*, 5 Cow. (N. Y.) 448. So, also, suit to recover for a subsequent installment, or even the receipt of such an installment is enough, because there can be no subsequent rent, unless it arise from the term. In all these cases, if a landlord be later allowed to re-enter as of a default earlier than the time of the distress or the period for which the rent is due, he will have got a right or a remedy which depended upon the existence of the term at one period which by his subsequent action he wishes to declare nonexistent during that period. Such I think are all the cases. I have not been referred to a case which holds a landlord to be estopped, because he spoke of a "lease," or acknowledged that the termor had some existing rights as of course he has.

What the landlords did here in order to compel the election appears in the recitals of the order of February 9, 1914, and the affidavit of Charlton verified the same day. No petition was made; the whole thing was done orally, except for the affidavit. It appears from this that on January 30th, the landlords' attorney told the court that they wished to have a time fixed within which the receivers should decide "what was their intention concerning said lease." After an adjournment and a subsequent appearance for the same purpose the court fixed a time, within which the receivers took the lease. Had the landlords asked that the receivers should within a fixed time declare

their intention "concerning their option to accept the defendant's rights in the forfeited lease," there would have been no waiver, as I understand it. Because without condition they called it a "lease," their recognition of it constituted a waiver. I cannot really see why, if this be so, we must not also say that it is a waiver to demand unconditionally of a termor rent already due under his "lease" or under "the lease under which you now hold." A landlord must be careful not to speak of the lease as such, without adding that he reserves all his rights.

I can find no authority for such a ruling, and it seems to me an interpretation of the conduct and language of the parties which violates their intention and the universal practice of all landlords and tenants. When the landlords asked the receivers to declare their option regarding the "lease," no one would, I think, have supposed that they intended to waive any existing conditions, and we ought to interpret language when we can as it is meant. The lease remains yet a lease, though the landlords may forfeit it if the lessee continued in default. Until then it is a lease, and may never be anything else. Why should he not call it what it still remains, without adding a complete statement of his rights regarding it? To require him, every time he mentions it, to attach a reminder that he makes no waiver, appears to me to substitute a purely factitious requirement to a perfectly plain transaction.

The other alleged waivers it is necessary to take up, if one disagrees upon the point I have just discussed. They are three: (1) The agreement of December 16, 1913; (2) the payment by the receivers during their occupation; and (3) the filing of the claim in the receivership proceedings. The first is not a waiver, in my judgment, for two reasons: First, because the sum received does not even amount to one month's rent, and there are three due. The landlord would have the right to allocate the payment on the first month's rent, leaving the subsequent rents unpaid. Now it is a well-settled principle that the receipt of rent waives forfeitures only for the period antedating that upon which the rent is applied, and the subsequent unpaid rents, with their several forfeitures, remained sufficient ground of forfeiture. However, the landlord specifically reserved all his existing rights, notwithstanding the security which he took, as he had the right to do, and this is a complete answer. Second, the acceptance of money from the receivers was not a payment of rent under the lease. It is well settled that the receivers or trustees in bankruptcy do not take over the term until they voluntarily accept it or remain mute an unreasonable time. *Re Frazin*, 183 Fed. 28, 105 C. C. A. 320, 33 L. R. A. (N. S.) 745. Until then everything they receive is by way of payment for occupation. This was in fact the case of the January payment. The receivers had not accepted the lease and could not pay the rent. The use of the word "rent" in the receipt was intended by neither side to constitute an acceptance of the lease or a payment of rent under it; but, if it had been, it was without the authority of the landlord, whose agent had not the right to bind him.

Finally, there is the question of proving the claim in bankruptcy.

On January 30th the final decree was entered directing all persons to file claims on or before February 16th. On the earlier day the landlords appeared and asked the court to fix a time within which the receivers must elect to accept the lease. That matter was adjourned until the 9th of February, when formal application was made and the court fixed the 4th day of March; the claim was not filed until February 13th. Thus it appears that the receivers were not called on by the court to decide before the time expired within which the landlords must file claims. If they did not file, they lost their dividends; and if the receivers later repudiated the lease, they could never recover anything for those months. It seems to me, in view of this, that the filing of the claim should not be taken as a recognition of the lease, inconsistent with the right of re-entry, but that it should be taken as a provision against repudiation by the receivers.

I dissent, and vote to reverse the order, and allow the landlords to sue in ejectment upon the breach of condition subsequent. I do not mean that in any event this court should forbid landlords recourse to the state court under such circumstances; but I have considered the merits, since the decision has been upon the merits. In any event it would seem to me that the proper place to decide all such matters was in an action of ejectment in some court of competent jurisdiction.

FITCHBURG DUCK MILLS v. BARRELL.

(Circuit Court of Appeals, First Circuit. September 8, 1914.)

No. 1042.

On rehearing. Petition denied.

For former opinion, see 214 Fed. 777.

Before PUTNAM and BINGHAM, Circuit Judges, and ALDRICH, District Judge.

PER CURIAM. The underlying question involved here was so close that we deem it proper to make some special observations in regard to it. The appellant's petition for rehearing is based on the proposition that the court did not consider properly the matter of anticipation; but the opinion of the District Court in this case took up the matter of anticipation broadly, and so broadly as to cover every allegation of the appellant in reference thereto. It disposed of the proposition that it could not be properly said that in this case the patentee had taken some "fabric of the prior art, and merely put it into use as a drier-felt, without change in structure, object, function or result"; and, therefore, the District Court held that the adaptation to the present use involved invention. This opinion, and the propositions contained in it, were before this court; and all the parties in interest had full opportunity to discuss the same and to have their day in reference thereto.

It seems to us that our opinion passed down on May 20, 1914, fully covered these propositions, and that, therefore, everything which the

appellant seeks to present on a rehearing has been fully anticipated. All cases of this character are close, as is well known, and as will be seen by the array of authorities pro and con given in Walker on Patents (4th Ed.) under sections 26, 37, and 180, where it is said there are more than 40 authoritative decisions, to which may be added the striking case of the Cash Register Co., 156 U. S. 502, 15 Sup. Ct. 434, 39 L. Ed. 511, and Mr. Renwick's section 13 in his work on Patentable Invention. We can therefore see nothing to be gained by renewing the matter as requested by the appellant.

Ordered: The petition for rehearing, filed by the appellant on August 1, 1914, is denied, and mandate will issue forthwith.

MORGAN v. SCHWAB.

(Circuit Court of Appeals, First Circuit. September 10, 1914.)

No. 1063.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SPRING CONTRACTING AND REMOVING DEVICE.

The Bryant patent, No. 1,008,694, for a spring contracting and removing device, especially intended for use in connection with valve springs of explosion engines, *held* not anticipated, valid, and infringed as to claims 2 and 3.

Appeal from the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Suit in equity by Louis Schwab against Bernard Morgan. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 207 Fed. 107.

T. Hart Anderson, of New York City (Munn & Munn, of New York City, on the brief), for appellant.

Andrew Wilson, of New York City, for appellee.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

DODGE, Circuit Judge. Morgan, the appellant here, was held, in the District Court, to have infringed United States patent 1,008,694, issued November 14, 1911, to George W. Bryant and owned, when the bill in this case was filed, by Schwab, the plaintiff below.

The patent is for a "spring contracting and removing device." It has seven claims, but there is now no question as to claims 5 and 6; the plaintiff not having contended that Morgan has infringed them. The District Court held claims 2 and 3 valid and infringed. Claims 1, 4, and 7 were held valid, but not infringed. See (D. C.) 207 Fed. 107. Morgan alone appeals.

The invention relates, as stated in the patent—

"more especially to devices intended for contracting and removing, or placing in position, the valve springs of explosion engines. Such valve springs, and especially those of automobile engines, are frequently or usually so located that access to them is obstructed by other parts or attachments of the en-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

gine, so that it is extremely difficult to get proper access to the springs for contracting or releasing the pressure on the valve stem and removing the valve, or for removing the springs or placing them in position."

In previous attempts, it is said, to provide tools for the purpose, the tools—

"have been of such shape or size or operated in such a way that they can be used only with great difficulty and inconvenience, * * * and are usually limited in their use to a particular operation, such as a mere lifting of the lower end of the spring by raising the disk on which the spring rests to relieve the pressure on the valve stem."

And the object of the invention is stated to be—

"to provide a device * * * which shall combine great strength and power with ease of operation and adjustment and such compactness and simplicity of construction and adaptability to being used in different positions, and with its parts in different relative positions, that it shall be adapted for convenient use with all styles of engines."

The invention is then stated to consist in—

"the construction and arrangement and combinations of parts in a device of the character referred to, as hereinafter fully described and specifically pointed out in the claims."

The opinion below describes the patented device as comprising—

"a stock or body piece of cylindrical form and a carrying rod mounted to move endwise in the bore of the body piece. The carrying rod has at one end a spring engaging member, U-shaped or forked, so that its two sides may be pushed into the spring on either side of the valve stem, being made sufficiently thin to readily enter between the coils of the spring; the prongs or forks being of sufficient width to enable the member to engage properly springs varying considerably in diameter."

The body piece referred to, in whose bore the carrying member is mounted to move endwise, as stated, has also a like U-shaped or forked engaging member, and it is by relative approaching or separating movements between these two engaging members that the spring, to which the device may be applied is compressed or extended.

The necessary relative movement is produced, in the device described and illustrated in the patent, by an operating gear or pinion, mounted in the body piece in position to engage a rack on the carrying member; the pinion being moved by a key. The patent states, however, that it describes in detail "a preferred construction," also that the invention "is not to be limited to the exact construction and arrangement shown," but is to "include changes and modifications thereof within the claims."

Claim 3, regarded by the court below as the broadest claim, and therefore first considered, is for the combination, in a device of the character described, of (1) the stock or body piece; (2) the carrying member to move in the cylindrical bore of (1) and adapted to be inserted from either end thereof; (3) forked engaging members carried by (1) and (2) respectively; and (4)—

"means mounted on the stock piece for moving the carrying member to cause relative approaching and separating movements between the engaging members."

We are unable, as was the court below, to find, in any device of the prior art relied on by Morgan, the same capacity of use in different positions which the patented device possesses because of the adaptation of its carrying member to be inserted from either end of the cylindrical bore of the body piece, combined with forked engaging members adapted for ready insertion between the coils of the spring. The nearest approach is found in the device patented by Wickwire (No. 875,761, January 7, 1908). But if this device can be said to have a stock or body piece, or any "cylindrical bore" therein, or any "carrying member" inserted therein, it has two cylindrical bores and two carrying members. No reversibility is suggested by the patent; if reversible at all, there is no such ready reversibility as in the patented device; and as to the "engaging members," if these are or can be made adaptable to enter in any degree between the coils of the spring, this would be only by putting them to a use neither suggested in the patent nor contemplated in the organization of the device described therein, which has for its object nothing more than the compression of the spring, with the disk whereon it rests, as was the case with the preceding devices which the patent describes.

Morgan's means for moving his carrying member to cause relative approaching and separating movements between his engaging members are (instead of a rack on the carrying member engaged by an operating gear mounted in the body piece) a screw-thread on the carrying member, whereon is screwed a nut mounted in the body piece and movable with the latter up or down on the screw-thread. The threaded carrying member is adapted to be inserted from either end into the cylindrical bore of the body piece. The device, like that of the patent, is thus adapted for reversal, and Morgan advertises it as so adapted. The forked engaging members of Morgan's device we are unable to distinguish, so far as capability of entering readily between the coils of a spring is concerned, from the forked engaging members of the patent.

The gear or pinion of the patent is worked by a detachable key. Morgan's screw-nut is rotated by the forked end of a hand-lever permanently mounted on the nut, but so mounted as to swing loosely around it. Teeth on the peripheral face of the nut, engaged by a reversible pawl in the hand-lever, held in engagement with them by a spring, enable the hand-lever to turn the nut on the screw-thread when swung in one direction, leaving it stationary thereon while the lever is swung in the reverse direction in preparation for another turn. The gear or pinion of the patent works in connection with a reversible stop-pawl which prevents movement, according to its position, of the carrying member with its rack, on the body piece, in one or the other direction. Morgan has taken out a patent for his device, No. 1,050,746, January 14, 1913, wherein his "means for moving the carrying member" are illustrated.

The combination described in claim 3 of the patent is found in Morgan's device, if the means whereby its carrying member is moved are equivalents of the means described in the patent. It is true that Morgan's device does not require and does not employ any appliance to do

what the stop-pawl of the patent does; i. e., prevent the carrying member from moving in the reverse direction when the means for moving it in the desired direction are not being actually applied for that purpose. The flat thread of Morgan's screw in the nut offers resistance enough to reverse strains without the aid of any detent. But we do not find in this fact sufficient reason to differ from the District Court in its conclusion that Morgan's screw-thread on the carrying member and lever-operated ratchet nut on the stock piece are mechanically equivalent to the rack, pinion, and stop-pawl of the patent, as means for moving the carrying member. We agree, therefore, that Morgan's device infringes claim 3.

That Bryant's drawings made in preparation for his application showed both means of producing the necessary movement referred to is not disputed. That he selected the rack and pinion as the means to be shown and described in his patent, accompanied by the distinct statement that he regarded them only as a "preferred construction," does not seem to us a deliberate renunciation, as is urged on Morgan's behalf, of the other means referred to.

Bryant, as also appears without dispute, had shown Morgan both drawings before filing his application, and Morgan had made tools for Bryant embodying both the above means. Morgan later filed his own application for the patent describing his infringing device, after Bryant's patent had issued and Bryant's tools had shown that they met a public demand.

Claim 2 is for the combination in a device of the character described of (1) the stock or body piece; (2) the carrying member mounted to move on (1) and provided with a rack; (3) forked engaging members carried by (1) and (2) respectively; (4) an operating gear mounted in (1), in position to engage the rack with which (2) is provided; (5) a reversible stop-pawl, spring-pressed toward (4) and provided with means for setting it in either of two operating positions.

It follows, from what is said above, that this combination is found in Morgan's device, unless the reversible stop-pawl, above referred to as the element numbered (5), is not therein found.

Morgan's device has a reversible stop-pawl, but, as is pointed out in the opinion of the District Court, it is not an element in all respects corresponding to that element of claim 2, to which those words are therein applied. It does not stop a reverse movement under load, as does the reversible stop-pawl described in the patent. It does, however, because reversible, enable the operating gear to be set for operation in either of two opposite directions; and this is also accomplished by the pawl of the patent, in addition to stopping reverse movement under load. We agree with the District Court that the pawl of Morgan's device is, for the reasons and to the extent there stated, to be regarded as performing the functions of the pawl which forms an element of the combination covered by claim 2; and that the device infringes that claim also.

The decree of the District Court is affirmed, and the case remanded to that court for further proceedings in accordance with this opinion; and the appellee recovers costs in this court.

J. D. RANDALL CO. v. FOGELSONG MACH. CO.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1914.)

No. 2608.

PATENTS (§ 304*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

The granting of a temporary injunction on a supplemental bill in an infringement suit to restrain infringement by a new device patented by the defendant after the original hearing held within the discretion of the court.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 304.*]

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Suit in equity by the Fogelsong Machine Company against the J. D. Randall Company. On appeal by defendant from an order granting a preliminary injunction. Affirmed.

See, also, 216 Fed. 601.

Walter Murray, of Cincinnati, Ohio, for appellant.

Border Bowman, of Springfield, Ohio, for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and SATER, District Judge.

SATER, District Judge. At the time we heard the original case between these parties (203 Fed. 41, 121 C. C. A. 377), the application for the Doane patent, No. 1,069,769, issued August 12, 1913, was pending in the Patent Office. Prior to its issuance the defendant (appellant) sold a machine constructed in harmony with the call of the patent, of which fact it would seem the plaintiff (appellee) obtained knowledge when the accounting between the parties, ordered by the trial court, was in progress. The plaintiff subsequently filed a supplemental bill charging such machine to be an infringement of its patent and prayed for an injunction. As the result of a hearing at which certain affidavits and the patents of the respective parties were submitted, a temporary injunction was awarded. An appeal was taken from such order. The question for decision is: Did the court in granting the order commit error?

The difference between the defendant's former infringing device and that made under the Doane patent is this: The upper part of Doane's hopper is given a fixed position which renders it incapable of revolving. The toothed or cogged member at the lower end of the hopper is retained; but, instead of pins projecting horizontally inward from its inner wall or surface, a corresponding number of vertical blades or arms are affixed to it and extend upward about eight inches to contact with and rotate the straw. The blades are stationed close to the inner wall of the hopper; the top portion being so beveled as to slope toward the hopper's center. Experiments conducted by the plaintiff with defendant's original device, when the upper portion of the hopper was made stationary, showed that the pins projecting inward-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ly from the cogged member will rotate the straw for a distance of from six to twelve inches above the bottom of the hopper, i. e., above the feeding rod. Like experiments with the Doane device showed that the upward projecting blades or arms so increase the capacity of the toothed ring as to rotate from one-third to one-half of all the straw the entire hopper will hold. The defendant, on the ground that it had no tangled straw machine in its factory at the time of the hearing, notwithstanding its previous manufacture of infringing devices, its necessary familiarity with the Doane patent, and its prior construction of a machine in accordance therewith, neither affirmed nor denied the result of such experiments. Following the announcement of our former decision, the construction of the Doane device was changed by setting the toothed ring out of alignment with the inner wall of the upper section of the hopper and placing between it and the interior of the hopper a metallic ring or wall whose inner surface is flush with that of the upper section. The defendant does not dispute the correctness of our former ruling, but asserts that the term "hopper" embraces only that part of its machine which extends above the toothed or cogged member, and that, such part being so made as to be incapable of a rotary movement, the Doane device has no rotatable hopper and thus lacking one of the elements in plaintiff's machine and called for by the combination claims of its patent, does not infringe. The plaintiff contends that, although the upper hopper member in the Doane machine is stationary, the defendant by means of the upward projecting blades or arms has, in effect, increased the height of the lower or ring member four times what it was in its original machine, and thereby made such lower section the equivalent (although an imperfect one) of the plaintiff's entire revolving hopper; its upper section being reduced to a mere straw-holding member. It insists that, instead of three projecting blades, the defendant may, within the terms of the Doane patent, use a larger number, and may, if it chooses, extend them to any height, and thus make them fully perform the office not only of the hopper's upper member, but of the complete hopper, and render the latter unnecessary as a straw retainer.

The only question before the trial court was that of infringement. The plaintiff's patented machine, prior to the filing of the supplemental bill, had sold on the market at prices six times that theretofore received for other machines made for the same purpose. The plaintiff's business had been quite well established. The profits realized from sales were handsome. The defendant had manufactured but one machine under the Doane patent. Whether it realized a profit or not on such machine does not appear. Its trade was yet to be built up. The loss to the plaintiff by the destruction or impairment of its trade through the defendant's competition would in all probabilities be serious and possibly irreparable. The inconvenience to it which would result from withholding injunctive relief would be greater than that which the defendant would sustain by granting it. The defendant's failure either to admit or deny the result of the experiments made by the plaintiff might well have suggested an inability to do so or a reluctance to disclose all the facts about the operation of its machines, whether made as originally or under the Doane patent. The question

of infringement presented was real and substantial, and was a proper subject of investigation in a court of equity. It was not necessary to move the court to action that the proof of infringement should be conclusive. On the situation presented the court might well have concluded that there was a reasonable probability, or even a reasonable certainty, that the case would ultimately be decided in plaintiff's favor, and that it ought to interfere and preserve the status quo as between the parties during the pendency of the suit. The circumstances were such as to bring the case easily within the rule heretofore announced by this court under which temporary injunctive relief may be administered. *Blount v. Société Anonyme du Filtre, etc.*, 53 Fed. 98, 101, 3 C. C. A. 455; *City of Grand Rapids v. Warren Bros. Co.*, 196 Fed. 892, 116 C. C. A. 454. In the last-named case we held that:

"In determining whether the record presents reversible error, we are required to consider the correctness of the order from the same standpoint as that occupied by the court in granting it, and if we find, after a consideration of the facts presented to that court for its action, that its legal discretion to grant the order was not improvidently exercised, we should not disturb its action."

The trial court did not improvidently exercise its discretion, and its action is therefore affirmed.

J. D. RANDALL CO. v. FOGELSONG MACH. CO.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1914.)

No. 2629.

1. PATENTS (§ 312*)—INFRINGEMENT—ACCOUNTING FOR DAMAGES.

Findings of a master as to the damages sustained by a complainant by reason of defendant's infringement *held* not sustained by the evidence.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544-549; Dec. Dig. § 312.*]

2. PATENTS (§ 312*)—INFRINGEMENT—ACCOUNTING FOR DAMAGES—EVIDENCE.

On an accounting for damages for infringement, testimony of complainant's salesman as to conversations with possible purchasers *held* admissible, as tending to show why sales were not made; but, after its admission, refusal to permit defendant, on timely notice, to take the testimony of the persons or concerns to whom sales were not made, was error.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544-549; Dec. Dig. § 312.*]

Accounting by infringer for profits, see notes to *Brickill v. Mayor, etc.*, of *City of New York*, 50 C. C. A. 8; *Clark v. Johnson*, 120 C. C. A. 389.]

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Suit in equity by the Fogelsong Machine Company against the J. D. Randall Company. From an order affirming the report of the master on an accounting, defendant appeals. Reversed.

See, also, 216 Fed. 599.

Walter Murray, of Cincinnati, Ohio, for appellant.
 Border Bowman, of Springfield, Ohio, for appellee.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before WARRINGTON and DENISON, Circuit Judges, and SATER, District Judge.

SATER, District Judge. After the validity of the plaintiff's (appellee's) patent had been sustained by this court (203 Fed. 41, 121 C. A. 377), a special master was appointed to state an account of profits and damages. The trial court affirmed his finding that the plaintiff, through the defendant's (appellant's) competition, lost four sales of its machine to the Bingham Harness Company, the Voss-Barbee Manufacturing Company, the Southern Oak Leather Company, and the Minnesota Harness Company, and that defendant should consequently pay to plaintiff \$100 as profits and \$3,480 as damages, and entered judgment accordingly. The defendant thereupon appealed. The only assignment of error that need be noticed relates to the insufficiency of the evidence to sustain an award of damages.

[1] The evidence indicates that, out of about 100 manufacturers of horse collars in the United States, the largest number of purchasers for a tangled straw stuffing machine has not been at any time more than about 50, and may have been much less. Until the defendant's device was put upon the market, the plaintiff may be said to have been without competition as to machines of the precise kind to which his belongs, but other machines were still in use. In some instances plaintiff's machine supplanted those of both the defendant and Bronson, but they did not monopolize the market or become a necessity in the manufacture of horse collars. Evidence of this is found in the fact that the largest horse collar manufacturer in the United States, as the result of a competitive test between the machines of the plaintiff and Bronson, selected a Bronson machine, and in the further fact that, notwithstanding the diligent efforts of each of the litigants to effect sales in 1910, the defendant sold but nine of its machines to as many persons, three of which were returned, and plaintiff in the same year sold but sixteen to thirteen different persons, one of them being a resident of Canada. The selling price of the defendant's machines averaged about \$300; that of plaintiff's, excepting one optioned in 1912 for \$450, ranged from \$1,200 to \$1,800, but from different causes, such as discounts and other allowances from the purchase price, the actual sum realized by the plaintiff was considerably below the figures above named. In 1911 it sold one machine and in 1912 four more.

The plaintiff, in 1909, placed a machine on trial with the Bingham Harness Company. It was returned in the latter part of that year before the defendant's machine was offered for sale. After the defendant had made its sale to the Southern Oak Leather Company, the plaintiff sold its device to that company and as a part of the transaction took over the machine theretofore sold by the defendant. Subsequently the company complained of the operation of the plaintiff's machine and refused to keep it, and plaintiff received nothing on account of it. It is manifest that the defendant was wrongfully charged with damages on account of its sales to those companies.

[2] Nor is the evidence sufficient to sustain a finding against the defendant on account of its sale to the Voss-Barbee Manufacturing Com-

pany. Aside from certain unsupported conclusions of the witness, Lause, the only evidence touching such sale is found in his statement that "they (the Voss-Barbee Manufacturing Company) said they would not pay us a price of \$1,800 when they could buy Randall's for \$300." This falls short of establishing that plaintiff's machine was a necessity to the company, or that it was able to pay \$1,800 for a machine, or would have bought from plaintiff but for defendant's competition.

Lause testified regarding the Minnesota Harness Company that "When I called on them at Winona, this company stated that they wanted a long tangled straw machine, but could buy a Randall for \$275 or \$300, and if Randall would stand back of any litigation that might come, they would purchase his instead of paying us \$1,800;" that they "stated they were in the market for tangled straw machines;" and that they "would not want to pay us \$1,800, when Randall was offering the same machine for about \$300." He further testified that plaintiff could have made \$1,000 on the machine the defendant sold to such company, basing such statement, he says, upon a letter bearing date of April 22, 1910. There is no letter in evidence which bears that date or warrants such a statement. Aside from certain conclusions of the witness and certain letters sent by the company which show that it had under consideration the machines of both litigants, nothing further appears in the record touching its purchase. The evidence regarding such transaction is not so conclusive as that relating to lost sales to the Tenison Bros. Saddlery Company and the Indianapolis Saddlery Company, in reference to which the master found the proof insufficient to award damages to plaintiff. The defendant objected to the admission of the statements of the Minnesota Harness Company and other manufacturers to Lause, on the ground that the evidence so offered was the recital of conversations had by the witness with third parties in the absence of any representative of the plaintiff. Without finally passing on the point thus raised, but allowing the testimony to stand for the time being, the master stated that the Minnesota Harness Company people should be called to testify concerning the matters mentioned by the witness, whose testimony he considered hearsay. The substance of the several conversations was given in a most general form. In only one instance was the date of the conversation fixed, and but twice were the persons named with whom conversations were had; but the objection did not go to such matters. The evidence was admissible, its purpose being to show the mental attitude of the manufacturers in question and why they did not purchase the plaintiff's machine. *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 295, 12 Sup. Ct. 909, 36 L. Ed. 706; *Steketee v. Kimm*, 48 Mich. 322, 324, 12 N. W. 177; *Railway Co. v. Herrick*, 49 Ohio St. 25, 29 N. E. 1052; *Elliott on Evidence*, c. 24; *Worth v. Chicago, M. & St. P. Ry. Co.* (C. C.) 51 Fed. 171. Its truth or falsity, as well as its probative weight, was for the master.

After the plaintiff had closed its *prima facie* case the master sent a letter to its counsel—a copy being delivered to the defendant also—in which he notified plaintiff that regarding the sales actually lost he found but little evidence other than hearsay, but that there was some

evidence strongly tending to show that the sales made to the Southern Oak Leather Company, the Voss-Barbee Manufacturing Company, the Minnesota Harness Company, and the Bingham Harness Manufacturing Company were sales that were lost to plaintiff, although in those cases, for want of positive testimony, much was left to inference. As to certain other sales, among which were those to the Tenison Bros. Saddlery Company and the Indianapolis Saddlery Company, he informed the plaintiff that the evidence was in large part or clearly hearsay, that he knew of no rule that would justify him in finding that the plaintiff lost those sales, and that the defendant should have an opportunity of cross-examining the parties and testing their actual state of mind on the question of purchasing machines. He suggested that plaintiff take the depositions of the parties to whom it alleged the defendant had sold machines and thereby give the defendant the opportunity of cross-examination, and thus produce competent evidence. The plaintiff declined to comply with such suggestion, and thereupon the defendant decided to offer no evidence. The master, having prepared his report, requested the parties to appear on a given date to enter their objections, if any. The defendant, having learned of the master's conclusions, appeared and asked leave to take the depositions of the Minnesota Harness Company and the Voss-Barbee Manufacturing Company, which request was denied. The report was filed three days later. In view of the announcement made by the master in the progress of the hearing and in his subsequent letter to counsel regarding the character of plaintiff's evidence, the defendant was, we think, justified in concluding that answering testimony was unnecessary and that, as the evidence against the Tenison Bros. Saddlery Company and the Indianapolis Saddlery Company was held insufficient to sustain an award, much more so was that offered regarding the loss of a sale on the part of plaintiff to the Minnesota Harness Company. The master's findings were sufficiently variant from his previously expressed views to operate as a surprise, and, in fairness to the defendant, its motion for leave to take evidence should have been sustained.

For the reasons above stated, the judgment is reversed, and the case remanded for further action by the trial court and the master.

HERMAN v. YOUNGSTOWN CAR MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1914. On Application for Rehearing, October 14, 1914.)

Nos. 2597, 2612.

L. PATENTS (§ 318*)—INFRINGEMENT—PROFITS RECOVERABLE—CONSTRUCTION OF PATENT.

Where the real invention of a patent consists only in the improvement of one element of a combination, although the claims describe the entire combination, it must be construed with regard to the real invention in determining its validity and scope and also the extent of liability for in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fringement, and profits derived from the sale of the complete device by an infringer are prima facie to be apportioned.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.*]

2. PATENTS (§ 318*) — ACCOUNTING FOR INFRINGEMENT — APPORTIONMENT OF PROFITS.

The profits made by an infringer from the sale of a device for making blueprints embodying the invention of the Herman patent, No. 777,096, *held* apportionable on an accounting for the infringement, and complainant *held* entitled to recover one-half of the entire profits.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.*]

3. PATENTS (§ 318*) — INFRINGEMENT — ACCOUNTING FOR PROFITS — COST OF MANUFACTURE.

On an accounting for profits for infringement of a patent, the defendant *held* entitled to credit as a part of the cost of production for royalties paid to a later patentee of improvements under whose patent defendant manufactured.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.*]

Accounting by infringer for profits, see notes to *Brickill v. Mayor, etc., of City of New York*, 50 C. C. A. 8; *Clark v. Johnson*, 120 C. C. A. 389.]

4. PATENTS (§ 323*) — SUIT FOR INFRINGEMENT — RELIEF.

In a suit for infringement, a decree for damages or profits cannot be rendered, covering a period after the defendant had in fact turned its business over to one not a party.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 596-599; Dec. Dig. § 323.*]

Appeals from the District Court of the United States for the Eastern Division of the Northern District of Ohio; William R. Day, Judge.

Suit in equity by Reinhold Herman against the Youngstown Car Manufacturing Company. From the decree after an accounting, both parties appeal. Affirmed on complainant's appeal, and modified on defendant's.

In No. 2597:

T. A. Connolly, of Washington, D. C., for appellant.

C. E. Brock and Melville Church, both of Washington, D. C., for appellee.

In No. 2612:

C. E. Brock and Melville Church, both of Washington, D. C., for appellant.

T. A. Connolly, of Washington, D. C., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. When this case was here on the former appeal, we held (191 Fed. 579, 112 C. C. A. 185) that six out of the eight claims sued upon were either invalid or not infringed, but we sustained the validity and found infringement of claims 12 and 13 of patent No. 777,096. Upon the subsequent accounting in the court below,

*For other cases see same topic & § NUMBER in Dec & Am. Digs. 1907 to date, & Rep'r Indexes

no effort was made to recover damages as distinguished from profits. The master found that the defendant, the Youngstown Company, was liable for the entire profits which it had realized, and, in stating these profits, he refused to credit to defendant the payments which it had made to Wagenhorst, the later patentee under whose patent defendant was manufacturing. On exceptions, the District Court affirmed the master's conclusion that defendant was liable for the entire profits, but reversed the master as to the Wagenhorst payments, and held that they were properly to be taken as part of the expenses of manufacturing. Both parties appeal. Herman will be called "plaintiff"; the Youngstown Co., "defendant."

The patent had reference to a device or structure for making blue-prints by artificial light. It consisted of a glass cylinder around the outside of which were exposed the sensitive paper and the negative, backed by an opaque curtain, facing inwardly, and on the inside of which an electric arc lamp was caused to be lighted for a suitable period. The cylinder was vertical and the electric light, suspended from above, was passed slowly and steadily down through the axial line of the cylinder. Of course, a suitable supporting frame was necessary to keep the cylinder and light and their various appurtenances in proper mutual relation. It is apparent, from our previous opinion, that the invention as to which patentability and infringement were found had reference only to the means provided for causing and regulating the desired downward motion of the lamp. This is illustrated by claim 12, which reads:

"12. In a printing apparatus the combination of a printing cylinder suitably mounted, an electric lamp, electric connections with said lamp, a liquid cylinder, and hollow piston rod operating in said liquid cylinder and means whereby the hollow piston rod is automatically raised by the counterbalance weight of the lamp, substantially as described."

[1] 1. It is first said that the device in question is a unitary thing, all parts of which are called for by the claim; that the claim is to a combination which is an entirety; and that the defendant's device was the same combination and the same entirety; and hence that all the profits flowed from the infringement and all must be paid over. Leaving out of view for the moment the effect of the presence in the defendant's machine of the additions or improvements covered by the Wagenhorst patent, there is plausibility in this contention, and it finds apparent support in our decision in *Yesbera v. Hardesty*, 166 Fed. 120, 92 C. C. A. 46; but we do not construe that decision as intended to reach a case like the present. It is true that the patent there was for a combination the elements of which, perhaps with one exception, were old; but the essential point of that case is that the combination, as an entirety, was a new thing and created a new demand rather than being a mere improvement on or addition to an old thing, making merely an increased or a different demand. The thing really invented was the complete folding seat, and it was rightly held that profits should be considered with reference to that new thing and not with reference to its old elements. In the present case, the terms of the claim furnish analogy to *Yesbera v. Hardesty*, but the similarity goes no farther. Generally similar printing devices were old. Nothing was new, except

the means governing the descent of the lamp. Except for the artificial rule of the Patent Office which requires a claim to include a completely operative combination (and very likely, in spite of that rule), this invention could properly and accurately have been formulated and claimed as "an improved lamp-controlling means for a printing apparatus, consisting of, etc." In determining the liability for profits, as well as in determining validity and scope, we must give due regard to the real invention—the real contribution or step in advance which the patentee has made—and the due effect of this consideration should not be obscured by the language in which the claim is clothed. We pointed this out in *Dunn v. Standard*, 204 Fed. 617, 619, 123 C. C. A. 111, 113, saying:

"The question of profits can hardly depend on the largely fortuitous language of the claim in extending the combination, instead of on the actual advance in the art."

And it is made additionally clear by the discussion in *Seeger v. American* (D. C.) 212 Fed. 742, 748, 749. We therefore conclude that, for the purpose of awarding profits, defendant's structure is not to be treated as merely and only an embodiment of plaintiff's invention; and it follows that an apportionment of the profits derived from the sale of that structure is *prima facie* necessary.

[2] 2. Nor can it properly be said that the entire profits belong to plaintiff merely because his invention was an essential part of the thing sold. The proofs show, as would be apparent enough, that a lamp-controlling device was absolutely necessary, and that, without it, no sales could have been made; but it does not follow that the sales were due to the use of plaintiff's particular form. Other lamp-controlling means were open to defendant, and still others were used by its competitors. There is no evidence showing part played by the patented invention in inducing sales. So far as the evidence indicated anything, it is to the effect that other features distinct from plaintiff's invention were the "talking points" which sold the machine against its market competition.

3. Can the profits be apportioned? Plaintiff recognizes his initial burden to show the negative of this proposition (*Westinghouse v. Wagner*, 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. [N. S.] 653), and claims to have discharged the burden by calling, as his witness, Mr. Young, defendant's manager, who testified that there were no bookkeeping data from which could be made up any accurate statement of the portion of profits attributable to the liquid cylinder; but he further testified that in his opinion the defendant's machine should, for this purpose, be divided into its component parts, and the profits apportioned equally to each part. His method of division was to say that the glass cylinder, the curtain, the supporting frame and the lamp with its connections, each constituted, for this purpose, one-fourth of the machine; that 25 per cent. of the profits should be apportioned to each; and that this portion attributed to the lamp and connections should be again subdivided into four parts with $6\frac{1}{4}$ per cent. to each—viz., the lamp, the electric wires, the automatic cut-out, and the hydraulic cylinder. This being the state of the record, we are

confronted with the question how far *Westinghouse v. Wagner* is parallel and how far inapplicable to the present situation. We do not find in that case any broad rule that a patentee is entitled to all the profits in every case where his device is a part of a larger structure and where the fraction of profits attributable to the invention cannot be mathematically demonstrated. The converter invented by Westinghouse was of the class of the folding seat in *Yesbera v. Hardesty*; it was an integer; the invention, through the rule of combination, extended to every part of the whole structure which defendant marketed. Even in a case of that class, it does not follow, from anything decided, that the apportionment must be precisely accurate; nor that intelligent expert estimate may not furnish all necessary certainty. In a case of the other class, where the entire composite structure is fairly resolvable into component parts, with some of which the patented invention has no connection, except by way of furnishing the environment in which the invention becomes useful—in a case of that class, the recovery of those profits which did not pertain, except so remotely, to the invention of the patent, must be required by an imperative legal rule before it can satisfy the conscience. In a case of that class, the semi-independent parts may each involve substantially the same cost of material and labor and may each contribute equally to the final marketability. In that event, an equal division of the profits among these parts is both arbitrary and reasonable; arbitrary, because of its form, but reasonable, because obviously fair and just. Into what parts the market device should be, for this purpose, divided, will be for the court, upon inspection of the structure and consideration of the field of invention; whether the parts, so ascertained, do bear this mutual relation or any other mutual relation which permits profit division is a question of expert knowledge; and a man of experience in the manufacturing and selling field can form thereon an intelligent and useful opinion.

Whether, in the absence of any helpful opinion, the court should presume the propriety of such equal division need not be decided; in this case, the witness Young was thoroughly qualified, the theory and effect of his testimony are that the situation justifies apportionment by division, and we think ourselves justified in adopting that view.

We do not, however, agree with the witness as to the proper separation to be made. The structure itself speaks. The marketed device really consists of two main parts, to one of which the invention pertains and to the other of which it is incidental: The glass cylinder or printing frame and its connections and appurtenances constitute one part; the lamp and its connections and appurtenances constitute the other. One is the means for giving out and controlling the rays of light which do the printing; the other is the means for receiving and giving effect to the light rays. The supporting frame is partially incidental to each of these two natural divisions. It follows that, in the absence of any conditions making an equal division improper, and in the presence of the undisputed testimony that this general method is correct, the profits should be divided into two equal parts, one of which should be apportioned to the light-giving part of the device.

Further than this, we cannot go. We cannot subdivide this function of the machine. The lamp itself, the electric wires, the automatic cut-out, and the controlling hydraulic cylinder are all elements of one thing—the light-producing means—and no intelligible theory of separation is presented or is apparent. Here, the theory of resolving the device into parts is not applicable, for these parts are so inherently interdependent and all so joined in contributing to one function that they, for that purpose, must be thought of as an indissoluble unit.

It follows that plaintiff was entitled to one-half and to only one-half of the profits.¹

[3] 4. The District Judge was right in allowing credit for the Wagenhorst payments. The defendant was a corporation. Wagenhorst, a stranger, had a patent upon his improvements in this machine, and he interested defendant. It agreed to manufacture and market the machine, and to give him, as compensation for the use of his patent and for some general supervision and technical assistance by him, one-third of the profits. This was done. The business was carried on by the corporation under the trade-name Wagenhorst & Co., but this was merely an arbitrary name. Wagenhorst had no voice or control in the business, and he was not, in any fair sense, a partner. We think these payments were not a division of profits among joint infringers, but were as truly a royalty as if they had been called by that name and had been paid according to a regular schedule per machine. Such royalty payments, when the inquiry concerns profits actually received by the defendant, are entitled to be considered part of the cost of production. *Elizabeth v. Pavement Co.*, 97 U. S. 126, 141, 24 L. Ed. 1000.

[4] 5. Pending this suit, the defendant corporation discontinued all active enterprises, and Mr. Young, personally, by an informal but effective transfer, took over and continued the blueprinting machine business. He conducted it under the same name, Wagenhorst & Co., and in the same way. Plaintiff asks a decree against him personally for the profits on the machines which he built and sold after the defendant ceased operations. He is not a party to this case. Such a decree is impossible. The fact that the public had no notice of the change in individuals doing business as "Wagenhorst & Co.," is immaterial. This is not an action by one who gave credit in reliance on the appearance of things, and who may invoke the rule of estoppel. This is, in its present stage, an effort to recover a sum of money wrongfully received by the defendant in this case.

In No. 2597, the decree is modified so as to award one-half the sum fixed by the District Court; but with interest from the date of that

¹ We do not regard our conclusions in paragraphs 1 and 3 as inconsistent with what is decided in *Brennan v. Dowagiac*, 162 Fed. 472, 89 C. C. A. 392. Whether the invention of the patent, by reason of the form of the claim, pervades the entire commercial structure so that the structure becomes the thing patented and nothing else, is to be determined in each case according to the facts of that case, and not merely from the face of the patent but from the entire record. The same thing is true regarding the question whether the patent itself or the oral evidence or both justify dividing the structure into parts and apportioning the profits among these parts. In the *Brennan Case*, there was no occasion to consider any such division.

decree. In No. 2612, the decree below is affirmed. In each case, the Youngstown Company will recover costs.

On Application for Rehearing.

PER CURIAM. The application for rehearing calls attention to an undoubted error in the opinion. It is there said that plaintiff sought a personal decree against John P. Young, who is not a party to the cause. This is a misstatement of plaintiff's position. He sought to have his decree against the corporation cover profits which had not been received by the corporation, but by Mr. Young after the corporation went out of business, and while business was continued by Mr. Young, but under the same old trade name. The transfer of the business was clearly proved; it was a good-faith transaction, and the corporation is not liable.

Plaintiff also asks that we permit, or that we direct the court below to permit, the filing of a supplemental bill, or such other amended pleading as may be thought proper and sufficient to include Mr. Young, and to warrant a final decree against him for the profits derived by him personally. It is urged that the joinder of the corporation and Young in one case would be proper, because he personally instigated and directed infringement by the corporation, and was personally liable, and that it would be proper in one accounting to hold him personally for all profits, corporate and individual, and to hold the corporation for what it had received. Without determining this question, or whether the settled rules will permit the desired new pleadings, or will compel the filing of a new bill, the court below will be directed, within such reasonable time as it may fix, to receive and consider such application of this character as plaintiff may make, and with the same force and effect as if the application had been made on the final hearing before the court on exceptions to the master's report.

The application for rehearing is denied.

UNITED STATES FRUMENTUM CO. v. LAUHOFF et al.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1914.)

Nos. 2405, 2406.

1. PATENTS (§ 321*)—INFRINGEMENT—ACCOUNTING—ESTOPPEL.

Where, after an interlocutory decree finding that defendant infringed both the product and process of complainant's patent, defendant continued to manufacture pending an accounting, using the same machine, but such machine was capable of being so used as not to infringe, defendant was not estopped to deny infringement during the accounting period.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 588, 589; Dec. Dig. § 321.*]

2. PATENTS (§ 328*)—INFRINGEMENT—PRODUCT FROM CORN.

A finding of infringement of the Lauhoff patent, No. 440,866, for a corn product and the process of making the same, concurred in by a master and the trial court, affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. PATENTS (§ 283*)—CONSTRUCTION—SUIT FOR INFRINGEMENT AGAINST PATENTEE.

While a patentee-assignor may, when made a defendant, litigate the scope of his patent, the courts will not unnecessarily construe it so narrowly as to make it worthless, but will be inclined, so far as the record permits, to make its exclusive right a real and valuable thing.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 448-450, 452; Dec. Dig. § 283.*]

4. PATENTS (§ 312*)—ACCOUNTING FOR INFRINGEMENT—DAMAGES.

On an accounting for damages for infringement, proof alone that complainant had factory facilities for making the additional quantity of the patented product sold by defendant is not sufficient to raise the presumption of fact that it would have made such sales, where the product was sold in competition with numerous others which served the same purpose.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544-549; Dec. Dig. § 312.*]

Accounting by infringer for profits, see notes to *Brickill v. Mayor*, etc., of City of New York, 50 C. C. A. 8; *Clark v. Johnson*, 120 C. C. A. 389.]

5. PATENTS (§ 312*)—INFRINGEMENT—DAMAGES—EVIDENCE ON ACCOUNTING.

In a case where willful infringement is shown with sales of the patented product by defendant, so extensive as to leave no doubt that complainant sustained substantial damages, he will not be denied relief because of his inability to prove an established royalty or to make definite proof of sales lost; but general evidence to prove his damages or a reasonable royalty may be considered as in other cases of tort, and from that a finding may be made as to what would be fair compensation for his injury.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544-549; Dec. Dig. § 312.*]

6. PATENTS (§ 319*)—"GENERAL DAMAGES."

"General damages" are damages not resting on any of the applicable, exact methods of computation, but upon facts and circumstances which permit the jury or the court to estimate in a general, but in a sufficiently accurate way, the injury to plaintiff.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 577-586; Dec. Dig. § 319.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3059, 3060; vol. 8, p. 7669.]

Appeals from the District Court of the United States for the Eastern District of Michigan; Henry H. Swan, Judge.

Suit in equity by the United States Frumentum Company against Frank Lauhoff, William Lauhoff, and Henry Lauhoff. From the final decree, both parties appeal. Reversed on complainant's appeal, and affirmed on defendants'.

The Frumentum Company brought against the Lauhoff Bros. the usual infringement bill, based upon patent No. 440,866, of November 18, 1890. This patent was issued to Frank Lauhoff, who was instrumental in organizing the plaintiff corporation and assigned the patent to it, but later ceased his connection with the Frumentum Company and, it is said, caused the defendant partnership, of which he was a member, to engage in infringing. The patent contained three claims, of which the first two are, for the purposes of this case, equivalent. Claims 2 and 3 are as follows:

"2. As a new article of manufacture the herein described product from corn, consisting of compressed films formed from the corn retained continuously in its normally dry and raw condition, substantially as described.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"3. The herein described process of producing films from corn, consisting in first crushing the cereal in its normally dry condition to granules and subsequently subjecting said granules, in their normally dry condition, to a drawing compression, substantially as described."

It is conceded that the patented product and (except for the drawing step) the patented process differed from the earlier ones of Gent (who called his product "cerealine") only in that the "grits" or granules produced by crushing the hulled and germ-freed kernels were, by Gent, steam-soaked and cooked before they were rolled into films, while Lauhoff retained these grits in their "normally dry" condition. Doubts as to the patentability of this change or step omission at once suggest themselves, but it has been conceded from the beginning of the case that Frank Lauhoff as patentee, and the other defendants by virtue of his relations to their joint enterprise, are estopped to deny the patent's validity; so that infringement and damages have been and are the only questions in dispute. To make its *prima facie* case, plaintiff produced an expert witness who testified that certain flakes, confessedly produced by defendants, were the product called for by the second claim and had necessarily been made by the process of the third claim of the patent; more specifically, that these flakes could not have been produced if the grits had been effectively steamed before rolling. Defendants met this proof only by an expert who said that the flakes might have been steamed before rolling and still have all their existing characteristics. The District Judge accepted plaintiff's theory, thought the proof of infringement was sufficient, and made the usual interlocutory decree for injunction and accounting.

The defendants continued to manufacture, pending accounting. The master's report was not made until 2½ years after the interlocutory decree, and both parties took evidence before the master upon the question of infringement during his period. The master found that the infringement had continued; that the defendants had made no profits; that plaintiff's profits, if it had made the sales which defendants made, would have been \$13,000; and that plaintiff was damaged in this amount. The defendant took exceptions, and on final decree the District Court affirmed the master's finding that the infringement had continued throughout the accounting period, and to the total amount stated; but concluded that plaintiff's proof was insufficient to support the conclusion that, except for the infringement, it would have made the sales. A final decree was therefore entered in favor of plaintiff, but for nominal damages only. The parties bring these cross-appeals.

R. A. Parker, of Detroit, Mich., for the United States Frumentum Company.

James Whittemore, of Detroit, Mich., for Lauhoff and others.

Before WARRINGTON and DENISON, Circuit Judges, and DAY, District Judge.¹

DENISON, Circuit Judge (after stating the facts as above). [1] The first substantial question is whether defendants, upon the accounting, were at liberty to deny infringement during the accounting period. The argument is that since they were necessarily, while before the master, bound by the interlocutory decree to the effect that what they had been doing was infringement, and that since they claimed to be doing the same thing after the decree as before, the issue was necessarily foreclosed, also, as to the second period. Of course, a master may not re-examine questions adjudicated by the decree and order of reference, but that rule does not reach the peculiar circumstances of this case. The defendants' apparatus, as described by them, contained

¹ Judge Day participated in the hearing and decision of the case, but not (owing to his resignation) in the preparation of the opinion.

a chamber in which the grits might be steamed in their progress to the rolls, and contained steam pipes and valves permitting this chamber to be so used. Whether infringement was thereby avoided depended on whether the defendants opened the valves and put steam into this chamber and how much steam was admitted and at what temperature and how long the grits were exposed thereto. It might be quite true that the defendants infringed up to the date of the interlocutory decree, and thereafter, although using the same apparatus, did not infringe. Under these conditions, the issue of fact regarding infringement pending accounting was open to defendants, and it was right for both parties, as they did, to produce testimony directed to that issue. Only in connection with a finding that the manipulation of the apparatus by the defendants was the same after the interlocutory decree as before could the decree operate to foreclose the question of later infringement.

[2, 3] We are not satisfied on this record to disturb the finding of infringement contained in the interlocutory decree or the finding of later infringement made by the master and affirmed by the final decree. Not only is it the settled rule that such concurrent findings, where the issue is one of fact, will not be set aside unless plainly wrong; but we think the lower tribunals drew the proper inference from the entire record. While a patentee-assignor may, when made a defendant, litigate the scope of his patent and have it judicially construed according to its true extent (*Noonan v. Chester Co.* [C. C. A. 6] 99 Fed. 91, 39 C. C. A. 426; *Smith v. Ridgley* [C. C. A. 6] 103 Fed. 875, 43 C. C. A. 365), the courts surely will not, unnecessarily, construe it so narrowly as to make it worthless. See *Alvin Co. v. Scharling*, by Judge Gray (C. C.) 100 Fed. 87. They will be inclined, so far as the record permits, to make its exclusive right a real and valuable thing. Ordinary equitable considerations must require this point of view, and the resulting liberality of construction. The substantial validity which this patent imports may well rest on the distinction between, on the one hand, sufficient soaking or cooking to swell or burst the starch cells and tend to create a pasty mass, and, on the other, the absence of any moistening which would prevent the grits from coming to the rolls in raw, normal condition. There can be no absolute standard of "normal" moisture in a grain. The record seems to show an approximate standard for corn thoroughly matured and dried; but this varies considerably in the published tables, and must vary with weather and other conditions. Granting validity to the patent, it can hardly be that it would be infringed by manufacturing last year's corn normally containing 11 or 12 per cent. of moisture and would not be infringed by manufacturing, by the same process, this year's imperfectly matured corn containing 16 to 18 per cent. of moisture; yet this extra 4 to 7 per cent. of moisture is about what defendants claim to have added in their process. When we consider the indefinite limitation of the claim, the small amount of moisture which defendants say they added in the tests which they describe, the facts that there is no definite testimony as to how much steam they used in their process, that whether they used any was a matter of choice, that an experienced and disinterested manufacturer was sure the patented

process must have been used in the product, and the further fact that defendants continually and repeatedly refused to permit any examination of their process or apparatus, we are better satisfied with the result reached below on this point than we could be with the contrary result.

[4] It is clear that, as the case was presented to the master, his ultimate finding of damages must rest on the premise, proved or presumed, that the plaintiff would have made the sales in question if the defendants had not made them. Obviously, where plaintiff seeks damages on the theory of lost sales, this premise is an essential step. There was here no direct proof. It was shown (and we assume sufficiently) that plaintiff had factory facilities for manufacturing the additional amount and so could have filled the orders; but the proof stopped there. There was no testimony that defendants' customers had formerly bought from plaintiff, nor that they were in negotiation with plaintiff or in a territory in which plaintiff was selling, nor of others of those circumstances sometimes held sufficient and sometimes held insufficient to raise the presumption that plaintiff would have made the sales. This presumption is not one of law. *Dobson v. Dornan*, 118 U. S. 10, 17, 6 Sup. Ct. 946, 30 L. Ed. 63; *McSherry v. Dowagiac* (C. C. A. 6) 160 Fed. 948, 89 C. C. A. 26. If it exists, it must be raised by the proofs as one of fact. No doubt this presumption may sometimes follow from the mere fact that some one buys or uses the infringing article, as in the cases of which *Gould v. Cowing*, 105 U. S. 253, 26 L. Ed. 987, is typical; but in that case, and in those cases generally, the infringing article was a special piece of apparatus, and it did not appear that anything else accomplishing the same purpose or generally similar was on the market. In the present case, the record is clear that plaintiff supplied only a small part of the market demand for the general product consisting of raw or partially cooked corn flakes and used chiefly by maltsters; that several other apparently similar, but noninfringing, products under various trade-names had a large sale; that these products were so similar that the ordinary user would not notice the difference, and, indeed, so similar that plaintiff, when its factory was broken down, had supplied its customers with one of the other products without objection. In this condition of the record, a presumption of fact that defendants' customers would have bought plaintiff's product if they had not bought defendants' does violence to the rules of natural inference; there can be no such presumption. In this particular, the case is ruled by the decision of this court in *McSherry v. Dowagiac*, *supra*, 160 Fed. at page 951 et seq., 89 C. C. A. 26, and on rehearing, 163 Fed. 34, 35, 89 C. C. A. 512. For another instance where proof was insufficient to show lost sales, see, also, our opinion in *Randall v. Fogelsong*, 216 Fed. 601, 132 C. C. A. 605, filed to-day.

[5] It follows that, upon the basis of the master's findings, the District Court was right in directing nominal damages only; and it would ordinarily follow in this condition of the case that the judgment below would be affirmed. We are not satisfied to have this case take that course. There is a finding that the patent was valid; that the defendant Lauhoff, who had sold the patent, infringed it extensively

and so endeavored to keep what he had sold; and that defendants' sales were so large that no one can doubt the actual existence of substantial damages. Under such circumstances, to have plaintiff recover nothing, because the difficulty of absolutely definite proof is insuperable, is a result so unfortunate that, if avoidable, it should not be permitted. We have concluded that, in the situation disclosed by this record, there is another theory of recovery which may be available, and which, because what we now think to be an applicable rule of law was misapprehended by all parties and by both tribunals, has not been considered. Under the practice sanctioned by the Supreme Court in the *Westinghouse Case*, 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653, and adopted by us in *Dunn Mfg. Co. v. Standard Co.*, 204 Fed. 617, 123 C. C. A. 111, we think it a proper exercise of discretion to permit a further accounting in which this theory may be presented. We do not intend to order an accounting *de novo*, or to permit defendants to contest further the question of infringement or plaintiff to piece out its defective proofs regarding profits and lost sales. On those subjects, the parties have had their day in court, and those questions must be considered closed; but upon the theory of recovery to which we now address ourselves, no one was heard, before either the master or the District Court.

Infringement upon the patentee's rights is a tort; it is a taking of the patentee's property. The measure of damages for that wrong is sometimes clear and sometimes its borders are obscure. We may with benefit compare the rules of damages as applied to property generally; for patents have no peculiarities making general rules of law wholly inapplicable. When we are asked to determine how much compensation an owner of any property should have because it has been wrongfully taken, our first thought is of the market value. The market value of the property or the impairment of that value is the ordinary, normal measure of damages. Obviously, where the act done is the wrongful manufacture and sale of a patented article, the thing taken is the right to manufacture and sell. This is the right which would be given by a license from the patentee, and, since the recovery and collection of full damages (past and future) for a sale operates to give a license to the vendee (*Stutz v. Armstrong* [C. C.] 25 Fed. 147, 148), the value of that license is the thing to be determined. Obviously, too, the fixed, established license fee or royalty is the only evidence of the market value of the right to make and sell. If there is no such established royalty, the thing taken has no market value, and this criterion of damages must fail. From *Seymour v. McCormick*, 16 How. 480, at page 490, 14 L. Ed. 1024, it appears that the use of a license fee as the measure of damages in a patent case is only adopting the ordinary rule of market value universally applied as to other property; and, though this thought is not often repeated, it remains the logical basis for this first, "primary" criterion of damages.

With reference to the owner's exclusive right under some patents, just as with reference to innumerable other items or whole classes of property, it often happens that there is no market value. In such case, the law always looks for some other appropriate measure. This is perhaps most commonly found, with reference to general property, in

the owner's entire loss of a sale, or lessened profits on a sale he does make; and the profits which the owner would have made except for the unlawful interference are the familiar measure. This has come to be independently considered as a criterion of damages, sometimes an alternative for and sometimes displacing the "primary" criterion. So, in patent cases, where a loss of sales or diminution of selling price or increase of selling expense by plaintiff can be fairly traced to defendant's infringement, so that the cause and effect relation is established, the profits which plaintiff has thus lost become an accepted measure of damages. Here, also, there is perfect accord between the rules as to property generally and the rules as to patent property.

Returning, now, to the observation of all other kinds of property and rights excepting patent rights, there remains a class of cases or a group of instances where no market value existed and where no loss or impairment of sales can be definitely proved. The law is not, in such case, impotent. Plaintiff is not compelled to go away with nominal damages just because he cannot show that his property, or other like it, was commonly bought and sold on the market, or because he did not wish to sell, or because it was returning him no income. The real value—the actual value—of what has been taken is always the ultimate question. Proof of market value is one way to show this actual loss; proof of lost sales is another way. But, if neither of these methods can be followed, the law permits other available, pertinent proofs. Those familiar with real estate estimate and testify to the real value or fair value of land which is without market value (Chicago, etc., *Ry. v. Ohio Co.* [C. C. A. 6] 214 Fed. 751, 131 C. C. A. 57); and these witnesses and the jury may take into account all the special circumstances of the situation as bearing on the ultimate question. The same thing is true as to personal property of such character that it has no market value. Instances of the application of this rule as to both real and personal property are too familiar for citation. In the same general class are all personal injury cases. Pain and suffering, the loss of earning power, the loss of support, are all things which have no market value and all present situations where the damages cannot be ascertained or computed according to any arithmetical formula; but the jury is put in possession of all the facts and circumstances, it has the benefit of such testimony from experts as may show the rules and methods in force in the particular field, and it estimates, as best it may, how much money will compensate plaintiff for the wrong done.

Further pertinent familiar illustration is found in the settled rules concerning the estimation of values of property taken in the exercise of the right of eminent domain. It frequently happens that property is taken which is so situated and environed as not to possess any market value; and yet its value is universally solved by opinion evidence. Constitutional inhibitions against taking private property without compensation are no more restrictive upon the government or the agency exercising the power than are other organic provisions which were aimed against mere wrongdoers who appropriate rights of property like those involved under patent grants. It is a travesty to allow property rights to be seized and enjoyed without remedy simply be-

cause of the supposed difficulty in establishing their value. There must be, in the nature of things, in all except the most extraordinary cases, if not in all, available testimony which can be employed with sufficient approximation to the true value—at least to justify its admission against any admitted or proved trespasser. Denial of such a proposition must rest upon the idea that it is better for wrongs to go without redress than that they shall be redressed with imperfect accuracy.

[6] We can see no reason why the owner of a patent may not be compensated upon the same principles, or why the perfect analogy between the rules of damages as to general property and as to patent property which apply with reference to market value and with reference to lost sales should be discarded when we come to what may, for convenience, be called general damages. The jury, in a patent case, can be shown what plaintiff's patent property was, to what extent defendant has taken it, its usefulness and commercial value as shown by its advantages over other things and by the extent of its use and as shown by the profits and savings which could be made upon its sale or adoption. The jury can learn how much of the realizable profit should be credited to the manufacturing process and business risk and how much to the patent, also, what share of the profits or of the selling price it may be customary in that or similar business to allow for the use of such an invention. Experts may be amply qualified to give useful opinions as to the value of the property which is to be appraised. More or less of these things may appear in a given case, all having a bearing on the real value of that for which plaintiff is to be compensated, and the case presents no greater difficulty in computing and ascertaining damages than is met by a hundred juries every day. This damage or compensation is not, in precise terminology, a royalty at all, but it is frequently spoken of as a "reasonable royalty"; and this phrase is a convenient means of naming this particular kind of damage. It may also be well called "general damage"; that is to say, damage not resting on any of the applicable, exact methods of computation but upon facts and circumstances which permit the jury or the court to estimate in a general, but in a sufficiently accurate, way the injury to plaintiff caused by each infringing sale.

Save for the effect of the decided cases, we should have no hesitation in affirming the right of the patentee to recover such "general damage" or "reasonable royalty" in a case where the clearer criteria did not exist, where the utility and advantages of the invention were established and where there was substantial basis for estimating the value of these advantages.² To send the successful plaintiff away aft-

² We have twice met the question, but passed it without discussion. *McSherry v. Dowagiac*, 163 Fed. 34, 36, 89 C. C. A. 512; *Dunn v. Standard*, 204 Fed. 617, 624, 123 C. C. A. 111. The very unfortunate situation existing as to the practical ability of a patentee to recover damages or profits for an infringement committed before the law permits him to have an injunction has been universally recognized. It is familiar knowledge, as stated by Macomber (*Fixed Law of Patents*, § 826), that experienced patent counsel have advised that, as a general rule, no recovery that would pay the expense of litigation could be anticipated.

er years of litigation and with only nominal damages is repellent to the sense of justice. Such a result has been many times condemned; it is characterized by Judge Severens as "an untoward ending of a good cause" (*Brennan v. Dowagiac*, 162 Fed. 472, 473, 478, 89 C. C. A. 392, 398), and led him to say, speaking of the patentee's difficulty in preserving his rights:

"But this only enhances the obligation of the courts to find a way, if it be possible, to redress the wrongs done by those who have been willing to gather the fruit into their own basket."

What are the decisions? In *Seymour v. McCormick*, 16 How. 480, 14 L. Ed. 1024, and *Mayor v. Ransom*, 64 U. S. (23 How.) 487, 16 L. Ed. 515, are expressions indicating the necessity of reasonably definite proof; but neither case presents for decision the point now under discussion. The question, however, was squarely raised and passed upon in *Suffolk Co. v. Hayden*, 70 U. S. (3 Wall.) 315, 18 L. Ed. 76.

It appeared that Hayden had a patent upon improvements in machines for cleaning cotton, that the Suffolk Company had infringed and that no sales or licenses had been granted; but the court below permitted an expert to describe the use and advantages of the invention as compared with the previous methods, and the plaintiff also proved the amount of cotton that had been cleaned by the infringing machines. The court charged the jury that the plaintiff was entitled to the actual damages sustained from the infringement, and said:

"You will look at the value of the thing used, and ascertain that value by all the evidence as to its character operation, and effect. You will take into view the value of that which the defendants have used belonging to the plaintiff."

This charge was assigned as error. The opinion of the Supreme Court was by Mr. Justice Nelson. The assignment of error was overruled, and the court said:

"This question of damages, under the rule given in the statute, is always attended with difficulty and embarrassment both to the court and jury. There being no established patent or license fee in the case, in order to get at a fair measure of damages, or even an approximation to it, general evidence must necessarily be resorted to. And what evidence could be more appropriate and pertinent than that of the utility and advantage of the invention over the old modes or devices that had been used for working out similar results? With a knowledge of these benefits to the persons who have used the invention, and the extent of the use by the infringer, a jury will be in possession of material and controlling facts that may enable them, in the exercise of a sound judgment, to ascertain the damages, or, in other words, the loss to the patentee or owner, by the piracy, instead of the purchase of the use of the invention."

The principle of *Suffolk v. Hayden* was frequently applied by the Supreme Court. In *Philp v. Nock*, 84 U. S. (17 Wall.) 460, 462 (21 L. Ed. 679), Mr. Justice Swayne said:

"The measure of damages to be recovered against infringers prescribed by the act of 1836 as well as by the act of 1870, is 'the actual damages sustained by the plaintiff.' Where the plaintiff has sought his profit in the form of a royalty paid by his licensees, and there are no peculiar circumstances in the case, the amount to be recovered will be regulated by that standard. If that

test cannot be applied, he will be entitled to an amount which will compensate him for the injury to which he has been subjected by the piracy. In arriving at their conclusion, the profit made by the defendant and that lost by the plaintiff are among the elements which the jury may consider."

In *Burdell v. Denig*, 92 U. S. 716, 720 (23 L. Ed. 764), Mr. Justice Miller, after saying that in an equitable accounting those profits which defendant has actually made, and in a suit at law, an established royalty, "constitute the primary and true criterion of damages," nevertheless adds:

"No doubt, in the absence of satisfactory evidence of either class in the form to which it is most appropriate, the other may be resorted to as one of the elements from which the damages or the compensation may be ascertained."

Birdsall v. Coolidge, 93 U. S. 64, 70 (23 L. Ed. 802), illustrates that the "established royalty" measure is not conclusive. Mr. Justice Clifford said:

"Still, it is obvious that there cannot be any one rule of damages prescribed which will apply in all cases, even where it is conceded that the finding must be limited to actual damages. Frequent cases arise where proof of an established royalty furnishes a pretty safe guide both for the instructions of the court and the finding of the jury. Reported cases of undoubted authority may be referred to which support that proposition; and yet it is believed to be good law, that the rule cannot be applied without qualification, where the patented improvement has been used only to a limited extent and for a short time, but that in such a case the jury should find less than the amount of the license fee; and it is admitted in several cases that the circumstances may be such that the finding should be larger than the royalty."

In *Root v. Railway Co.*, 105 U. S. 189, 196 (26 L. Ed. 975), Mr. Justice Matthews quotes with apparent approval from *Suffolk v. Hayden*:

"Where there is no established patent or license fee in the case, or even an approximation to it, general evidence must necessarily be resorted to. * * *

"And what evidence * * * could be more appropriate and pertinent than that of the utility and advantages of the invention?"

The principle was again distinctly recognized by Mr. Justice Brown, when he said, in *Sessions v. Romadka*, 145 U. S. 29, 45, 12 Sup. Ct. 799, 803 (36 L. Ed. 609):

"This court has, however, repeatedly held that, in estimating damages in the absence of a royalty, it is proper to consider the savings of the defendant in the use of the patented device;"

although this comment loses some of its force, because the case before the court was an accounting for profits.

In the lower federal courts, also, the principle of *Suffolk v. Hayden* has been repeatedly applied. In *Judson v. Bradford*, Fed. Cas. No. 7,564, what evidence was given affecting the amount of damages does not appear from the report. Mr. Justice Clifford said:

"Frequent cases arise where proof of an established royalty furnishes a pretty safe guide for the instructions of the court and the finding of the jury, but cases also arise where it cannot be applied without qualification, as where a patented improvement has been used only to a limited extent and for a very short period. Proof of a single license was given in this case, but it cannot, in view of the circumstances, be regarded as affording the only measure of

compensation to which the plaintiff is entitled. Where there is proof of an established license fee, it may, in a case of protracted infringement, be regarded as a pretty safe guide; but the proof in this case is not of that character, and, in such a case, general evidence may be resorted to as the basis of decision.

"Neither party having furnished any definite evidence as to the amount of the injury sustained by the plaintiff, the court is compelled to estimate the same from evidence introduced upon the subject. Weighed in review of the whole evidence, as the question must be, the court finds that the plaintiff is entitled to recover, as compensation for the injury occasioned by the infringement, the sum of \$300. * * *

In *Westcott v. Rude* (C. C.) 19 Fed. 830, 833, the accounting was by a master, but profits had been waived and damages only were involved. The evidence was held insufficient to show a fixed, established royalty. In the course of the discussion, District Judge Woods said, "The question is, What is a reasonable royalty?" and the case was remanded to the master for further evidence.³

In *Wooster v. Thornton* (C. C.) 26 Fed. 274, 276, the question was as to the amount of damages for infringement before any license fee was established. District Judge Wheeler said:

"It is understood that an established royalty or license fee is evidence, and not an absolute test, of value. Whether the situation was such that the value was equal to the license fee before the latter became established was a question of fact for the master. The weight of the evidence was for him. The court cannot say, as matter of law, that the license fee, which did not become established until afterwards, should govern."

In *Graham v. Plano Co.* (C. C.) 35 Fed. 597, it seemed that there was no fixed royalty. So experienced a patent judge as Judge Blodgett, after finding that "no customary charge or royalty had been fixed," awarded damages at the rate of \$3 per machine "as most nearly measuring or approximating the compensation or damages to which the complainant was entitled."

In *Ross v. Montana Co.* (C. C.) 45 Fed. 424, 431, District Judge Knowles charged the jury:

"You are instructed upon the question of the measure of the damages that in this case the proper method of assessing plaintiff's damages, if you find that he is entitled to recover any, is for you to ascertain and determine what would have been a reasonable royalty for the defendant to have paid for the use of the cars in question at so much per car."

In *Lee v. Pillsbury* (C. C.) 49 Fed. 747, District Judge Nelson charged the jury:

"If * * * [plaintiff's] rights have been invaded under this patent by the defendants, then he is entitled to actual damages, and the question then presented is, What amount is he entitled to recover? You can readily see, where there is no license fee, no price fixed for the royalty, and nothing disclosed which would show that the patentee puts on the market a machine, for the use of which he charges so much, it is a very difficult matter to determine

³ Later, the master reported a "reasonable royalty," and judgment was entered. The Supreme Court (*Rude v. Westcott*, 130 U. S. 152, 9 Sup. Ct. 463, 32 L. Ed. 888) set it aside because the evidence on which the master acted did not sufficiently support his conclusion. If all right to recover necessarily disappeared when the effort to show an established royalty failed, it would have been natural to dispose of the case by saying so.

what the amount of damages may be in a certain case; but, like all questions presented to a jury for their determination, the plaintiff is bound and required to give some data, and must furnish the jury with evidence, so that they may be enabled to come to a proximate amount of the damage which the patentee has sustained by the infringement. In other words, general evidence may be resorted to for the purpose of furnishing data for the jury to come to a conclusion. * * * Upon those data you are furnished with something by which you can arrive at perhaps not an accurate, but an approximate conclusion as to what amount of damage has been suffered by the plaintiff."

In *Brickill v. Mayor*, 60 Fed. 98, 101, 8 C. C. A. 500, 503, the plaintiff's evidence showed that there was no established license fee, but that the defendant had made certain savings by using the patented device. The court below had said to the jury that there was no established royalty so as to fix the "primary and true criterion" of damage and value, and had charged:

"If you find in favor of the plaintiffs, you should consider the utility and advantage to the defendant of the use of the patented device, as compared to any other means of obtaining similar results which were open to the defendant to use, and you may consider the cost of using one as compared with the cost and savings to the defendant of using the other; and from these data, if proven to you, you should ascertain, in the exercise of a sound judgment, what would be a fair compensation to the plaintiffs for the damage which they have sustained by reason of the defendant having infringed, instead of having purchased the right to use the invention."

It will be noticed that the defendant's savings or profits were not to be taken as the measure of plaintiff's damages, but only as a part of the data from which fair compensation to plaintiff was to be determined. The Circuit Court of Appeals of the Fourth Circuit said:

"The rule now well established relative to the question of damages in cases of this kind was properly given by the court to the jury."

The case is no less authority upon the proposition it announces because the jury, under this instruction, had found only nominal damages.

In *Hunt v. Cassiday*, 64 Fed. 585, 587, 12 C. C. A. 316, 318, and after it had been decided upon a previous appeal that the proof did not show an established license fee, it was said, by the Circuit Court of Appeals for the Ninth Circuit:

"The plaintiff was clearly entitled to damages for the infringement. If there had been an established royalty, the jury could have taken that sum as the measure of damages. In the absence of such royalty, and in the absence of proof of lost sales or injury by competition, the only measure of damages was such sum as, under all the circumstances, would have been a reasonable royalty for the defendant to have paid. This amount it was the province of the jury to determine. In so doing, they did not make a contract for the parties, but found a measure of damages."

Recognizing this as the established rule, Mr. Walker, in his third edition (1895, § 563, p. 432), said:

"Where damages cannot be assessed on the basis of a royalty nor on that of lost sales nor on that of reduced profits, the proper method of assessing them is to ascertain what would have been a reasonable royalty for the infringer to have paid. In determining this point where the infringement consisted of making and selling, or in selling after a purchase, the profits of the defendant may be considered; and where the infringement consisted in using,

the cost and the utility of the patented process or thing as compared with the other process or things known at the time of the infringement and capable of doing similar work may be the leading guides. But those profits and advantages do not alone show what a reasonable royalty would have been, because it would not be reasonable for a royalty to be as much as the entire benefit derived from the business by a licensee. Therefore an instruction to the jury that the plaintiff was entitled to recover whatever value the defendant had received from the use of the plaintiff's invention was an error."

In *Robinson on Patents*, § 1061, Note 1, and in the course of an introduction to an exhaustive and careful analysis of the cases on damages and profits, the learned author says:

"Profits were, until recently, the only measure of damages in equity. They have always been admissible in evidence upon the question of the amount of damages at law."

The principle thus established by *Suffolk v. Hayden*, and generally recognized by the courts and text-books, has been more recently affirmed and applied by the Circuit Court of Appeals for the Third Circuit. In *McCune v. B. & O. Ry. Co.*, 154 Fed. 63, 83 C. C. A. 175, Judge Buffington, speaking for that court, pointed out that the proposition that sometimes "general evidence must be resorted to" had been approved in *Root v. Railway*; and the Circuit Court of Appeals held that it was error in the court below to direct a verdict for nominal damages in the absence of any testimony tending to show an established royalty or impaired sales and in the face of testimony offered to prove the utility and advantages of the patented device and its appropriation and use by several railroads.

In *Bemis Co. v. Brill Co.*, 200 Fed. 749, 759, 119 C. C. A. 229, 239, the same Circuit Court of Appeals, speaking again by Judge Buffington, expressly approved the finding of the referee fixing a certain sum as the "reasonable royalty or license fee which plaintiff should have received from the defendant for the latter's unlawful use of the plaintiff's invention without compensation"; and the master had fixed this sum (alternatively), upon the theory that there was no sufficient evidence to show either an established license fee or that the plaintiff had lost any sales.

The right of a plaintiff to recover in a suitable case this "reasonable royalty" would probably be unquestioned, except for the decision of the Supreme Court in *Coupe v. Royer*, 155 U. S. 565, 583, 15 Sup. Ct. 199, 207 (39 L. Ed. 263) and its supposed overruling effect upon *Suffolk v. Hayden*. In *Coupe v. Royer*, the patent involved was upon a machine for converting hides into leather. Upon the trial, the patentee had established his patent and its infringement, but had put in no evidence whatever supporting an assessment of damages, except that he proved the amount of the defendant's profits or savings. The trial court instructed the jury that these savings were the measure of plaintiff's loss. The Supreme Court held that this was error; that defendant's profits could be recovered in equity but not, as profits, at law; and that the defendant's profits do not, ipso facto, constitute plaintiff's damages. In the opinion by Mr. Justice Shiras, *Suffolk v. Hayden* is not mentioned, nor is there any consideration of the right to recover "general damage" or "a reasonable royalty." The only sen-

tence in the opinion which has been thought to work a change in the law is this:

"Upon this state of facts, the evidence disclosing the existence of no license fee, no impairment of the plaintiffs' market, in short, no damages of any kind, we think the court should have instructed the jury, if they found for the plaintiffs at all, to find nominal damages only."

This cannot be rejected as mere dictum; it was said by way of indicating the practice to be observed upon a new trial, and so it must be considered as the ruling of the court; but its comparatively casual character warns us against giving it unintended effect. Indeed, the language of this sentence seems to have been carefully chosen so that it should not go beyond the instant case. Its conclusion is predicated not only upon the lack of evidence of an existing license fee or of an impairment of plaintiff's market, but also upon the lack of evidence of "damages of any kind." If the only possible recoverable damages depended on the existence of one or the other of the two specified criteria, there was no object in referring to other evidence of other damages of some other kind. We may note, in passing, that the case is distinguishable from all those of the class where plaintiff is engaged in marketing the patented article or in using the patented process and in marketing the product, because in these cases there is from defendant's competition necessarily an "impairment of the plaintiff's market." The particulars and the precise extent of that impairment may be impossible to prove, but that the impairment exists no one can doubt. We also note, with the greatest deference, that even when plaintiff is not himself marketing his device, nor practicing his process, it is often a fallacy to suppose that defendant's infringement does not "impair plaintiff's market." The patentee's exclusive right to the market extends for seventeen years; he is not obliged to find or create and to supply the demand at once; he may have good reasons, of policy or of necessity, for postponing his efforts; but the whole market for the whole period, nevertheless, belongs to him; and by so much as the infringing defendant supplies that demand and permanently fills that market before plaintiff offers to do so, by so much is plaintiff's eventual market impaired. As to articles of long life and to be sold in a limited field this eventual impairment would be about the same whether plaintiff, in the early years of his patent, was or was not manufacturing; as to articles of short life and of less limited demand, the impairment would be much less; but it always would be existent, theoretically, and often, practically. Judge Severens' comments in *Brennan v. Dowagiac*, supra, 162 Fed. at page 478, 89 C. C. A. at page 398, are here pertinent:

"A patentee may withhold the exploiting of his patent in a particular territory, or he may not be able at the time to extend his business therein. But this gives no right to an infringer to invade the territory and anticipate the sales which the patentee might make when he should desire and be able to carry his invention there for a profit which is legitimately his own. * * * The fact that the owner of a patent does not exercise his right, or cannot at the time do so to the full, gives no license to another, and the latter is liable for infringement, to the same extent as if the owner were exercising his right to the utmost. The owner has the same right as he has to any other property, which he may put to use or not as he chooses; and in such case the rule al-

ways is that, if a stranger without right seizes and uses it, he is bound to pay for such use, and it is no answer for him to say that the owner was doing nothing with it. If it be true, as has often been declared, that the exclusive right of a patentee is property, for the protection of which the public faith is pledged, it should have the same immunity from invasion, and its violation should be attended with the same consequences as in the case of other species of property."

In view of the facts before the court in *Coupe v. Royer*, and the form in which the pronouncement on the question was made, we cannot believe that the case should be taken as intended to overrule, without naming it, a decision so important and so generally followed as *Suffolk v. Hayden*. In this conclusion, we do not stand alone. The question arose almost immediately and was presented to Circuit Judge (now Mr. Justice) McKenna. He considered it exhaustively in *Cassidy v. Hunt* (C. C.) 75 Fed. 1012, and reached the conclusion that *Suffolk v. Hayden* is not overruled, and that a reasonable royalty remains as a measure of damages, to be applied in suitable cases. Judge McKenna's opinion and his review of the cases bearing on the point should be read at length; extracts from it will be insufficient.

In *McCune v. B. & O. R. Co.*, *supra*, the Circuit Court of Appeals for the Third Circuit considered the same question and reached the same conclusion, although without reference to *Cassidy v. Hunt*. Judge Buffington's opinion is clear and persuasive.

On the other hand, opinions of the Circuit Courts of Appeals in the First, Second, Fifth, Eighth, and Ninth Circuits indicate that the authority of *Suffolk v. Hayden* is weakened or gone. It is noteworthy that the Circuit Court of Appeals for the Ninth Circuit, in *Seattle v. McNamara*, 81 Fed. 863, 26 C. C. A. 652, in an opinion rendered very soon after *Cassidy v. Hunt*, reached the contrary result, and did so without reference to Judge McKenna's opinion and without any of the analysis and consideration of the other cases by which his conclusion is strengthened. Whether the overruling effect of *Coupe v. Royer* will extend to a case where plaintiff had established a market is left undetermined. In *City of Boston v. Allen*, 91 Fed. 248, 249, 33 C. C. A. 485, 486, the Circuit Court of Appeals for the First Circuit, speaking by Judge Putnam, concludes that *Coupe v. Royer*, substantially overrules *Suffolk v. Hayden*. It is to be noted, however, in the *Allen Case*, that there was no evidence whatever bearing on the question of damages, except as to the amount of the travel over the ferry and "what related to the nature of the device" (which was a gangway for ferryboats). It may well be that such a case was precisely like *Coupe v. Royer*, and that there would still be, in many cases, ample room for a finding of reasonable royalty based upon testimony supporting such a conclusion. In *Tompkins v. International Paper Co.*, 183 Fed. 773, 106 C. C. A. 529, the Circuit Court of Appeals for the Second Circuit takes a narrower view of *Suffolk v. Hayden* than was indicated by Judge Buffington, but still leaves room for the recovery of substantial damages where plaintiff was selling against defendant's competition. In *Houston Co. v. Stern*, 74 Fed. 636, 20 C. C. A. 568, the Circuit Court of Appeals for the Fifth Circuit expressly held that certain proffered evidence as to the reasonable value of the right to use the invention was properly ex-

cluded. This was held to be a matter of opinion; but the holding was without discussion and without consideration of the fact that the value of property is usually provable by opinion evidence. The court apparently considered *Coupe v. Royer* as establishing the broad rule that, in the absence of a fixed license fee or lost sales, nominal damages only can be given. The limitation of *Coupe v. Royer* to cases where there appeared not only neither of these classes of damage but also where there was "no evidence of any damage whatever" is not noted. In *Brown v. Lanyon*, 148 Fed. 838, 78 C. C. A. 528, the only effort was to recover defendant's profits as damages, or to recover damages measured by defendant's profits, and plaintiff's counsel conceded that, unless they could have such a recovery, they could have none. The Circuit Court of Appeals for the Eighth Circuit concluded, as it was bound to do, that *Coupe v. Royer* was conclusive against this claim. Whether general damages could be shown in any other way than by the two familiar criteria was not involved or decided, although the impression of the court evidently was that *Coupe v. Royer* should have a very broad effect.

Upon this review of the rules of damages and the decisions affecting this particular question, we are the better satisfied to adopt the conclusion of Judge McKenna and Judge Buffington and to hold that a "reasonable royalty," if the proper foundation is laid and if the primary measures cannot be adopted, may become the applicable criterion in an action at law. If this is true, the same result follows before a master in determining damages in an action in equity. It is settled in this court that the damages and the profits contemplated by the statute are quite distinct and separate (*Yesbera v. Hardesty* [C. C. A. 6] 166 Fed. 120, 92 C. C. A. 46), and the conflicting decisions and the nice questions as to accountability for defendant's profits, as such, have nothing to do with the question of damages. In cases at law, the jury finds the facts; in equity cases, the master does the same thing. The functions of the two in assessing damages are wholly analogous. As Mr. Justice Strong said in *Locomotive Co. v. Penn Co.* (C. C.) 2 Fed. 677, 682:

"There is no conceivable reason why the damages sustained by a patentee from the infringement of his patent are not the same whether he proceeds at law or in equity."

The amount of plaintiff's loss by the infringement, or, more specifically and in certain cases, the amount of a "reasonable royalty," is a question of fact. It may be determined by a master just as by a jury.

We have before us only the question of recovery of legal damages; there has been no reason to consider the recovery of the profits which the defendant has made as a trustee. The practical difficulties attending the patentee upon the two branches of recovery are somewhat analogous; and it was clearly in recognition of the unfortunate situation on the second branch that the Supreme Court, in *Westinghouse v. Wagner*, 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653, made a deliberate effort to correct the resulting injustice; but the remedial effect of this decision is incomplete. It gives no help at all in cases where there are no profits; and even in cases where profits appear, its application to dissimilar facts must be uncertain. It

has been thought that the old rule as to standards of comparison remains unaffected (*Schmertz Co. v. Western Co.* [D. C.] 203 Fed. 1006, 1009); and that the rule announced in the *Westinghouse Case* does not extend to instances where the invention is in a semi-independent part of the structure (*Seeger v. American Co.* [D. C.] 212 Fed. 742, 750; and see our own comments in *Dunn v. Standard*, 204 Fed. 617, 619, 123 C. C. A. 111, and in *Herman v. Youngstown Co.*, 216 Fed. 604, 132 C. C. A. 608, opinion this day filed). The books are full of cases where damages or profits have been allowed upon reasoning that poorly satisfies the rules of proof as applied in other controversies, and the cases present a constant and uncertain contest between the desire to do what seems to be justice and the necessity of observing legal rules. If the conclusion which we now reach is eventually approved by the Supreme Court, it will be because that tribunal thinks there has been a general misapprehension regarding the effect of *Coupe v. Royer* similar to the general current misconception which it found had grown up regarding *Garretson v. Clark* †; and it may be that the rule which we are here stating will afford the means by which the courts can, in most instances, feel reasonably satisfied that substantial justice is done and also that the result is reached with due regard to all applicable general rules of law.

The present case impresses us as one which may be suitable for the application of this rule; although whether it is or not we cannot now decide. It is enough to say we see a fair probability that plaintiff might be able to put in proofs affording a sufficient basis for a reasonably accurate estimate of the damages which plaintiff's business suffered by reason of the infringement, and the case, upon the *Fruentum Company's* appeal, is reversed and remanded for that purpose only, but without costs. Upon the *Lauhoff* appeal, the case is affirmed, with costs.

ADAMS v. BOSTON STORE.

(District Court, N. D. Illinois, Eastern Division. August 24, 1914.)

No. 30968.

PATENTS (§ 328*)—NOVELTY—JOINT CONNECTION FOR BEDSTEADS.

The Adams patent, No. 923,235, for a joint connection for metal bedsteads, while covering a device which is simple, economical, and successful, is void for lack of novelty, in view of prior devices of similar construction.

In Equity. Suit by George Adams against the Boston Store. On final hearing. Decree for defendant.

George E. Waldo, of Chicago, Ill., for complainant.

Offield, Towle, Graves & Offield, of Chicago, Ill. (Albert H. Graves and Frank L. Belknap, of Chicago, Ill., and Louis Quarles, of Milwaukee, Wis., of counsel), for defendant.

SANBORN, District Judge. This is an infringement suit, brought on patent No. 923,235, dated June 1, 1909, applied for January 27,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371.

1909, issued to George Adams for a joint connection for metal bedsteads. The device is made by fastening a small fixture, known as a mold plate or cavity cup, on the inside of the upright corner post of the bed, holding it there by a screw which reaches through the mold plate and is pressed against the inner opposite side of the hollow bedpost, while a metal casting is made which fills the cavity of the mold plate and projects through upon the outside of the post, in order to make a corner fastening, by means of which the side rails of the bed are connected to the post. This casting is referred to in the testimony as a frenching. A hole or opening is made in the post. The mold plate is then inserted into the end of the post, and brought into position opposite the hole or opening. A screw is inserted through this hole and through the mold plate, and turned up until the end of the screw bears against the opposite inner surface of the post. A closed cavity is thus made between the inner surface of the post and the mold plate. The post is then placed in a mold, and molten iron or lead is then poured into the mold, which will fill the cavity to form the corner fastening, and also flow through the hole in the post and fill the cavity.

When complainant was making his *prima facie* case, he did not attempt to carry the date of invention back of the time of application, January 27, 1909. On the cross-examination defendant attempted to show by the complainant the earliest date of his invention. At that time complainant was not able to remember any positive date earlier than his application when he had conceived or produced his device. Complainant's counsel objected to the attempt of defendant to establish the date of invention by the testimony of complainant, George Adams, but the latter was ruled by the court to answer questions along this line, and did so, but, as stated, was unable to fix any earlier date. Defendant having given testimony tending to show a prior use considerably earlier than the complainant's date of application, on rebuttal complainant produced testimony and records tending to carry his date of invention back to January, 1908. It was contended by defendant that complainant's testimony along this line was inadmissible, by reason of the testimony of complainant on his cross-examination, above referred to.

While the defendant of record in this case is the Boston Store, it appears that the bed which is alleged to infringe was manufactured by the Simmons Manufacturing Company, of Kenosha, Wis., and the latter has assumed the defense of the suit, with the acquiescence of complainant, and has therefore become a party. It appears that in the spring of 1906 the Simmons Company manufactured an iron bed upon an order made by the Michael Reese Hospital, at Chicago, and the cost estimate on this bed was made March 9, 1906. From the records of the Simmons Company it appears that there was a cavity cup made for the purpose of forming a frenching or dovetail on the outside of the rail. This was a double cup instead of a single one, as in the patent in suit. Defendant gave considerable testimony describing how the cup was held in place when the mold was made, but this testimony may possibly relate to a later date, and of itself

would not be sufficient to establish any prior use. It appears, however, that this double cavity cup was described in certain foundry cost cards put in evidence, which show threaded wires or screws, iron castings and frenchings, together with estimates for forming the frenching, drilling the posts or pillars, and putting on the casting for reinforcement of the cavity cup. A witness was produced who personally made the cost estimate, and who remembered what the items referred to, and the date inserted on one of the cards is March 9, 1906. Other witnesses were sworn tending to corroborate this evidence, and the superintendent of the Michael Reese Hospital was produced as a witness on the hearing, and testified to certain bed ends, which had been theretofore offered, as having been taken from the Michael Reese Hospital. He was not able, however, to state that this bed end came from the first lot of beds sold to the hospital. This bed end shows the double cavity cup construction above referred to.

From all the evidence, I am convinced that the defendant's prior use of the double cavity cup is established as of the date of March, 1906. The records were offered in evidence, and it is claimed by the witnesses they clearly show the making of the double cavity cups and the frenching connecting them to the bed post prior to July, 1906, and, although no bed of this construction is clearly proved, yet the evidence is satisfactory that such a bed was manufactured before the July furniture exposition in Chicago held in 1906. Such an exposition was held twice a year, in January and July, for the purpose of exhibiting all classes of furniture.

On the part of complainant it was likewise satisfactorily shown that his invention was made in the winter of 1907 and 1908, for the purpose of the January exposition of 1908. Records of the Art Bedstead Company, of Chicago, with which complainant was connected, were produced that clearly show the manufacture of three beds with the single mold plate of the patent as early as January, 1908.

It appears, therefore, that the Simmons Company was first in the field with a mold plate construction, and that, unless the construction of complainant can be fairly distinguished from the double mold plate or cavity cup of March, 1906, the patent must be held to have been anticipated. It is argued by counsel for the complainant that the double cavity cup does not anticipate. It appears from the testimony that, instead of one cavity held up against the inside of the bed-post to receive the molten iron or lead, the Simmons construction was double; two cavities being held up against the inside of the post for the reception of the molten material. By a screw or threaded wire the double cavity cup was held up against the inside of the post. Holes were made in the post on each side of the center of the cup. The device was then placed under a mold and a frenching made, substantially as described in respect to the mold plate of the patent. The main difference between the double plate construction and that in the patented construction is that the screw goes through to the opposite side of the post and bears against it like a strut, while in the double construction the screw merely reaches through the

mold plate. There are some further details which are different in the two constructions. The single mold plate may be inserted and secured in position more easily and quickly than the double cup. It is also claimed that the complainant's construction is stronger and firmer than the old double plate construction. In the latter the cast metal does not interlock with the screw used to secure the double cavity cup in position, and does not reinforce or strengthen the joint, although it goes through two holes opposite the cavity in the double cup and fills up those cups on either side of the screw, which is located in the center, thus making a long bearing on the inside of the post as well as on the outside. While the single cup construction is an improvement upon the double cup, and may be more cheaply and quickly made, on account of using less material, and although the latter has gone into quite general use for cheap bedsteads, yet it seems perfectly plain that the two are substantially identical in the principle of construction. In order to make a frenching or dovetail device for the side rails of the bed it is necessary to have a cast metal joint, which extends from the outside to the inside of the upright post. In order that this may be properly made, it is necessary to insert a cavity cup on the inside of the post, and hold it there temporarily while the casting is being made; also that the casting shall extend on the inside and on the outside of the post, so as to make a firm joint or connection for the support of the bed rails. It appears from the testimony that this has been done in a variety of ways; the principle of construction remaining the same in all forms. It is entirely clear that there could not be any invention in substituting a single cavity cup for a double one, or in extending the screw designed to hold the cup in place through the post so it could bear upon its opposite inside surface.

It is true that the complainant's device has met with success as a practical, cheap device for bedsteads selling at a low cost, and that, if there were doubt on the question of invention or novelty, the adoption of the device by the Simmons Company and the general use of the invention in the construction of such beds would be sufficient to determine the question of patentability. It is, however, entirely clear that, with the double cavity construction of the Michael Reese Hospital bed established, there could not possibly be any invention in changing the construction from a double to a single cup and extending the retaining screw entirely through the hollow post. This would be a mere development in the process of construction, which would inevitably occur.

The patentee, on the prima facie case made by complainant, had apparently entirely forgotten the construction of his device in the shop of the Art Bedstead Company in January, 1908. This, however, did not prevent complainant from submitting testimony tending to show that construction. I think it is established that George Adams produced the construction covered by his patent as early as January, 1908, but this was nearly two years later than an equivalent construction made by the Simmons Company and placed in the Michael Reese Hospital beds. The changes made by complainant in his own de-

vice were simply minor ones, and were the natural outgrowth of the progress of the business of cheapening and simplifying the art. While the complainant's device is simple, cheap, and successful, I think it should be held that the patent is invalid for want of novelty.

There should be a decree dismissing the bill, with costs.

ST. LOUIS UNION TRUST CO. v. STUDEBAKER CORPORATION et al.

(District Court, S. D. New York. May 28, 1913.)

PATENTS (§ 328*)—INFRINGEMENT—STREET-FLUSHING MACHINE.

The Ottoby patent, No. 795,059, for a street-flushing machine, if valid, held not infringed by a machine which does not deliver the stream of water near to and nearly parallel with the surface of the street.

In Equity. Suit by the St. Louis Union Trust Company, as trustee, against the Studebaker Corporation and Studebaker Brothers Company of New York, for infringement of the Ottoby patent No. 795,059 for a street-flushing machine. Decree for defendant.

Decree affirmed, 211 Fed. 980, 128 C. C. A. 478.

C. V. Edwards and J. S. Wooster, both of New York City, for complainant.

Duell, Warfield & Duell, of New York City, for defendants.

HOUGH, District Judge. The specification and claims of a patent, studied in connection with the patentee's own story of what he wished to do, why he wished to do it, and how he accomplished the desired result, seem to furnish the best basis for understanding the precise addition to knowledge made by the invention claimed.

The specification of this patent first alleges a distinction between street sprinkling and street flushing or washing. The patentee says he has devised a "street-flushing cart," although he later concluded to add a contrivance which can make his machine a sprinkler. He does not pretend that flushing carts are generally new; therefore he describes only a particular form of cart, wherein the water is easily controlled, and economically discharged with minimum injury to the street, under the observation of the driver and without detriment to the hauling horses or to passers-by.

His "invention," as distinct from the mechanical embodiment thereof, "comprises" (says he) a water reservoir under pressure, "combined with nozzles" especially constructed for "discharging the water in suitable manner." The nozzle which is suitable shall be made "flat transversely and will consequently throw a broad, substantial, flat stream, which by adjusting the position of the nozzle can be made to strike the pavement at the angle necessary to give the maximum scouring effect." These adjustable nozzles "are located close to the ground, within a few inches, and are directed outwardly and forwardly."

The machine shown is an elaborate three-wheeled affair, plainly designed to give the driver a view of the water flow, and keep the water

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

away from running gear and horses; but the claims are very general, are all for combinations, and all show an intent to apply to any street-washing machine nozzles "substantially parallel" to the street, and having "narrow elongated delivery apertures which open laterally toward the front of the machine," and all constructed to deliver water under pressure "nearly parallel" to the street.

Ottofy's evidence greatly helps out this description. He was associated with one Murphy, who had a patented street-washing machine used to some extent in St. Louis, Mo. This machine Ottofy endeavored to introduce in England, where objections were made to wetting down, not only the fore wheels of the cart, but the horse's heels, and further objection to the force and directness with which the stream struck the pavement. In simple language, Murphy's machine did not spurt in quite the right direction, and it spurted too hard. What Ottofy wished was to improve on Murphy; his three-wheeled cart obviates some of the difficulties, and nozzles near the ground, nearly parallel thereto, and necessarily ejecting water in their own planes, solve (as he contends) the rest.

I do not overlook the fact that the specification does not describe any specific nozzle, nor is any definite form of nozzle claimed; but the nozzle shown in Ottofy's diagrams must eject water in its own plane, there to remain until gravity overcomes initial velocity. I am not informed that any machine such as Ottofy pictures was ever built; what he really did he sums up thus:

"Murphy's nozzle delivered a stream which injured the street; I claim mine delivers one which does not injure the street."

He approved of some other mechanical differences of no importance, but his position amounts to the following proposition: Any street-flushing or washing machine which delivers forwardly a stream of water under pressure, flat, near the ground and nearly parallel thereto, infringes his patent.

Complainant asserts that discussion of this proposition is ended, by the long series of decisions in this circuit and the Eighth. *St. Louis Street F. Mach. Co. v. American Street F. Mach. Co.*, 156 Fed. 574, 84 C. C. A. 340; *American Street Flushing Mach. Co. v. St. Louis Street Flushing Mach. Co.* (C. C.) 180 Fed. 759; *Id.*, 192 Fed. 121, 112 C. C. A. 582; *American Street Flushing Co. v. D. Connolly Boiler Co.*, 198 Fed. 99, 117 C. C. A. 285. This may be true, yet this is a new record, and the defenses being not only invalidity, but noninfringement, the reasons for prior judgments must be looked into.

The previous decisions have evidently accepted that marked difference between the art of washing streets and that of sprinkling streets which Ottofy assumes in the first part of his specification. No discussion of this matter has been reported. To any one who has ever used a hose to wash down a pavement and then sprinkle the adjacent street, the difference is merely in the direction of one implement; i. e., the hose. The more directly the nozzle is pointed at the ground, and the closer it is held thereto, the greater the washing; obliqueness of angle to the ground, and distance therefrom, produce sprinkling. To any

one brought up to the use of common tools, the idea that to turn a sprinkler into a washer involves invention is merely amusing. But, Murphy having procured a patent for a washer, the thought that any improvement on his machine or method must also be patentable is distinctly traceable in the decision which started this series (Finkelnberg, D. J., District of Missouri).

An improvement on a device itself lacking in invention may contain a patentable idea; but if it is not invention to turn a street sprinkler into a street washer, then it makes no difference if one man effects the conversion in a cleverer manner than another. The mere act of conversion cannot constitute invention. Therefore, if before Murphy and Ottofy there were pressure sprinklers, delivering flat streams parallel with the street, or nearly so, and producing their result by directing such streams backward, it was not invention to change the direction of the stream and shoot it forward. Any one can see that the same stream, discharged at the same angle, through the same nozzle, will sprinkle if shot back, and wash if shot forward. The only difference between sprinkling and washing is that in the first dirt particles receive but one impulse from the driving or falling water, while in the second such repeated impulses are given by the advancing stream that dirt is moved in the direction of advance.

If there was such earlier sprinkler, then to patent in any way the same thing with its nozzle shifted about 180 degrees is to grant a monopoly on a manner of using an old tool—something never, I think, approved in any court. How closely this thought touches complainants' position is clearly shown by the interpretation of the patent given by Adams, J., in the Eighth circuit, and accepted by Ottofy (as he testifies):

"We emphasize the fact that the production of the flat stream, delivered and operating nearly parallel with the surface of the street, is an indispensable element of the invention of the patent."

When complainants' actual machine is compared with Ottofy's described device, the emphasis of the quotation is strengthened. The three-wheeled wagon and the careful avoidance of horse and wheel wetting are abandoned; so that (as above shown from Ottofy's evidence) all that the combination amounts to is that Murphy's stream is better directed through a different, but admittedly old, nozzle.

In this case, reference is made for the first time to the Mengelberg German patent (4331 of 1878). This is a pressure street sprinkler ejecting water to the rear in flat streams near to and parallel with the ground. That any man of ordinary intelligence, with Mengelberg's patent and Murphy's machine before him, could and should be able to plan a street washer exactly covering the only part of Ottofy's combination worthy of consideration, and the only part pressed in any suit on this patent, is, in my judgment too plain for argument.

Eccles' patent, 436,406, was introduced into the previous case in this circuit on motion for reargument in the lower court and not alluded to in the opinion of the Circuit Court of Appeals. It seems to me very instructive, and worthy of more attention than was given it, perhaps owing to its belated appearance. But the matter is made so plain, by

the newly adduced Mengelberg reference, that I must assert my belief that invention is lacking in Ottofy's device.

But even within the very narrow limits judicially laid down for this patent under other evidence, I do not think that defendants are shown to have infringed. What is meant by "near to," and "nearly parallel with," the ground? Such vagueness is not to inure to the benefit of a patentee; he cannot complain if his own lack of precision narrows his own rights.

The patent itself by diagram shows a scoop-shaped nozzle parallel with the ground, and pointing forward and "outwardly"; i. e., away from the fore and aft line of the cart or wagon. The streams from such a nozzle will (theoretically) all strike level ground at the same distance from the center of the discharge. The language of the specification satisfies me that Ottofy's idea was to raise or lower this nozzle, at right angles to the plane of support, and thus produce a greater or less cutting effect, just as a hose is raised or lowered to wash or sprinkle as may be desired.

The defendants set their nozzles at such an angle to the street plane that the forward edge of the stream strikes the ground many times nearer the discharge point than does the after edge (Hammer, D. R., 184; Photo, D. R., 262; Anders, C. R., 182—describes what is evidently the same method of operation). These nozzles as described, pictured, and shown by models on argument are not "nearly parallel" to the street plane, according to any definition of that phrase known to me.

Complainants, however, urge that they set their nozzles in the same way, and the specification shows that Ottofy intended to attach his nozzles by joints enabling them to be "adjusted in any direction horizontally or vertically or to allow the nozzles themselves to be twisted." This is true, but a described capacity for adjustment cannot be treated as an enlargement of the claim. The specification would cover a vertical position of nozzle, but the claims cut that down to something which will "deliver water * * * nearly parallel to said plane" (i. e., that of the street).

What is meant by "delivering" water is uncertain; complainants treat it as synonymous with "ejecting," whereas defendants insist that since water (or anything else) is not "delivered" until it arrives, the angle of incidence with the ground must be meant. No such refinement on words was ever thought of by the draftsman of the specification. In strictness of definition I incline to think defendants are right; but it is enough for me that on this evidence there is no showing that defendants have either "ejected" or "delivered" a *stream* of water nearly parallel to the street. I think they have done the same thing that complainants probably do in practice—that is, some not calculated, and perhaps noncalculable, part of the stream is ejected nearly parallel with the street plane, at a height which insures incidence with the street at a very obtuse angle.

This angle of incidence varies very little along the falling water edge, because the nearer the discharging water particles are to the reservoir the nearer to 90 degrees is the angle of discharge. This is the necessary

result of twisting the nozzle as defendants do. If complainants have done this, too, they have traveled beyond the limitations of their own patent as interpreted in the cases on which they rely.

Bill dismissed, with costs.

P. M. CO. v. AJAX RAIL ANCHOR CO.

(District Court, N. D. Illinois, Eastern Division. August 25, 1914.)

No. 266.

1. PATENTS (§ 310*)—SUITS FOR INFRINGEMENT—ANSWER.

In a suit for infringement, a paragraph of the answer setting up that complainant has charged defendant with infringement of various patents and threatened suits against its customers, no fraud being charged, is immaterial, and will be stricken out on motion.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507-540; Dec. Dig. § 310.*]

2. DISCOVERY (§ 8*)—INTERROGATORIES—PARTIES ENTITLED—MATTERS TO BE OBTAINED.

Under equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv), interrogatories may be filed by either party, requiring the other to state material matters relating to the nature of the case and the facts supporting it, but not mere evidence.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 8, 9; Dec. Dig. § 8.*]

In Equity. Suit by the P. M. Company against the Ajax Rail Anchor Company. On motions to strike out portions of answer. Sustained in part.

Rector, Hibben, Davis & Macauley, of Chicago, Ill. (Frank Parker Davis, of Chicago, Ill., of counsel), for complainant.

Sheridan, Wilkinson & Scott, of Chicago, Ill., for defendant.

SANBORN, District Judge. Three motions are presented in an infringement suit brought on patent No. 1,014,155, issued January 9, 1912, to Adam T. Kramer, and duly assigned to the complainant. One motion is to strike out paragraph 6 of the answer, and require defendant to answer paragraph 6 of the bill which alleges that complainant gave written notice to defendant of alleged infringement, but that defendant disregarded the notice and continued infringing acts. Paragraph 6 of the answer admits receiving certain communications from attorneys representing the complainant, charging infringement of various patents. It then goes on to allege in detail the substance of letters, three of which were written by O. R. Barnett and one by attorneys for complainant. The Barnett letters charge infringement of six patents, and the letter from attorneys for the complainant the infringement of three patents, including the one in suit. The answer then states that the said Barnett or the attorneys for complainant, or others acting on behalf of Barnett or complainant, or each or all of said parties, have written to railroad officers throughout the United States representing that defendant's device (which is an

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

anchor for use as a rail anti-creeping device) infringes all of said patents, and that such representations have injured defendant's business and caused it great financial loss; that the representations are without justice or legal foundation; and that each of the patents, upon which the representations were made, is either invalid or not infringed by defendant. The answer further alleges that a contract, agreement, or understanding exists between complainant and said Barnett, binding them to prosecute and harass defendant, and any and all other persons who make, use, or sell rail anchors, by threats of patent infringement and by suits at law or in equity; that, in pursuance of said understanding or agreement, complainant and said Barnett have recklessly and knowingly, without justice or legal cause, made threats to prospective customers of defendant, well knowing that patents upon which said threats have been based could by no possibility be infringed by any device ever made, used, or sold by defendant.

Defendant submitted nine interrogatories to complainant under provisions of rule 58 of the equity rules. The first interrogatory inquires upon which of the five claims of the patent complainant relies. The second, third, and fourth interrogatories seek to have the complainant describe that element in defendant's device which complainant considers to be the wedge described in the Kramer patent, and that element which complainant considers to be the supporting member described in said claims, and whether the phrase "other edge of the rail," occurring in the claims, refers to the edge opposite to that engaged by the flange. The fifth interrogatory requires an answer as to whether complainant has manufactured any devices under the Kramer patent, and how many, and whether it is now making them, and requiring the production of a sample of such devices, or a cut or drawing. The sixth interrogatory inquires whether the complainant is licensed under, or has any interest in, various of the patents described in the correspondence above referred to. The next interrogatory inquires whether complainant considers defendant's device, to infringe any patents which complainant may own, be licensed under, or have an interest in, other than the three patents mentioned in the notice given by complainant to defendant, and, if so, inquiring the numbers and dates of the patents and names of the patentees. The eighth interrogatory asks whether complainant contemplates instituting other suits for patent infringement against defendant; and the last interrogatory asks whether one of the letters above referred to was written with the knowledge and consent of complainant.

Complainant objects to all of the interrogatories, and moves that they be stricken out, on account of impertinence and immateriality. Complainant has also moved that the experts' testimony be set forth in affidavits and filed, that of the complainant within 40 days after August 21, 1914, those of the defendant within 20 days thereafter, and complainant's rebutting affidavits within 15 days after the expiration of defendant's time.

[1] I think that the matters set up in paragraph 6 of the answer are entirely immaterial. The suit is a simple action upon a patent,

and it is claimed that the matters so alleged tend to show that the complainant has no standing in equity to prosecute his suit upon the patent. No fraud is charged; nothing that the complainant has not a legal right to do. No unlawful means are alleged, nor any unlawful purpose or object. Complainant has a perfect right to charge defendant with infringement, and the question whether its patent or patents are valid, as well as whether they are infringed, may be a matter of honest difference of opinion. I think that the complainant's motion to strike out paragraph 6 of the answer should be sustained.

[2] In regard to the interrogatories which were filed under rule 58 of the equity rules (198 Fed. xxxiv, 115 C. C. A. xxxiv), either party has a right to require the other to answer questions relating to material matters. This rule was in substance taken from order 31 of the English equity rules of practice, which has been in force for a considerable time, and has been construed and applied in very many English cases. It is well settled by these decisions that the disclosure of evidence is not required. The nature of the case and the facts supporting it may be required to be stated. Mere evidence or facts tending to prove the nature of the case, or the facts upon which it is based, are quite generally held not proper to be inquired into. *Marriott v. Chamberlain*, 17 Q. B. D. 154; *Hooton v. Dalby*, [1907] 2 K. B. 18.

The second, third, and fourth interrogatories inquire as to the opinion of the complainant as to the construction of the patent. This is a matter to be supplied by expert testimony in support of the contention of infringement, or the validity of the patent, or both. It is a matter purely evidentiary, and one which within the English rule, and the proper construction of rule 58 cannot be inquired into. The same considerations apply to interrogatories 5, 6, and 7, inquiring whether complainant has manufactured devices under its patent, whether it has any interest in other patents, and whether it considers defendant's device to infringe any such other patents. These questions all relate to evidence of circumstances or of facts tending to prove some contention of defendant, supposedly the one set up in the sixth paragraph of the answer, which is to be struck out. The eighth and ninth interrogatories, inquiring whether complainant contemplates bringing other patent suits, and whether it had knowledge of one of the letters pleaded in the answer, should be treated in the same way.

All of the interrogatories should be struck out except the first, which is to be answered by the complainant.

The other motion of the complainant, relating to the filing of expert affidavits under rule 48 (198 Fed. xxxi, 115 C. C. A. xxxi), should be granted.

ECONOMIC ENGINEERING & CONSTRUCTION CO. v. AURORA,
E. & C. RY. CO.

(District Court, N. D. Illinois, E. D. September 15, 1914.)

No. 30,886.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PNEUMATIC CONVEYOR.

The Bassler patent, No. 851,054, for a pneumatic conveyor, for conveying coal ashes, discloses patentable novelty, and sufficiently describes the invention, although the device has been made more efficient by experimentation since the patent; also *held* infringed.

In Equity. Suit by the Economic Engineering & Construction Company against the Aurora, Elgin & Chicago Railway Company. On final hearing. Decree for complainant.

George E. Waldo, and C. C. Bulkley, both of Chicago, Ill., for complainant.

George L. Wilkinson, of Chicago, Ill., for defendant.

SANBORN, District Judge. This is a suit for infringement, based on patent No. 851,054, for a pneumatic conveyor, issued to Edwin M. Bassler, April 23, 1907. The two defenses, want of novelty and no infringement, are closely related to each other; defendant contending that its conveyor is the result of long experiment subsequent to the patent, and not of anything disclosed in it.

The patent is for a combination of a conduit for conveying ashes or other material, a tank or receptacle for discharge of such material, a vacuum to create an air current for conveying the material, a baffle-plate or other means for interrupting the blast from the conduit to the tanks, and means to discharge water along the face of the baffle-plate and across the blast from the conduit. Defendant's device is a pneumatic conveyor for ashes. The conduit starts in front of the boilers and runs quite a long distance to the ash-tank. The hot ashes and clinkers are put into the conduit at the boilers, and drawn through the conduit by suction. A baffle in the form of a scoop shovel is hung in the tank in front of the discharging end of the conduit, which fills up so as to present a surface of ashes to the incoming blast of ashes, clinkers, and water. A spray of water is inserted into the conduit 30 feet away from the tank to extinguish the fire in the clinkers, and without thoroughly wetting the ashes mix with them in the form of vapor and small drops of water so that the fine air-dust will be laid, the fire extinguished, and sufficient water will be carried to the baffle to keep the surface of the ashes held by it washed off. If the fire is not extinguished by the time the material reaches the tank, explosive gases are generated there, and it is necessary also to settle the dust because the friction of dry ashes blown against the pipes, and the suction fan, is destructive.

The gist of the defense is that the patentee only provides that the water shall be discharged inside the tank and at the very point where the material strikes the baffle. Such an arrangement is a failure, be-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cause the fire cannot be put out or the dust laid without carrying the spray back into the conduit a distance sufficient to accomplish these results and also keep the baffle in proper shape. It is further urged, as the fact is, that it was only after long experiment by expert workmen that the proper location of the water spray was found, and that this was the discovery of the defendant, wholly unknown to the patentee. It further appears that a system built according to the Bassler drawings, with the water discharge in the ash-tank, was a failure, as any system in which the water-spray is not located in the conduit must be. It is urged that defendant's device is not derived from any disclosure of the patent; that the Bassler claims require the water-discharge to be across the blast after it leaves the conduit and along the face of the baffle, which defendant does not do, and which cannot be practically done; that Bassler did not understand the problem of properly discharging hot ashes, and did not disclose or even hint at its proper solution; that he merely put out a puzzle (to use the illustration of the Rubber Tire Case, cited below), and does not even "express a happy thought" towards the practical result obtained by defendant.

It is true, as universally held by the federal courts, that a patentee must not only produce something new, but tell us how to use it. *Diamond Rubber Tire Co. v. Consolidated Rubber Tire Co.*, 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527. The question is whether, in view of the nature of the problem, the invention claimed was sufficiently described. From the patent description and drawings it is evident that Bassler believed the application of water just in front and along the face of the baffle would put out the fire and lay the dust so that the mass would fall to the bottom of the tank and the baffle be kept clean. This has been found not to be practical, as the water-spray must be placed in the conduit, and far enough away to extinguish the fire, lay the dust, and enable enough free water to be carried to the baffle to keep it free from the sticky ashes, which contain sufficient carbonate of lime to harden them like cement, if they are allowed to remain in a wet mass. So the inquiry is whether Bassler, assuming he discovered something new, sufficiently described it to enable skilled men to construct it. Coal ashes vary considerably in their composition, depending on the elements in the coal in different mines, so that different kinds require different methods of applying the water. Experiment is always necessary.

The patentee describes and claims two things essential to the operation of pneumatic conveyors of hot ashes, that water must be discharged (1) across the blast from the conduit, and (2) along the face of the baffle; assuming that he does not limit the water-discharge to a point within the tank, but permits it to be made in the conduit itself. No doubt the word "blast" technically means a discharge from the mouth of a pipe, but it is equally evident that it was the purpose of the patentee to put out the fire by a water-spray at right angles to the line of movement of the material. In this view the word should not be limited to its ordinary meaning. As so understood the discharge of water in the conduit across the line of draft extinguishes the fire and carries free water against the baffle to keep it free from sticky accumula-

tions. This idea is expressed in the patent disclosure, and its application is necessarily a matter of experiment, differing in each construction.

I think the patentee discovered a new thing and sufficiently disclosed it. In the Rubber Tire Case it was contended in defense that the Grant tire was a success wholly by reason of discoveries subsequent to its publication, and that the patentee had no conception of the device, knowing nothing of the "tipping function," and giving no direction as to the proper tightening of the wires which hold the tire in its seat, nor did he know that the tire would travel around the wheel. It was found that these wires must be strained to a clamping point, a process not explained or known by him. The patent was sustained, although there was as much evidence there as here that the success of the device depended on subsequent development. So in the Expanded Metal Case, 214 U. S. 366, 29 Sup. Ct. 652, 53 L. Ed. 1034, no complete mechanism was disclosed for getting the desired result, but the underlying purpose was fully described. The inventive idea is disclosed by Bassler, and defendant has adopted it, I think, even though after long experiment.

The patentee, it is true, shows the water discharge to be in the tank, close to the baffle. This would tend to extinguish the fire, lay the dust, and wash off the ashes, but did not secure an efficient result. It did, however, suggest trying the plan of wetting the ashes far enough back from the tank to put out the fire and secure the other results referred to. As the witness Hawkins says, in the practical construction of pneumatic conveyors, one could not get away from the Bassler patent.

Claims 4, 5, 6, and 8 are infringed, and there should be a decree as prayed.

JOHNS-PRATT CO. v. ECONOMY FUSE & MFG. CO.

(District Court, E. D. Pennsylvania. September 2, 1914.)

No. 1071.

1. PATENTS (§ 327*)—SUITS FOR INFRINGEMENT—EFFECT OF PRIOR DECISIONS.

The decision of a court sustaining a patent must be followed by an inferior court in a subsequent case, unless there is additional evidence which justifies different findings of fact, and these compel a different conclusion; and this evidence must be new, not only in the sense that it was not before introduced, but in the sense that it is different.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620-625; Dec. Dig. § 327.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SAFETY FUSE.

The Sachs patent, No. 660,341, for a safety fuse for electrical use, *held* valid and infringed, on prior decisions.

In Equity. Suit by the Johns-Pratt Company against the Economy Fuse & Manufacturing Company. On final hearing. Decree for complainant.

Mason & Edmonds, of Philadelphia, Pa., and Oscar W. Jeffery and Edmund Wetmore, both of New York City, for plaintiff.

Horace Pettit, of Philadelphia, Pa., and Henry M. Huxley and Charles C. Linthicum, both of Chicago, Ill., for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

DICKINSON, District Judge. The complaint of the plaintiff alleges an infringement of letters patent No. 660,341, dated October 23, 1900, issued to Joseph Sachs; the right of the inventor therein being now owned by the plaintiff. The letters patent were issued for an improvement in safety fuses for electrical use.

[1] The defense is a challenge of the proprietary right claimed, the patent being alleged to be invalid. This is based upon lack of invention and prior use. As the present case follows previous judicial inquiries into the validity of this patent, the inquiry here is directed chiefly to whether the present attack involves anything which, if introduced as part of the defense in the previous cases, would have compelled a different judgment. The defendant is confronted at the outstart with the necessity of overcoming the strong *prima facie* case of the plaintiff in favor of the validity of the patent.

[2] The juridical history of this patent restricts the discussion of it to very narrow limits. Its validity is attacked here on the ground that it shows no invention, because there is disclosed by it nothing which was not already known and in prior use. Adjudications sustaining a patent are not within the *res judicata* principle. It would not be a working rule to hold a patent valid simply because it had been so adjudged in a prior case. There must come a time, however, if our patent laws are to have any value or give any protection to inventors, when the proprietary right favored by our Constitution and given by acts of Congress becomes so buttressed by judicial rulings upholding it as to be protected from further attack. This patent is entitled to this immunity. It has been before six different courts, and been made the subject of nine rulings. Some of these rulings, it is true, have no direct bearing upon the issue now before us, and the expressions of opinion made supporting the right of the plaintiff are strictly *obiter dicta*. Other of the rulings, though directly in point, were made by courts of other districts, whose decisions have no technical, binding, and authoritative force. The same ruling has, however, been made by the court whose decisions are binding and must be accepted and followed. The plaintiff has, therefore, a right to expect a decision in its favor because it is able to quote the opinions of judges who, though not speaking to us with authority, speak with the persuasiveness borne of the high respect which their well-known abilities command, and because, also, it is able to put its claim of right within the protection of the principle that courts within the territory in which a law operates should give that law the same construction, and, finally, because it is able to produce an authoritative decision upholding the right it claims. It cannot, therefore, be disappointed in this just expectation, unless it can be shown that the present case is outside the limits of these rulings.

This history is to be traced in the following cases: *Johns-Pratt Co. v. Sachs et al.* (C. C.) 155 Fed. 129; *Id.* (C. C.) 168 Fed. 311; *Id.*, 176 Fed. 70, 99 C. C. A. 92; *Johns-Pratt Co. v. Freeman Co.* (D. C.) 201 Fed. 356; *Id.*, 204 Fed. 288, 122 C. C. A. 512; *Johns-Pratt Co. v. Snow* (D. C.) 212 Fed. 173; *Id.*, 214 Fed. 110, 130 C. C. A. 484; and, finally, in this very case by the awarding of a preliminary injunction by Judge Thompson, of this district, without reported opinion. This surely re-

stricts, as already intimated, the present discussion to an inquiry into the sole question of whether the present record discloses any evidence which is not to be found in the record of the cases in which the plaintiff's right was upheld. This evidence, to affect the decree, must be new, not only in the sense that it was not before introduced, but in the sense that the evidence is different.

The fact that an expert is now called, who did not before testify, who differs in opinion with the courts by whom the former rulings were made as to the effect of the prior state of the art or prior use upon the inventive merits of the patent, can surely not affect the decree which should now be made. The fact, if it were the fact, that we were convinced the expert is right, cannot avail the defendant. A difference of ruling must be effected, not by a change in the conclusions or judgments which dictated the former rulings, but in the evidence commanding different findings of facts from those on which the former conclusions of law were based. This evidence must differ also in kind, as well as the means by which it is introduced. If, for illustration, a printed publication was before in evidence which described a device which, in the opinion of the court, was not an anticipation of the patent in suit, nothing new is introduced in a subsequent case by introducing another printed publication or a publication from another source describing the same device.

The best test of whether the evidence introduced in the present case is new in this sense is that applied in their treatment of the present case by the defendant's experts in their testimony, and by counsel in their argument. Do they reargue the old questions upon the old evidence, or place their reliance upon the new? None can read the testimony or follow the argument without being impressed with the thought that it is a review.

It would be interesting, but superfluous, to discuss the merit or lack of merit in the Sachs device. It has been judicially determined to be the product of invention, and the patent to be valid. This ends the inquiry, unless, as has been said, there is new evidence to justify different findings of fact, and these compel a different conclusion. The burden is upon the defendant to point out in what this evidence consists. Counsel has summarized it in six paragraphs. The chief use which has been made of it in the argument is to seek to rebut a collateral observation, by Judge Cross, in favor of the Sachs device, that up to that time there was no workable fuse on the market, and that it supplied the need of the trade was evidenced by the sales made. None of this evidence disturbs the conclusion reached by the court. That it throws no light upon the prior use, as bearing upon the novelty issue, is shown by the fact that the stress of the argument here, as in the former cases, is borne by the Mordey patents. To give weight to this argument now is to assume to overrule the prior decisions, and to take from the plaintiff that which the courts have adjudged to belong to it.

A decree sustaining the validity of the patent may be submitted. The decree may cover the six claims, although No. 2 would seem to be sufficient to embrace the whole of plaintiff's right.

KRYPTOK CO. v. HARRIS.

SAME v. STRAUS et al.

(District Court, S. D. New York. June 18, 1914.)

PATENTS (§ 306*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Preliminary injunctions against infringement of patents granted, in suits against dealers only, subject to suspension pending decision in a suit against the manufacturer on the giving of security by defendants.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 500, 501; Dec. Dig. § 306.*]

In Equity. Suits by the Kryptok Company against Moses I. Harris and against Jesse I. Straus and others, trading as R. H. Macy & Co. On motions for preliminary injunctions. Granted.

Wm. M. Stockbridge, of New York City, for plaintiff.

Howard P. Denison, of Syracuse, N. Y., for defendant Harris.

Howard P. Denison and Eugene A. Thompson, both of Syracuse, N. Y., for defendant Straus.

WARD, Circuit Judge. The complainant exploits the patents in suit by means of licenses and these suits are against dealers. A suit against manufacturers is soon to be reached for final hearing before Judge Hazel in the Northern district. In it a mass of new proofs have been already taken, which have been submitted to me on this motion, and more are still to be taken. Under these circumstances preliminary injunctions may go, but they will be suspended pending the decision of the cause in the Northern district, provided the defendants give proper security to pay to the complainant any damages or profits which may hereafter be awarded.

In re HEFFRON CO.

(District Court, N. D. New York. September 8, 1914.)

No. 5408.

1. BANKRUPTCY (§ 228*)—FINDINGS OF REFEREE—REVIEW.

Findings of fact by a referee cannot be disturbed by the bankruptcy court, where they are accurate and supported by the evidence.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. § 228.*]

2. CORPORATIONS (§ 656*)—GENERAL CORPORATION LAW—APPLICATION—MORTGAGES—CONSENT OF STOCKHOLDERS.

New York Stock Corporation Law (Consol. Laws, N. Y. c. 59) § 6, provides that every stock corporation shall have power to borrow money and mortgage its property, except that mortgages other than for purchase money, and mortgages authorized by contracts made prior to May 1, 1891, shall be consented to by the holders of not less than two-thirds of the capital stock of the corporation. General Corporation Law (Consol. Laws, N. Y. c. 22) § 20, declares that any foreign corporation doing business in New York may acquire and hold such real property in the state as may be necessary for its corporate purposes, and convey the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

same by deed otherwise in the same manner as a domestic corporation. *Held*, that section 6 did not apply to a foreign corporation doing business in New York, and hence a mortgage of such corporation's New York real property, otherwise valid, was not rendered void because it was not authorized by the corporation's stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2578-2587; Dec. Dig. § 656.*]

3. COURTS (§ 366*)—FEDERAL COURTS—RULES OF DECISION OF STATE COURTS—CONSTRUCTION OF STATUTES.

A decision of the highest court of a state construing a state statute is binding on the federal courts sitting within such state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. § 366.*]

4. CORPORATIONS (§ 656*)—MORTGAGES—VALIDITY—DOING BUSINESS WITHIN STATE—CONSENT OF SECRETARY OF STATE.

That a foreign corporation doing business in New York did not obtain the consent of the Secretary of State, as required by General Corporation Law (Consol. Laws, N. Y. c. 22) § 15, providing that a failure to do so shall preclude a corporation from maintaining any action on its contracts, did not invalidate a mortgage executed by the corporation on its property located in New York.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2578-2587; Dec. Dig. § 656.*]

5. BANKRUPTCY (§ 346*)—CORPORATIONS—TAXATION.

A trustee of a bankrupt corporation is not concluded by an assessment of franchise and license taxes by the comptroller of the state, but the amount and legality of taxes so assessed is determinable by the bankruptcy court as provided by Bankr. Law, § 64a (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 535; Dec. Dig. § 346.*]

3. JUDGMENT (§ 490*)—LIEN—SUSPENSION—VACATION OF ORDER.

Where the lien of a judgment has been suspended as authorized by Code Civ. Proc. N. Y. § 1259, but the proceeding is defective, or the order has not been properly obtained on proper notice, it cannot, for that reason, be regarded as void in bankruptcy proceedings against the judgment debtor, but application should be made to the court granting the order to vacate it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 926-928; Dec. Dig. § 490.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Heffron Company. Motion for confirmation of report of a special master, to whom certain questions were referred, the main one being the validity of a mortgage of \$50,000 on the real estate of the Heffron Company, a corporation of the state of Maine, situated in the city of Syracuse, N. Y., and which mortgage was made and executed by said corporation for a good and full consideration on or about June 26, 1913, and duly recorded, but which was so made and executed without having obtained the consent of the stockholders of such corporation thereto, and without having procured from the Secretary of the State of New York the certificate required by section 15 of the General Corporation Law of the state of New York, to the effect that such corporation had complied with the requirements of law authorizing it to do business in the state of New York. Certain questions as to taxes al-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

leged to be due the state of New York and the city of Syracuse are also involved to some extent, as well as a question of usury and the validity of certain judgments. Confirmed.

Costello, Burden, Cooney & Walters, of Syracuse, N. Y., for trustee.
Tracy, Chapman & Tracy, of Syracuse, N. Y., for Daniel F. Tolman, mortgagee.

Jas. J. Barrett, of Syracuse, N. Y., for State of New York.

C. G. Baldwin, of Syracuse, N. Y., for United States Fidelity & Guaranty Co. and others.

Herbert Robinson, of Syracuse, N. Y., for Heffron Co.

Frank Hopkins, of Syracuse, N. Y., for City of Syracuse.

Benj. Stolz, of Syracuse, N. Y., for general creditors.

RAY, District Judge (after stating the facts as above). The special master has found certain facts, viz.:

"First. The Heffron Company is a foreign corporation, incorporated under the laws of the state of Maine, December 27, 1907. It immediately began doing business within the state of New York and continued so to do until the filing of the petition in bankruptcy. During all of such time, its business has been carried on within the state of New York. On December 8, 1913, a petition in bankruptcy, involuntary in form, was presented to the court, on which date Frank B. Hodges was appointed receiver, and Mr. Hodges was appointed trustee of the bankrupt on the 14th day of April, 1914. The bankrupt was insolvent for at least four months immediately prior to the filing of the petition in bankruptcy.

"Second. On June 26, 1913, and for some time prior thereto, the Heffron Company was the owner of certain real estate in the city of Syracuse, described as follows. * * *

"On the last-mentioned date, this property was incumbered by two mortgages; one amounting to \$16,400, held by the Syracuse Savings Bank, and another amounting to \$20,000, held by Clifford E. Lipe. On said date, it executed and delivered to Daniel H. Tolman its bond, secured by a mortgage covering the property above described in the sum of \$50,000, which mortgage bore interest at the rate of 6 per cent. and which was recorded in the Onondaga county clerk's office June 28, 1913, in Book 462 of Mortgages, at page 406. This mortgage was executed pursuant to a resolution of the board of directors, but no consent to the execution of such mortgage was ever given by the stockholders. No consent of the stockholders had been given to the execution of the mortgage to Clifford E. Lipe above referred to. The Heffron Company had never procured from the Secretary of State the certificate prescribed by section 15 of the General Corporation Law of the state of New York, to the effect that it had complied with the requirements of law authorizing it to do business within this state.

"Third. At or prior to the execution of the bond and mortgage to Daniel H. Tolman and as a part of the same transaction, the Heffron Company and Daniel H. Tolman entered into an agreement in writing (Exhibit 10) which, in effect, secured to Tolman, in addition to the interest specified in the bond and mortgage, a commission of 1½ per cent. on the gross monthly sales of the Heffron Company, and subsequently there was paid to Tolman by the Heffron Company \$424.67 to apply upon such commissions.

"Fourth. From the proceeds of the loan of \$50,000 received from Daniel H. Tolman, the Heffron Company paid the bonds and mortgages held by the Syracuse Savings Bank and Clifford E. Lipe, respectively. It also paid the claims of certain creditors, aggregating \$1,995, attorney and recording fees of \$255, and the balance was retained by it. Interest was paid on the mortgage down to August 30, 1913.

"Fifth. The Heffron Company never paid to the state treasurer of the state of New York the license tax or fee imposed on foreign corporations by sec-

tion 181 of the Tax Law [Consol. Laws, N. Y. c. 60], nor did it ever pay the annual franchise tax imposed by section 182 of the Tax Law of the state of New York.

"Sixth. On April 15, 1913, it filed with the state comptroller of the state of New York, a report (Exhibit 1) on a blank form prepared by the comptroller and executed by its secretary and treasurer, showing, among other things, the date and place of its corporation, the date when it began business in the state of New York, the amount of its capital stock, the dividends paid since its incorporation, the nature of its business and the percentage of its capital stock employed in the state of New York during the year ending October 31, 1912, in manufacturing and in the sale of the product of such manufacture. This report shows the company to have been a manufacturing corporation, that its total capital stock was \$1,000,000, and that the percentage of its capital, used in this state during the year mentioned in manufacturing, to have been 60 per cent. Upon this report, and without any other evidence or outside information, the comptroller on the 18th day of April, 1913, fixed a license tax under section 181 of the Tax Law of \$1,250, and a franchise tax under section 182 of the Tax Law for the years 1908 to 1912, inclusive, which with accrued penalties now amounts to \$2,196.34. In arriving at the tax imposed by section 182 of the Tax Law, the comptroller ignored the claim of the Heffron Company, as shown by the report filed, tending to show that it was a manufacturing corporation, as well as its claim that 60 per cent. of its capital was employed in the state of New York during the year 1912 in manufacturing, and the amount of the tax imposed under section 182 was the tax properly imposed on a nonmanufacturing corporation without any exemption to which it was entitled under section 183 of the Tax Law if it were a manufacturing corporation employing, at least, 40 per cent. of its capital stock in manufacturing in this state.

"Seventh. On the 20th day of May, 1913, there was docketed in the Onondaga county clerk's office a judgment against the Heffron Company and in favor of David Chezensky and Louis Alpern in the sum of \$2,146.20. Thereafter the Heffron Company took an appeal from said judgment to the Appellate Division, First Department, and an undertaking on appeal in the sum of \$2,500 was executed by the United States Fidelity & Guaranty Company. The United States Fidelity & Guaranty Company was indemnified by the personal bond of Messrs. Stansfield and Loop, officers of the Heffron Company. On the 14th day of June, 1913, the attorney for the judgment creditors Chezensky and Alpern, and the attorney for the Heffron Company entered into a written stipulation to the effect that the lien of said judgment upon any real estate or property of the Heffron Company should be suspended during the appeal, and that an order to this effect might be entered in the clerk's office of Onondaga county. Pursuant to this stipulation and on application of counsel for the Heffron Company, the Special Term of the Supreme Court did, on the 23d day of June, 1913, grant an order exempting the real property of the Heffron Company from the lien of said judgment as against judgment creditors, purchasers, and mortgagees in good faith, and directing the clerk of Onondaga county to note on the docket of said judgment that the lien thereof was suspended on appeal pursuant to the terms of said order. This order was entered in the clerk's office of Onondaga county on June 23, 1913, and the clerk complied with the terms of its direction to him. The stipulation entered into between the attorneys for the respective parties to the action, the granting of the order of the Special Term, and the action of the clerk in noting on his docket the suspension of the lien, were all without notice to the United States Fidelity & Guaranty Company, although section 1256 of the Code of Civil Procedure provides that such an order may be made only upon notice to the attorney for the respondent and to the sureties in the undertaking. The appeal to the Appellate Division terminated on the 27th day of December, 1913, by an affirmance of the judgment. 144 N. Y. Supp. 1103. An appeal was thereafter taken by the Heffron Company to the Court of Appeals, and on the 29th day of December, 1913, the United States Fidelity & Guaranty Company executed an undertaking on appeal to the Court of Appeals. The appeal to the Court of Appeals was dismissed on the 4th day of June, 1914. The order of the Special Term granted June 23, 1913, has never been

vacated, nor has the lien of the judgment as suspended by said order ever been restored by an order of the Supreme Court of the State of New York.

"Eighth. The city of Syracuse on the 15th day of September, 1913, levied an assessment against the Heffron Company for the year 1913, which, together with fees and penalties, now amounts to the sum of \$1,119.52, no part of which has been paid.

"Ninth. The county of Onondaga on the 15th day of December, 1913, levied an assessment against the Heffron Company for the year 1913, which, together with fees and penalties, now amounts to the sum of \$426.57, no part of which has been paid."

[1] These findings of fact cannot be disturbed, as they are accurate and fully supported by the evidence. As to certain judgments, the special master finds that one has been paid, that another has been paid, except \$70, and that the others were obtained within four months of the filing of the petition and are not liens. He then finds as conclusions of law:

"First. That the mortgage of Daniel H. Tolman described in the second finding of fact is valid and is a lien upon the property described therein for \$50,000 and interest from August 30, 1913.

"Second. That the contract of June 19, 1913 (Exhibit 10) is so related to the said mortgage and the bond accompanying the same that interest in excess of 6 per cent. per annum was thereby taken upon the loan secured by the mortgage.

"Third. That by reason of the provisions of section 374 of the General Business Law of the state of New York, the Heffron Company and the trustee in bankruptcy are precluded from interposing usury as a defense, and the mortgage in question is not invalid on account of usury.

"Fourth. That the provisions of section 6 of the Stock Corporation Law of the state of New York, requiring the consent of not less than two-thirds of the capital stock to a mortgage, does not extend to a foreign corporation, and therefore the failure to have such consent to the mortgage of Daniel H. Tolman does not render the same void.

"Fifth. That the failure of the Heffron Company to procure from the Secretary of State a certificate to do business as prescribed by section 15 of the General Corporation Law does not render the said mortgage void.

"Sixth. That the state of New York has a valid lien against the property of the bankrupt for taxes amounting to \$2,128.54; the same being \$1,250 license tax assessed under section 181 of the Tax Law of the state of New York and \$878.54, being 40 per cent. of the amount of the franchise tax assessed under section 182 of the Tax Law of the state of New York for the years 1908 to 1911, inclusive. That the balance or 60 per cent. of the franchise tax assessed under section 182 of the Tax Law of the state of New York was wrongfully assessed, and is invalid for the reason that during the years for which said tax was assessed the Heffron Company was a foreign corporation engaged in manufacturing and employing 60 per cent. of its capital in the state of New York in manufacturing, and to this extent of its capital was exempt from franchise tax under the provisions of section 183 of the Tax Law of the state of New York.

"Seventh. That David Chezensky and Louis Alpern, judgment creditors, and the United States Fidelity & Guaranty Company, surety upon the undertaking given upon an appeal from the judgment of said Chezensky and Alpern, are not entitled to have the lien of said judgment restored nunc pro tunc as of June 23, 1913, the date upon which the lien of said judgment was suspended by an order of the Supreme Court.

"Eighth. That the city of Syracuse has a valid lien against the property of the bankrupt for taxes amounting to \$1,119.52.

"Ninth. That the county of Onondaga has a valid lien against the property of the bankrupt for taxes amounting to \$426.57.

"Tenth. That the judgment recovered in favor of Harold P. Hall against the bankrupt, which is described in the tenth finding of fact, having been

paid, is not a lien on the property of the bankrupt, and should be vacated and discharged of record.

"Eleventh. That the judgment recovered in favor of Charles S. Baxter against the bankrupt, which is described in the tenth finding of fact, having been paid with the exception of \$70, is a valid lien against the property of the bankrupt to the extent of \$70 with interest from July 13, 1913, only.

"Twelfth. All of the other judgments recovered against the bankrupt, which are described in the tenth finding of fact, were recovered within four months prior to December 8, 1913, the date of the filing of the petition in bankruptcy, and were recovered during the insolvency of the bankrupt and are void, and each of said judgments should be vacated and discharged of record.

"Thirteenth. That the valid liens against the property of the bankrupt in the order of their priority and the amount of each, are as follows:

State of New York, tax.....	\$ 2,128.54
City of Syracuse, tax.....	1,119.52
County of Onondaga, tax.....	426.57
Daniel H. Tolman, mortgage.....	52,525.00
Charles S. Baxter, judgment.....	74.13"

[2] The General Corporation Law of the state of New York (section 20) provides that:

"Any foreign corporation * * * doing business in this state, * * * may acquire such real property in this state as may be necessary for its corporate purposes and the transaction of its business in this state, and convey the same by deed or otherwise in the same manner as a domestic corporation."

That a mortgage, such as this Tolman mortgage is, is a conveyance within the meaning of this statute cannot, in view of the decisions, be successfully questioned. That the state of New York, through its law-making power, may prescribe the mode and manner in which a foreign corporation doing business in this state shall convey by deed or mortgage its real property situate within the state, and prescribe the preliminary action, if any, to be taken by such corporation through its directors and stockholders before executing such a mortgage or the subsequent action to be taken by them, if any, in order to validate it, cannot, in view of many decisions be questioned. *Williams v. Gaylord*, 186 U. S. 157, 168, 22 Sup. Ct. 798, 46 L. Ed. 1102, and cases cited. The state may say that if a foreign corporation comes into this state and purchases and owns property it shall not incumber or mortgage it except with the prior consent or on the subsequent ratification of its stockholders. The question is, Has it done so? The answer to this question depends on whether or not the following clauses of section 6 of the Stock Corporation Law of the state of New York applies to foreign corporations, viz.:

"In addition to the powers conferred by the General Corporation Law, every stock corporation shall have the power to borrow money * * * and it may issue and dispose of its obligations for any amount so borrowed, and may mortgage its property and franchises to secure the payment of such obligations, or of any debt contracted for said purposes. Every such mortgage, except purchase-money mortgages and mortgages authorized by contracts made prior to May 1, 1891, shall be consented to by the holders of not less than two-thirds of the capital stock of the corporation" which consent, etc.

If this provision does apply to mortgages given by a foreign corporation doing business in the state of New York on its real property situated in such state, the mortgage in question is void.

On this subject the learned special master says:

"The provision of the Stock Corporation Law, requiring mortgages to be consented to by two-thirds of the stockholders, does not, in my judgment, extend to foreign corporations. The statute should not be construed so as to defeat an obligation of a foreign corporation unless it is clear that the Legislature intended the act to apply to such corporations. The provision of the statute is primarily for the protection of stockholders. No such protection appears in the corporation law of the state of Maine. From an examination of the statute in question, and its history, commencing with chapter 40 of the Laws of 1848, it seems to me that the intention of the Legislature has been to limit its application to domestic corporations. The question is not entirely free from doubt (*Williams v. Gold Hill Min. Co.* [C. C.] 96 Fed. 454; *Williams v. Gaylord*, 186 U. S. 157, 22 Sup. Ct. 798, 46 L. Ed. 1102), but I think the language of the Constitution and statute of California which were involved in the determination of that case, indicate an intention to cover corporations organized without the state but doing business therein. The weight of authority, I believe, is in favor of limiting the application of the New York statute to domestic corporations. *Vanderpoel v. Gorman*, 140 N. Y. 563, 35 N. E. 932, 24 L. R. A. 548, 37 Am. St. Rep. 601; *Matter of Prime*, 136 N. Y. 347, 32 N. E. 1091, 18 L. R. A. 713; *Standard Nat'l Bank v. Garfield Nat'l Bank*, 56 App. Div. 43, 67 N. Y. Supp. 472; *Ernst v. Rutherford Gas Co.*, 38 App. Div. 388, 56 N. Y. Supp. 403; *Saltmarsh v. Spaulding*, 147 Mass. 224, 17 N. E. 316."

Since the special master rendered his decision in this case (July 3, 1914), the Court of Appeals of this state has handed down its decision in *Muck v. Hitchcock et al.*, 212 N. Y. 283, 106 N. E. 75, which confirms the above interpretation or construction put on the Stock Corporation Law and General Corporation Law. Section 21 of the General Corporation Law of the state of New York provides that:

"Any foreign corporation * * * may take by devise any real property situated within this state * * * and convey it by deed or otherwise in the same manner as a domestic corporation."

In the *Muck Case* the American Millennial Association, a religious corporation of the state of Massachusetts, and owning certain lands in the state of New York, contracted to convey same to Elvira E. Muck for \$600. She paid \$50 of the purchase money and later tendered the balance, but the association refused the tender and refused to return the \$50 paid. Later one Welch contracted for the purchase of the land with the association and assigned his contract to Hitchcock. Proceedings were had in the county court pursuant to statute for liberty to convey, and Hitchcock received his deed and went into possession. Muck brought action for specific performance, but relief was denied on the ground that permission to enter into the contract with her for a conveyance of the land had not been obtained of the court. Section 12 of the Religious Corporation Law of the state of New York (Consol. Laws, c. 51) provides:

"A religious corporation shall not sell or mortgage any of its real property without applying for and obtaining leave of the court therefor pursuant to the provisions of the Code of Civil Procedure," etc.

This provision had not been complied with, but the Court of Appeals held that the statute quoted (section 12 of the Religious Corporation Law) does not apply to foreign corporations. The court also quoted and construed section 21 of the General Corporation Law, and per *Cuddeback, J.*, *Chase, Collin, Hogan, Miller, and Cardozo, JJ.*, concurring, *Willard Bartlett, C. J.*, concurring in result, said:

"A religious corporation shall not sell or mortgage any of its real property without applying for and obtaining leave of the court therefor pursuant to the provisions of the Code of Civil Procedure,' etc. It has been held that broad words in a statute conferring powers and privileges on 'a corporation,' or on 'any corporation,' apply only to corporations organized under the laws of this state. 'The Legislature in such cases is dealing with its own creations, whose rights and obligations it may limit, define, and control.' *Matter of Balleis*, 144 N. Y. 132, 133, 38 N. E. 1007; *White v. Howard*, 46 N. Y. 144, 165; *Colquhoun v. Heddon*, L. R. (25 Q. B. D.) 129; *Saltmarsh v. Spaulding*, 147 Mass. 224, 17 N. E. 316; *United States v. Fox*, 94 U. S. 315, 24 L. Ed. 192; *Alfred University v. Hancock*, 69 N. J. Eq. 470, 46 Atl. 178; *Vanderpoel v. Gorman*, 140 N. Y. 563, 35 N. E. 932, 24 L. R. A. 548, 37 Am. St. Rep. 601.

"In my opinion the words of section 12 of the Religious Corporations Law should be limited in like manner to domestic corporations. The object of the state in requiring a religious corporation to obtain leave of the court before conveying its real property is to protect the society and its members from loss through unwise bargains, and to prevent perversion of the association's property. The state owes no service of that kind to foreign corporations. Indeed, it would be impracticable for the courts of this state to exercise such visitatorial power over a foreign corporation. Our courts do not know the needs of the foreign association, and they cannot determine with any satisfaction, as the statute requires (General Corporation Law [Consol. Laws, c. 23] § 73), whether the interests of the association will be promoted by the sale of its land in this state or not, nor can they, with any satisfaction, direct what disposition shall be made of the proceeds of sale. Furthermore, after the sale, the courts of this state would, in most cases, lose jurisdiction of the foreign corporation and its property. The power of visitation over foreign corporations can be exercised effectually only by the courts of the association's domicile. For these reasons, I think it should be said that the law of this state, prohibiting religious corporations from selling their real property without leave of the court, does not extend to foreign corporations.

"It is, however, argued on behalf of the defendants that under section 21 of the General Corporation Law, the Millennial Association could not convey its land without leave of the court. Section 21 reads thus: 'Section 21. Any foreign corporation * * * may take by devise any real property situated within the state and hold the same for not exceeding five years * * * from the time when the right to the possession thereof vests in such devisee, and convey it by deed or otherwise in the same manner as a domestic corporation.' The defendants rely upon the final words of this section, which read thus: 'And convey it by deed or otherwise in the same manner as a domestic corporation.' The argument is that this clause requires a foreign religious corporation to obtain permission of the court before conveying its real property in this state the same as a domestic corporation. Section 21 includes all classes of foreign corporations, and is not confined to those formed for religious or similar purposes. The statutes of this state prescribe certain solemnities which shall attend the transfer of title to real property, and it was those solemnities and nothing more that the Legislature had in mind. *Saltmarsh v. Spaulding*, supra; *Hosford v. Nichols*, 1 Paige, 220, 226."

[3] This decision, so far as the construction of statutes is concerned, is binding on this court and, I think, disposes of the question of the validity of this mortgage. The final words of sections 20 and 21 are the same, and must have the same interpretation. The contrary view has been very ably presented by the learned attorney for the trustee, but I deem the question foreclosed by the Muck Case.

[4] This court agrees with the special master that the failure of the Heffron Company to obtain the consent of the Secretary of State to do business in the state of New York, as required by section 15 of the General Corporation Law, should not be held to invalidate the mortgage. That statute itself prescribes the penalty for such failure, which

is that such corporation cannot maintain an action on its contracts. As the special master says:

"It would be unreasonable to place a premium upon the omission of a delinquent corporation and thereby absolve it from liability to others upon its contracts."

[5] As to the taxes assessed by the state of New York the special master says:

"I think the trustee is not bound by the determination of the comptroller in fixing the tax, nor limited to a review of that determination by certiorari. While ordinarily relief must be secured through certiorari, if at all, an exception in favor of a trustee in bankruptcy is created by section 64a of the Bankruptcy Act. *Matter of Selwyn Importing Co.*, 18 Am. Bankr. Rep. 190; *State of New Jersey v. Anderson*, 17 Am. Bankr. Rep. 63, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284.

"The license fee assessed under section 181 of the Tax Law is, I think, a valid lien even though the Heffron Company never applied for or received a certificate to do business under section 15 of the General Corporation Law. As a matter of fact, it did do business in this state within the meaning of the statute and for several years enjoyed this privilege. I believe the intention of the law to be that the state may levy this tax against a foreign corporation at any time upon learning that the corporation is doing business in this state, and is not restricted to a time when the corporation may ask for the certificate.

"The report upon which the franchise tax for the years 1908 to 1911, inclusive, is based, clearly showed that the Heffron Company was a manufacturing corporation. It also showed that 60 per cent. of its capital was employed in manufacturing in the state of New York during the year ending October 31, 1912. The printed blank furnished by the comptroller limited that particular inquiry to the period mentioned. No other investigation was made by the officer fixing the amount of the tax to ascertain any fact upon which to base his determination. A fair and reasonable construction to be placed upon the entire report would be that the same percentage of capital was employed during the entire period covered by the report. At any rate, the report shows that the company was a manufacturing corporation during all that period, and there was no reason shown for the taxing officer ignoring this fact entirely and taxing the company as a nonmanufacturing corporation. The report does not show that any capital was employed outside of New York. The entire franchise tax assessed is not invalid, but I think it should be reduced as set forth in the sixth conclusion of law."

The amount and legality is to be determined by the bankruptcy court, not the state court. Section 64a, Bankruptcy Law. In *State of New Jersey v. Anderson*, Trustee, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284, it was held:

"A state creating a corporation may fix the terms of its existence and provide that for the continued existence of its franchise it must yearly pay the state certain sums fixed by the amount of its outstanding stock. While the state court may construe a statute and define its meaning, it cannot conclusively determine that which is not a tax to be a tax within the meaning of a federal statute; that is a federal question of ultimate decision in this court."

[6] As to the *Chezensky* and *Alpern* judgment, the lien, if suspended, was suspended pursuant to section 1256 of the Code of Civil Procedure (N. Y.), and can be restored only as prescribed by section 1259, which provides what is to be done and then says:

"The lien of the judgment is thereupon restored, for the unexpired period thereof, as if the order had not been made, but with like effect only, as against judgment creditors, purchasers, and mortgagees in good faith, as if the judgment had then been first docketed."

If the lien of this judgment was properly suspended on due notice, section 1259 controls, but if the proceeding was defective or the order suspending the lien was not properly obtained on proper notice, a motion should be made in the same court where granted for an order vacating such order suspending the lien on appeal. I do not think this court can or should ignore that order, or treat it as a nullity. Clearly it cannot set it aside or vacate it. The parties may make such motion or application in the state courts in respect thereto as they may be advised, and there will be an order to that effect.

The report of the special master is confirmed, and there will be an order or orders to that effect and in accordance therewith, and also allowing an application in the state court as to this judgment last referred to.

So ordered.

THE REMEMBRANCE.

(District Court, E. D. Pennsylvania. August 26, 1914.)

No. 28.

1. SHIPPING (§ 84*)—LIABILITY OF VESSEL—DUTY TO STEVEDORE'S EMPLOYEES.

An employer must use proper and reasonable care to provide a reasonably safe place in which to have his work done, and proper and reasonably safe appliances with which to do the work, but a steamship which contracts with a stevedore to discharge the vessel is not the direct employer of the stevedore's men, and that fact must vary, to some extent, the measure of its duty and responsibility to them.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349-351; Dec. Dig. § 84.*]

2. SHIPPING (§ 84*)—LIABILITY OF VESSEL—INJURY TO STEVEDORE.

Libelant was a winchman employed by a stevedore in discharging respondent ship. The winch was furnished by the ship, and was intended to be operated by a man standing, but another employé of the stevedore who preceded libelant at the winch had rigged a seat which, however, was not secure, and by reason of its falling, libelant who was using it, was caught in the machinery and injured. *Held*, that there was no ground upon which the vessel could be held liable for the injury.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349-351; Dec. Dig. § 84.*]

In Admiralty. Suit by William H. Spilker against the steamship Remembrance. Decree for respondent.

John A. Toomey, of Philadelphia, Pa., for libelant.

Edward F. Pugh, of Philadelphia, Pa., and Convers & Kirlin, of New York City, for respondent.

DICKINSON, District Judge. The special findings of facts and conclusions of law filed herewith give the particular facts in this case. The general facts necessary to an understanding of the ques-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tions involved are few. The libelant was in the employ of stevedores who were unloading the steamship Remembrance. She had a cargo of iron ore. The operation of unloading was performed by the use of buckets. They were required to be lowered into the hold, filled, hoisted out, and hauled athwartship to and the contents dumped into cars on the wharf. This was accomplished by means of winches. These belonged to the ship and their use was given to the stevedores. Beyond furnishing the winches and rigging them the ship had nothing to do with their operation. At the time he was hurt the libelant was working as winchman. The winches were made and rigged so as to be operated by the winchman standing. The winchman who preceded the libelant had rigged up a seat so that he could work while seated. This consisted of a hatch plank supported at the one end by being swung in the bight of a rope fastened to the mast and at the other end by resting on an iron frame and on the rounded top of the flanges of the cylinder head of the winch. The libelant was using this seat with his right foot against the part of the winch next to a heavy driven wheel. This wheel had open spaces somewhat like those between the spokes of an ordinary carriage wheel. The libelant being jostled by the vibration of the lever which he held in his hand, his seat was upset and his right foot and leg pushed between what may be called the spokes of the driven wheel. His leg was so crushed as to require amputation.

[1] Following back the chain of causes we find the nearest responsible cause to be either the act of the libelant in using an obviously insecure seat, or some one in supplying it for his use. Had the seat been part of the place provided the libelant in which to work and did the case turn solely upon the question of whether the proximate cause of his hurt was his own act or that of the employer, his conduct would be of importance. It is unnecessary to pass upon what the libelant did, because in any event the case resolves itself into the question of the negligence of the respondent. Whatever views one may entertain as to the policy of throwing the entire burden of personal injury loss upon the injured, the commonest sense of justice demands that it should not be thrown by law upon another unless that other be in some way to blame for the damage done. If there be a liability, the grounds of it must be known and may be formulated into a proposition. It is a principle of the law of negligence that the employer must, among other things, use due and proper or, in other words, reasonable care to provide a reasonably safe place in which to have his work done and proper and reasonably safe appliances with which to do the work according to the usages, requirements, and ordinary risks of the business in which he is engaged. A like obligation rests upon him to use due and proper care to keep them so. The libelant here, however, has pursued, not the employer for whom, but the ship on which, he worked. This must vary, to some extent at least, the measure of duty and of responsibility.

[2] The case of *Foster v. Bucknall*, 206 Fed. 415, 124 C. C. A. 297, sustains the libelant in his proposition that a ship which bene-

fits by the work done, and which provides the place where and supplies the appliances with which the work is done, is bound to the same degree of care above defined so far as affects what is provided. Had, therefore, the damage here been caused by anything in the conditions of the place or the condition of the appliances provided by the ship, the responsibility of the ship could be found. The ship was not, however, the employer, and had no control over the workmen. If, therefore, the libellant came to his hurt not through anything which the ship had furnished but to something subsequently done by the employer or his employes, the exculpation of the ship is complete. Counsel for libellant recognize this, and advance the proposition of fact that the injuries were caused by a defect in the machinery provided. The fact is set up that there was something out of repair in the winch, causing it to vibrate, and that this jostled the libellant from his seat. This we cannot find as a fact. The libellant was hurt because of the insecurity of the plank on which he was seated. This seat was not provided by the ship, and it was improvised by the stevedores without its consent and by men not under its control.

Waiving the proposition advanced by the respondent, to which reference has already been made, that the use of this insecure seat was the voluntary act of the libellant who thus brought his hurt upon himself, the most which can be said for him is that the seat was provided with the acquiescence of the employer and was used as found and therefore in effect provided by the master. The employer further knew of this use and at least acquiesced in it. All this, however, as the ship was not the employer, falls short of visiting responsibility or liability upon the ship. Whatever the responsibility of the employer may be, that of the ship cannot extend beyond responsibility for the condition of what the ship has provided. To impose liability upon the ship, it is necessary to make good one of three propositions. It must be held that the ship was answerable, not only for what it did provide, but also, in view of the difficulty of operating the winches with the winchman standing, it was its duty to have provided seats. We do not feel warranted by any known principle of the law of negligence or by any authority to so hold. The second ground of possible liability is that, although the condition of the winch did not cause the injuries to the libellant it did cause the lever to vibrate or shake, and that this contributed to the injuries by causing the plank to be displaced. It is a principle of the law of negligence that one guilty of negligence is answerable if his negligence was a contributory cause to the injuries sustained, but this would compel a finding that the respondents here were bound to anticipate that the winch would be operated by the winchman from an insecure seat. This we cannot find. This leaves as the only other possible ground of liability the proposition of fact, from which a finding of responsibility might or might not arise, that the injuries of the libellant were received, not because of the falling of the plank, but because he was thrown from his seat by the movement of the lever. Unfortunately for the libellant we cannot make this finding. There is nothing in the evidence to justify it.

The conclusions of fact and law reached are those already stated that the cause of the injuries to the libelant was the insecure plank on which he was seated, and as this seat was not provided by the ship, she was without blame and her owners free from legal negligence.

A decree dismissing the libel, with costs to the respondent, may be submitted.

UNITED STATES v. COLO et al.

(District Court, W. D. Arkansas. September 1, 1914.)

1. INJUNCTION (§ 230*)—STRIKE INJUNCTION—VIOLATION—PROCEEDINGS TO PUNISH—NATURE AND CHARACTER.

A proceeding to punish certain union miners for violating a strike injunction against violence is criminal in character.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 502-516; Dec. Dig. § 230.*]

2. INJUNCTION (§ 223*)—STRIKE INJUNCTION—INCITING OTHERS TO VIOLENCE.

Where an injunction against certain union miners had been issued, restraining violence against the property and nonunion employés of a mining company, language or conduct intended to incite others to violence and to a violation of the court's order constituted a punishable contempt.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 448-473; Dec. Dig. § 223.*]

3. INJUNCTION (§ 230*)—STRIKING INJUNCTION—VIOLATION—EVIDENCE.

In proceedings for alleged violation of a strike injunction prohibiting interference with the workings of a mine, its property, employés, etc., or the exercise of violence towards nonunion employés, evidence held to require a conviction of some of the defendants, and insufficient to establish the guilt of others beyond a reasonable doubt.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 502-516; Dec. Dig. § 230.*]

4. CRIMINAL LAW (§ 168*)—OFFENSES—AUTREFOIS CONVICT.

Conviction of certain union miners for violating a strike injunction, prohibiting acts of violence against the property and nonunion employés of a mine operator, on a charge of contempt for an offense which is also a crime, does not bar a prosecution for the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 290-303; Dec. Dig. § 168.*]

Proceedings by the United States against Morrow Colo and others, for alleged violation of a strike injunction. Judgment against certain of the defendants, and certain other defendants discharged.

J. V. Bourland, U. S. Atty., and Read & McDonough, all of Ft. Smith, Ark., for the United States.

Webb Covington, of Clarksville, Ark., and R. W. McFarland, of Greenwood, Ark., for defendants.

J. W. Goolsby, of Hartford, Ark., for defendant Loyd Claborn.

YOUMANS, District Judge. On the 9th of May, 1914, in the case of Mammoth Vein Coal Mining Co. v. M. Hunter et al., this court rendered the following decree:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Now on this day came the complainant, by Jas. F. Read and James B. McDonough, its solicitors, and the defendants by their solicitors, Ben Cravens and Webb Covington, and the defendants having filed answer herein, this cause came on to be heard upon the evidence introduced and argument of counsel. And thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, namely: That this cause be dismissed as to said defendants, M. Hunter, John Bumpus, and Peter McMullan. And it is further considered, ordered, adjudged, and decreed by the court that as to all the other defendants named in the caption hereof, and each of them, and all other persons acting or co-operating with defendants, or conspiring or combining with them, or any person having notice of this order, be, and the same are hereby, perpetually restrained, individually and collectively, from interfering with, injuring, obstructing, or stopping by force, threats, or intimidation any of the business of complainant, and from in any manner interfering with the property of complainant, or trespassing upon the same, whether the same is specifically described in this decree or not, which property is generally described in such complaint as Prairie Creek Coal Company mine No. 4, and Mammoth Vein Coal Company mine No. 1, near the town of Midland, in the county of Sebastian, state of Arkansas, and from entering upon any of the grounds or premises occupied by the complainant as aforesaid for the purpose of interfering with the business of complainant or with the property or employes of complainant, and from compelling by threats and force and violence, or by direct or indirect coercion, any of the present or future employes of complainant from performing their duties as such employes, or in doing any act whatever in furtherance of a design to restrain or prevent, by unlawful conduct, complainant from operating its said mines, and said defendants and each of them, and such persons unlawfully associating or conspiring with them, or having knowledge of this order, be further restrained from in any manner unlawfully interfering with any person or persons that the complainant may hereafter bring or cause to be brought to its said mines heretofore referred to, or from encouraging or abetting any person or persons to threaten or coerce, directly or indirectly, any person or persons that may enter or continue in the employment of the complainant, and that they and each of them, their confederates or associates, or persons having knowledge of this order, be enjoined from assembling in or upon the premises of complainant, for the purpose of holding disorderly or riotous meetings, or for the purpose of effecting unlawful interference with employes of complainant or with its property, and from in any manner damaging or destroying the property of complainant. It is further ordered that printed copies of this decree be made and posted at and about the said mines of complainant and at other public places in the said county of Sebastian and state of Arkansas. It is further ordered that the marshal of this district be, and he is hereby, directed to adopt such measures and use such means as may be necessary to enforce this decree. It is further considered, ordered, and decreed by the court that the complainant have and recover of and from the defendants above named, except the said M. Hunter and John Bumpus and Peter McMullan, all its costs herein laid out and expended, and may have execution therefor, and jurisdiction of this cause is retained for the purpose of taking such action herein as the court may deem necessary for the enforcement of the decree."

On the 13th of June the plaintiff in that case filed a motion for an attachment against Morrow Colo, Foster Bean, Sandy Robinson, Blue Johnson, James Slankard, P. R. Stewart, and Frank Gripando, for contempt in violating the orders of the foregoing decree. On the 20th of June the Mammoth Vein Coal Mining Company filed a similar motion containing charges against John Manick, Sandy Robinson, and Clint Burris. Foster Bean, Morrow Colo, and Blue Johnson have not yet been arrested. The cases against each of them will be continued. The other cases were heard together.

On July 27th, after the evidence on the original charges had been

taken and the cases submitted, a motion was made to reopen them to allow additional testimony to be introduced, growing out of an alleged attack on mine No. 4 by an armed mob, the killing of two of the company's employes, and the burning and blowing up of its property. The motion was sustained as to P. R. Stewart, but was denied as to all others. Motions were then filed for attachments for contempt against John Manick, Frank Gripando, Loyd Claborn, Pink Dunn, and George Burnett, charging them with having been members of the mob. Testimony was then introduced as to the occurrences of July 17th.

[1] Each one of these cases is a criminal proceeding. *Merchants' Stock & Grain Co. v. Board of Trade*, 201 Fed. 20, 120 C. C. A. 582. The charges against Sandy Robinson, Clint Burris, and John Manick contained in the motion filed June 20th will be considered together. These three men were defendants in the case in which the decree was rendered. They were prominent in the occurrences of the 6th of April, when a large number of Union miners and their sympathizers attacked the employes of the Mammoth Vein Coal Mining Company and compelled that company to stop for a time the operation of its mine as an open shop. After the issuance of the injunction, the Mammoth Vein Coal Mining Company undertook again to operate its mine, called No. 4, as an open shop. For the purpose of protecting its employes and property, it employed a number of armed guards. Robinson, Burris, and Manick lived at Prairie Creek, only a short distance from mine No. 4. Prairie Creek is a station on the line of the Midland Valley Railway. The line of railway passes mine No. 4 at a point nearer than Prairie Creek. By a rule of the railroad company, its passenger trains stop at No. 4 when there is a certain number of passengers who desire to get off there.

On the 15th of June, 1914, a number of employes of the Mammoth Vein Coal Mining Company were on the train going from Ft. Smith to mine No. 4. At Midland Robinson, Burris, and Manick, with others, boarded the train. There is testimony tending to show that all three had baseball bats. It is admitted by Burris and Manick that each one of them had a bat. The passenger car was divided into two compartments. The employes of the coal company were in the smoking compartment of that car. There is testimony to the effect that these three men came into that compartment and began to ask the employes where they were going. On ascertaining that they were going to No. 4 to work, Robinson, Burris, and Manick began to curse them and call them "scabs," and applied to them opprobrious epithets. There is testimony that Burris held a bat over the head of one Boraski, and told him that he should not get off at No. 4. There is also testimony that, on the arrival at mine No. 4, Manick called to Robinson and Burris to stand at one end of the car and he would stand at the other, and that they would not let these "scabs" out. One witness testified that, in coming out of the car, he was struck from behind, and on looking around Robinson was the man nearest him. The testimony of Robinson, Burris, and Manick was that they had done nothing except to endeavor to persuade certain men not

to work at the mine, and did succeed in persuading one man, by the name of Abe Harris, who remained on the train; that Burris refunded the amount of Harris' fare to the company's agent.

D. O. Stout, who was on the train, testified as follows:

"Q. If there was anything out of the ordinary occurred on that train, in your own way tell the court what it was. A. I don't think of anything only they had some boys going to No. 4 to work, and these union boys, it seems, got on, and they were talking about this, and they were talking and telling them how it was, and trying to get them not to go back to work, and I think there was some that got in conversation with them, and I think there was some one said that he didn't know what he was getting into, and he wouldn't get off."

The testimony of the witness Emery was to the same effect. He also said that Robinson, Burris, and Manick "didn't have any baseball bats that he knew of."

Mrs. Cox testified that she was in the ladies' compartment, and that Robinson came in there and talked to her on the way from Midland to No. 4.

Dr. Routh testified that he also rode in the ladies' compartment, and that he heard nothing in the way of threats.

After a consideration of all the testimony, I am convinced that Burris, Robinson, and Manick did use threats on that occasion against the employes of the company and endeavored to intimidate them, and that in so doing they knowingly violated the court's orders. In my opinion the presence of armed guards and a deputy United States marshal, who met the train at the stopping point, alone prevented an attack on the employes.

Sandy Robinson is separately charged with having cut some sacks of feed belonging to the Mammoth Vein Coal Mining Company on the platform at Prairie Creek. This was on May 18th. The feed was being unloaded from a Midland Valley car for the purpose of being taken to mine No. 4. The testimony is that Robinson was there and engaged in an altercation with a mine guard, and that he took out his pocketknife and cut five sacks. I am convinced that this is true, notwithstanding his denial, and the testimony of witnesses tending to show that he was not there.

The defendant P. R. Stewart, at the time of the occurrences herein mentioned, was president of district No. 21 of the United Mine Workers of America. He was present during the trial of the case of Mammoth Vein Coal Mining Co. v. Hunter et al. He heard all the testimony, sat with counsel for the defendants during the trial, and heard the opinion of the court when it was handed down. He therefore had full knowledge of the issuance of the injunction and its terms. The charge against him consisted of certain statements made by him. On May 25th Stewart went from Ft. Smith to Midland in an automobile in company with Paul Little, state prosecuting attorney. While at Midland, Stewart made some statements in front of McGee's Drug Store.

Dr. O. M. Neal testified as follows:

"I was not in the drug store when they came up. I was down the street a ways. I think he and Paul Little came down there together, and Mr. Stewart

had gotten out of the car, and Mr. Little also, and Mr. Little had gone up the street when he got there. I don't know what Mr. Stewart was saying when he got up there. The remark that attracted my attention was something like this: 'That they armed them scabs up there and allowed them to parade up and down our public highways and curse our wives and beat us up.' And he put his hand up to his side, and says, 'That man'—I cannot call his name. I believe he said his name was Bailey, the man that put him out of business down at Hartman, kicked him when he was down. He says, 'If they don't want a Colorado in Oklahoma, they had better stop that, for after this week all the men that want arms can get them.' That is about the way—about what he said."

Dr. Neal testified further as follows:

"Q. Did he make a statement as to where they could get the guns if they wanted them? A. No, I don't believe he did. He said he wanted it distinctly understood; that it was no secret; it was a public thing that they were armed; that any man had a right to arm for the protection of his home, that wanted it, I believe. Well, I believe he said that any man that wanted a gun, he would see that he got it."

J. F. York testified as follows:

"Q. Did you hear a man at McGee's store on the 25th, at Midland, make a statement to a crowd, with reference to this mine trouble, or anything connected with it? If so, state what you heard. A. I heard a man make a few remarks. He seemed to be talking to five or six of the boys; two remarks only. I didn't know who he was. I was told he was Stewart. Q. You may tell what he said. A. I stepped out of McGee's store, just on the pavement in front of the store, and there was a man came up to my left and passed towards him, and I never did reach him. He was remarking to a half a dozen men, about that number. He never introduced us. It really did not attract my attention; and the remark I heard was this: That the men couldn't stand everything; that they had better die. And then somebody said something about a gun, or guns (I don't know whether they were saying it in the plural or in the singular), and this man that made the remark and was standing there talking to the other men said, 'You can get all the guns that you want.' What they were talking about, I don't know. That is all I heard said, and the man that made the remark walked right on in the street away from the crowd immediately after he made the second remark. Q. Was that (pointing to Stewart) the man that was pointed out as president of the United Mine Workers? A. Yes, sir. Q. You did not hear the conversation that took place before you got there? A. That is all I heard."

T. J. Porter testified as follows:

"Q. On the 25th of May, of this year, please state whether or not you heard Mr. Stewart make any remark at McGee's store at Midland. A. I don't remember the date, but I heard him make a statement. Q. I wish you would state to the court what he said, as well as you remember? A. He said that the Bache-Denman guards were carrying guns up and down the public highways, and that they must be stopped. I don't know that I heard all that he said; that they were carrying guns up and down the highway; and he said, 'Next week that all the men that wanted guns could have them,' and that also there would be another Colorado trouble. Q. What men was he talking about; what men could have guns if they wanted them? A. I suppose—well, I don't know what he meant unless he meant the miners. Q. Did he say anything about the mine running as 'open shop'? A. No. I remember of hearing him say rather than see them work out there, he would go out there and die himself. Q. Rather than see them work 'open shop'? A. At No. 4. Q. He would go out and die himself? A. Yes, sir. Q. Did he make, in that connection, any statement as to whether or not he was armed at that time? A. Yes. He said he was carrying his gun, and he advised every one else to do so; that he was taking that responsibility on himself. Q. State whether or not he was

making that conversation, or making that statement publicly, or whether he was making it privately? A. He was making it publicly. He said there was no secret. Q. What did he say about another Colorado? A. He said next week there would be another Colorado trouble at No. 4. Q. You heard him say that he was carrying his gun himself? A. Yes, sir. Q. What did he say about others carrying their guns? A. He said he would take that responsibility on himself, and next week anybody that wanted a gun could get one."

B. Bishop testified as follows:

"Q. Do you know where McGee's store is over at Midland? A. Yes, sir. Q. Were you there on May 25, 1914? A. Yes, sir. Q. Do you know a man named P. R. Stewart? A. Yes, sir. Q. Did you hear Mr. Stewart make a statement on the day named at McGee's store? A. Well, I heard him make a statement; yes. Q. What did he say? Give his exact words as near as you can remember. A. I don't know as I could give his exact words. Q. Give them as near as you can remember. A. He made a statement about all the men that wanted guns they could get them, so far as that was concerned. Q. I wish you would repeat that. I did not hear it. A. All the men that wanted guns could get them. Q. I will ask you to state if he said anything about getting the guns himself for them; whether he said he would get them, or whether he said the men could get them. A. I didn't understand it that way. The way I gave it is the way I understood it. Q. You made an affidavit on the 27th, didn't you? A. Yes, sir. Q. For the purpose of refreshing your memory, I will ask you to say if you didn't say in that that you heard him say that, if the union men needed any guns, he (Stewart) would see that they got them? A. I didn't understand it that way. Q. You have given it as your understanding? A. Yes, sir. Q. What else did he say, if anything? Did he say anything about a Colorado trouble? A. Well, I believe he did say if they wanted trouble like the Colorado, they could get it. I didn't hear it all. Q. I know. I am just asking you what you heard. What did he say, if anything, about whether or not he would die before he would see the mine at No. 4 run 'open shop'? What did he say on that subject, if anything? A. He said he would pick up a gun and die himself before he would see it run 'open shop.' Not in them words, hardly, but they meant that way."

On cross-examination the witness said:

"Q. Did you hear anything said about two of those guards having abused some women and children over there? A. I don't believe I did. Q. I will ask you if Stewart did not make this statement: 'I am advised that two of those guards over there abused two little girls on the road from school to home'—and upbraided them for it, the mother upbraided them for it, and they cussed her out. A. No, sir; I didn't. Q. If any man—the thing is public property over there, then, if the men wanted guns to protect their homes, they could get them. Isn't that what he said? A. Well, I believe that is. He did say that they were abusing some children, and that is the way he brought it in. Q. And in that connection, didn't he also say that one of the guards, Riley Bailey—didn't he say that Riley Bailey, one of the guards, had fixed him when he was attacked at Jamestown, and kicked him in the side and about put him out of business, and that he was a bad man? A. Mr. Stewart did say that."

Mr. McGee testified as follows:

"Q. Do you know Mr. P. R. Stewart, president of the United Mine Workers? A. This is the third time I ever saw him. Q. On May 25th, this last May, state whether or not you heard him make a statement at your store in Midland, if he made a talk to any men there. A. Well, that is about the time. Q. What was it you heard? Just give it to us. A. I was not outside. Q. Give your best recollection of all you heard. A. All I heard Mr. Stewart say, if that is Mr. Stewart there (pointing), was that they could all have guns that wanted them, and that there would be a Colorado in a few weeks if

they wanted it that way. That is all I heard him say. Q. Did you hear him say anything on the subject of whether he was armed himself? A. No, sir."

Mr. Stewart testified as follows:

"Q. Are you president of district 21, United Mine Workers of America? A. Yes, sir. Q. How long have you been president of the district? A. I believe it is since 1908 or 1907. I don't remember which. Q. Did you hold any official position in the organization before you were elected president? A. Yes, sir. I was a regular officer since 1903. Before that time, I held the position probably a month or two at a time. Q. How long have you been connected with the organization as an official, in that capacity? A. I have been an official in the organization since 1903, and practically since 1890 I have been hired to go around and settle disputes and talk to the men, at different times. Q. You are charged here with having made a statement to a gentleman in Midland in front of McGee's drug store with reference to the court's order in this case. I wish you would state if you recall the trip that you made to Midland, and if you can state now about what was said on that occasion. A. As near as I can remember, I had information that a guard named Bailey and some guards had insulted some girl, and of course that made me pretty mad, I don't deny that, because it was the one who had insulted me previously in another county, and I got to Midland and got to talking to some of them people there, and I said it was reported that some women and children had been insulted, and I said it was an outrage that women and children should be insulted by such men, and, if we couldn't get any protection, it was my idea to arm the men in the Hartford Valley so that they could protect their own homes and so they could protect the women and children. I didn't have any idea in saying that that I was violating any order of Judge Youmans. I didn't have any idea that I was violating the injunction by saying that. If I thought I was violating the injunction by saying that, I wouldn't have said it. I thought it was the right any American citizen would have to protect the homes and the wives and children; that is, for the members of our organization. I had remembered the Ludlow affair when our women and children were murdered, and I didn't think there should be any such thing out there; indeed, my idea of it is that no man should be armed; neither side should be armed. I don't think men should be brought in who are ex-convicts and then go around carrying arms, and I think they all ought to be disarmed, and that when one side carries arms themselves, and the other side carries arms, the homes are going to be shot into in the night, and are afraid of their lives to live there, and request us to ship guns out there. There is no place to ship them to. No work in the country and I want to say now, as an evidence of my respect for the court, I want to say that I don't think there is any one in this country has any greater respect for the courts of this country than I have."

It will be seen that Mr. Stewart did not deny any of the testimony given by the witnesses as to what he said in front of McGee's store at Midland. He explains it by saying that he "had information that a guard named Bailey, and some other guards, had insulted some girls," and that that made him pretty mad. He said:

"It was my idea to arm the men in the Hartford Valley so that they could protect their own homes, and so that they could protect the women and children."

What was the occurrence that caused this outbreak on his part, and gave birth to the idea "to arm the men in the Hartford Valley"? He had just ridden from Ft. Smith to Midland with the prosecuting attorney, Mr. Little.

Mr. Little testified as follows:

"Q. Do you know P. R. Stewart? A. Yes, sir; I am personally acquainted with him. Q. Did you make a trip with him, or see him, at Hartford some time back, and, if so, at about what date? A. I made a trip with him to Midland, and I returned that evening as far as Bonanza, and he came back to Ft. Smith, and the next day I went to Hartford, and he happened to be on the same train I was. I don't remember the date. Q. Do you know Riley Bailey? A. I know him by name. I don't know that I would know him by sight. Q. Do you know Will Bohannon? A. I know Mr. Bohannon by name; yes, sir. Q. Had you, prior to the date you went to Hartford, had Bohannon arrested? A. I had three men arrested prior to the date on which I went to Hartford. Bohannon was one of them, but I do not recall whether Bailey was or not; but after the first arrest I did have a warrant issued for Bailey, charging him with a disturbance of the peace, by using abusive language towards a young lady over there. I believe, now, Mr. Bailey was one of the parties that accidentally got shot, was he not? Q. Yes, sir. A. That is the party that I speak of. Q. Did you try him? A. No, sir. Q. Why? A. Because he has sustained an injury accidentally down there, and was confined in the hospital here."

That was the incident that put the idea into Mr. Stewart's head, according to his testimony, "to arm the men in the Hartford Valley." The inference is permissible that he had gotten the facts from Mr. Little with whom he had ridden from Ft. Smith, and that he knew what Mr. Little had done with reference to instituting a prosecution against Bailey. Later, on the same day, he accompanied Mr. Little to mine No. 4, to investigate the accidental shooting of Bailey and Bohannon. He knew all of the facts, both of the alleged disturbance of the peace and the accidental shooting. He knew that Bailey had been arrested and would be tried as soon as he could leave the hospital. He knew that the situation did not justify his threat to arm the men in the Hartford Valley. There was nothing, so far as the attitude of the state and county officers towards offenses committed by employes of the Mammoth Vein Coal Mining Company was concerned, to warrant him in assuming authority to supplant the legal methods for the enforcement of the law. He made a speech at Hartford the next night at a gathering at which Mr. Little was present. With reference to that, Mr. Little testified as follows:

"Q. Now you say you made a trip with Stewart to Hartford. Did Stewart make a speech addressing the miners at Prairie Creek and Hartford, at the town of Hartford? A. I could begin at the beginning and give you my reasons for being there. I don't know why Mr. Stewart was there. One of the fraternal organizations of that town had a public installation and invited me to come over there and make them an address, and in response to that invitation I went over, and I engaged in a conversation with Mr. Stewart, who was on the train at that time, and I told him of the blow-out they expected to have there, and took the liberty to invite him to go with me to this banquet, and it was at that banquet that Mr. Stewart made an address. Q. Upon what subject? A. I made a speech on 'Fraternalism,' and, after that part of the program was completed, they served some cream and cake, and some of the parties had evidently found out the day before Mr. Stewart and myself were at No. 4, or at Midland, and they began to publicly ask me to make them a statement about what I found over there; at least it had been rumored that they had gotten into a fight among themselves, and they wanted to know about the conditions. I hesitated for some time, and they kept insisting, and I made them a little talk and gave them what information I had gathered. In the course of my remarks, I admonished them, like I had done privately to different individuals, that this was a very serious matter, and it was a time when they should let their best judgment govern them, and they

should not in any way violate the terms of the injunction that had been issued against them, and I complimented Mr. Stewart for the way in which he had, in my presence, advised the men to let the law take its course, and not interfere with the officers or property of the mine officials, and, after I had concluded my remarks, they voluntarily called on Mr. Stewart. He was present, and he got up, and he made them what I considered a nice little talk. He told of his early struggles as a miner, and he said he was always glad to be associated with the laboring people because he was one of them, and he was very proud of the fact that he was there on that occasion, and he went ahead then and told them what he had found out; and likewise he admonished them to let the law take its course and not to in any way conduct themselves so that it would be any contempt of court, and he went ahead there, and among the things he said, if I recall it in his manner of expressing himself. He used broken English, and he said: 'It is a serious condition that confronts us down there.' He says, 'In addition of these men coming in here and taking the places of the union men, from the reports that I have gathered to-day from different authorities, I learn that they are insulting women and girls,' to use his expression; and he says, 'That is one thing I won't stand for, for the womanhood and girlhood of the country to be insulted and run over in such a way, and stand for it, and, if they could get no protection under the law, in order to protect the women and girls he was willing to arm every man in the valley and fight and serve in the defense of the womanhood and girlhood of the country.' He may have made some remarks along that line, and sat down. That was about all that was said."

Stewart made this statement at Hartford more than 24 hours after he had made the statement in front of McGee's store at Midland. If the first statement was made in anger, the second was made after his temper had had ample time to cool. It was made after the prosecuting attorney had, in response to inquiries, stated the information he had gathered. There was no reason to presume that the officers and the courts were not able to cope with all violations of the law. Notwithstanding this, Mr. Stewart saw fit to repeat his threat, and that, too, in the presence of the prosecuting attorney, who permitted it to pass unrebuked.

The conviction cannot be avoided that the real object of Stewart was to prevent the operation of the mine as an "open shop." The charge against Bailey was merely a make-weight.

T. J. Porter, referring to Stewart's statement at Midland, said:

"I remember of hearing him say rather than see them work out there he would go out there and die himself."

Bishop stated:

"He said he would pick up a gun and die himself before he would see it run 'open shop.' Not in them words, hardly, but they meant that way."

After the injunction was made perpetual, and evidently after the charge was made against Bailey, Oliver Johnson, a deputy United States marshal, was on a train going from Greenwood to Midland. Mr. Stewart was on the same train going to Atoka, in Oklahoma. He entered into conversation with Mr. Johnson without knowing who he was. Johnson testified as to what was said as follows:

"Q. I wish you would state what that conversation was. A. He asked me—he came and sat by me and asked me where I was from, and I told him I was from Washington county down here. He says, 'I presume you are a farmer;' and I said, 'I was born and raised on a farm.' Then he spoke about a couple of girls down there that had been insulted by the employees at No. 4.

I asked him if he knew who the girls were, and he said they were farmers' girls, school girls. I said that I noticed that the papers referred to them having trouble about that mine, and he said, 'Lots of trouble;' and I said, 'The paper states that they are going to operate it with nonunion labor;' and he says, 'We don't aim to let them;' and I said 'we,' and he said 'the union'; and I said: 'What steps will you take to prevent it? The court has granted a permanent injunction, I understand.' And he says: 'Damn the injunction; the national government is against us, but the people are with us, and we don't aim to let them dig coal.' And he did not say how they aimed to prevent it. I believe that is the conversation, the substance of the conversation."

Stewart denies the statement to Johnson in an argumentative way. That is, that he could not have made the statement because it was contrary to the way he felt and different from the advice he had given the members of the union. His denial does not appear to me to be candid, and I am compelled to believe Johnson. From the testimony quoted, the conclusion must be that Stewart's real purpose was to prevent the operation of the mine as an "open shop" regardless of the injunction.

The testimony also shows that there was a shipment of arms from McAlester, Okl., to Hartford by Fred Holt, secretary treasurer of the union, to Oscar Layton. This shipment was made about the 16th or 17th of June. Holt testifies that these arms were sent in response to letters from members of the union, and were to be distributed among the members upon the arising of an emergency to be determined by him. Holt also testified that his action in making the shipment was approved by Stewart. The motions for attachment for contempt were filed on the 13th and 20th of June. Between the 20th and 25th of June, Stewart and Holt had a conference at McAlester, and it was decided that the shipment of arms might be held to be in violation of the injunction, and it was determined between them to have those arms shipped back to McAlester. They were sent back on the 3d of July; the hearing of the contempt cases having begun on the 1st of that month. Arms had already been sold to members of the union by a merchant at Prairie Creek by the name of Mastelle. Holt testifies that he took up, or caused to be taken up, all guns sold by Mastelle that had not been paid for, and became responsible for the price to Mastelle. Mastelle testifies that he had no transaction with Holt at all, and that all the guns sold by him were sold for cash, and that therefore he did not remember who bought them.

The reason assigned by Holt for the shipment of arms made by him were: First, because the coal company had armed its men; and, second, because arms were needed for the protection of the families of the members of the union, and that the civil authorities were powerless to afford them protection. These reasons will be considered in the light of the evidence.

The coal company had determined to run its mine as an "open shop." The union was opposed to such operation. If the coal company had no legal right to run its mine as an "open shop," there must have been some way, by orderly procedure in the courts, to prevent it. The union was endeavoring to prevent such operation, but not by legal proceedings. If it could accomplish its purpose by legal means,

no one had a right to complain. Its first effort was not by legal means. On the 6th of April its members and sympathizers assembled on the company's property, assaulted its employes, and compelled them to stop work. That method was unlawful. At the instance of the coal company, all persons engaged in that attempt, and all others, were enjoined from in any manner interfering with the company's property or employes. Notwithstanding the injunction, assaults were threatened. Shots were fired into the mine inclosure. It was necessary to keep armed men about the mine. From some time in June to the 15th of July deputy United States marshals were stationed at the mine. Even when men went to Midland for supplies, it was necessary for them to go armed. As before stated, the purpose of the union was to prevent the operation of the mine as an "open shop." That purpose was maintained despite the injunction. Some colorable pretext was sought in order to effect that purpose. The charge against Bailey was made, and that incident was seized upon by Stewart as a justification for arming the members of the union, notwithstanding the fact that Bailey was promptly arrested and held for trial. The testimony shows that every charge against the company's employes was investigated promptly. To show the activity of the local officers and the prosecuting attorney in prosecuting employes of the company, I will refer to certain testimony. Three of the employes with a supply wagon were sent to Midland for supplies. On leaving the mine, they placed two guns in the wagons.

W. B. Womack testified to what occurred at Midland as follows:

"Q. Were you in Midland on May 18th of this year? A. Yes, sir. Q. Did you see the supply wagon of the coal company in charge of Levi Brown and Charles Cheek, and some other employes of the company, at the time it was driving away from Midland? A. I saw the wagon. I don't know who was the owner of it, or any of the men. Q. Did you see some rocks thrown there by anybody? A. Yes, sir. Q. I wish you would describe what you saw. A. I was standing at the car door at the time the wagon left the car. At the time the men had gone a few yards from the car, a bunch of men gathered across the street. I didn't know but one of the men that was throwing the rocks, and that was that Foster Bean. Foster Bean and a boy that looked to be 16 or 17 years old stepped out in the street and taken and threw rocks at the men at about 100 yards from there, and he stepped down and got off and tied one of their bread boxes that they had on the wagon, and they continued until one of the men stepped to the wagon and got his gun, and after that time the marshal came and arrested them. Q. Arrested whom? A. The men on the wagon."

J. W. Baker testified as follows:

"Q. Where were you on the 18th day of May? A. I was at Midland. Q. Were you there at the time the drivers of that wagon were arrested? A. Yes, sir. Q. Describe what you saw. A. When they were loading the stuff, some of the boys says, 'Let us rock them scabs; let us rock them scabs;' then they drove off down the street below the store, between the store and that little bridge down there, and they began throwing rocks at them, and Mr. Bohannon got out his gun, and they started, and he was sitting down when the marshal went and arrested them. Q. The men that were driving the wagon were in sight of you at the time the rocks were being thrown at them? A. Yes, sir. Q. Did these men do anything—the men that were in the wagon? A. No, sir; they did not do a thing. Q. Did you see them do anything to be ar-

rested for when they were arrested? A. No, sir. Q. How many rocks were thrown? A. Well, I don't know. I expect there was something near a dozen rocks, or maybe more. Q. Did any of the rocks come near hitting the men in the wagon? A. One of the rocks came pretty near hitting Mr. Brown."

This testimony was uncontradicted. The prosecuting attorney testified as to the disposition of that case. He stated that these men were prosecuted for disturbing the peace by brandishing firearms, and were fined. He himself went to Midland and conducted the prosecution in the mayor's court. As to the men who threw the rocks, he testified as follows:

"Q. Did you institute prosecutions against any of the men who threw the rocks? A. I did not, because, after I inquired about it, they said they had been tried before and acquitted. Q. In the night. Did you know that? A. If you want me to tell you what they told me— Q. You had information that they had been tried before, and acquitted? A. Yes, sir. Q. You say you never instituted any proceedings against those men for throwing rocks? A. No, sir. Q. You never instituted any prosecutions against anybody that was a union miner? A. I never had any complaint against the union miners."

In this instance the uncontradicted evidence is that an employé of the coal company picked up a gun for the purpose of defending himself and two others with him against a crowd that was throwing stones at them. The employés were arrested on a charge of disturbing the peace by brandishing firearms. The prosecuting attorney went to Midland to prosecute them. They were fined and convicted. The men who had thrown the stones were acquitted. Certainly no member of the union could say that the civil authorities were powerless or inactive in such a case. The prosecuting attorney on his own initiative went from Ft. Smith to the mine to investigate the case of accidental shooting referred to, and took the president of the union along. It cannot be said that, so far as charges against the company's employés were concerned, he did not act promptly. In that regard his course is in strong contrast with his action with reference to alleged violations by members of the union, or their sympathizers. On that point he testifies as follows:

"Q. Have you instituted any prosecutions in the state court for any of the things that occurred at the mine on April 6th? A. Is that the date of this alleged beating up? Q. Yes, sir. A. No, sir; I have not, because I never learned who beat them up. Q. Have you made any investigation to find out who beat them up? A. Yes, sir; I have, and I intended to lay it before the grand jury at this time. I told you the other day I would be glad to present any information you had. Q. I told you that the matter was under investigation in the federal court, and that you could get some of the names of witnesses from the records there in the files, and that I had the information at my office, and that you were welcome to anything I had. A. You said something like that. I know when this matter first came up it was like trying to investigate the matter of who hung this nigger over here; we could not find out, because there were so many of them."

On redirect examination Mr. Little says:

"Q. Mr. McDonough (counsel for coal company) asked you if you had instituted any prosecutions. Please state if he did not promise to turn over to you the information, so you could lay it before the grand jury. A. That was my understanding when he and I had the conversation over there in the courtroom. I understood that he was to. He asked me why I did not prose-

cute these violations, and I told him that I had thought over the matter, and the matter was over there in the federal court, and they had enough power to enforce their orders, and I supposed they did not need any assistance from the state authorities to enforce their orders or enforce the injunction."

It will thus be seen from the testimony of the prosecuting attorney that, so far as the violations of the injunction were at the same time violations of the criminal laws of the state, those laws were suspended for the time being.

The conclusion is unavoidable that if the members of the union had obeyed the orders of the court, or if the officers of the county had shown the same disposition to prosecute violations of the law when committed by union men as when committed by employes of the company, it would not have been necessary for the latter to carry arms.

The argument is made by counsel on behalf of Stewart that, while he was opposed to the operation of the mine as an "open shop," he was also opposed to violence as a means of preventing such operation, because the end desired could and would have been effected in time without resort to violence. That conclusion is reached by this process of reasoning: The margin of profit to the coal operator in this field is very small, even when the mine is operated under the most favorable conditions and upon the most economical basis. Any added cost of production beyond that required by favorable conditions and economical management subtracts that much from the narrow margin of profit. If a condition could be brought about by which a sufficient sum could be added to the cost of production, not only would the profit be wiped out, but the cost of production would also exceed the value of the coal in the market.

It was the policy of Stewart, according to the argument of counsel, to have the union maintain such an attitude as would make the employment of armed guards, if not actually necessary, at least apparently so from the viewpoint of the coal company, and thus cause to be added, to the usual cost of the production of coal, such sum, by the expense of maintaining guards, as would result in loss to the company, and bring about the suspension of operation as an "open shop." According to that plan, the company was to be kept in a constant state of apprehension of an attack to the extent that it would continue to maintain guards, but it was in fact the intention of Stewart that the attack should never be made. Such an experiment in tight-rope walking could not result otherwise than in failure.

Putting on Stewart's acts and speeches the construction most favorable to him, he incited to action forces which he could not control. Occupying a position in which his influence could have operated powerfully for the maintenance of law and order, he saw fit to so deport himself as to incite to and encourage mob violence. He knowingly played with fire with a reckless disregard for consequences. His conduct was at variance with his declaration made on the witness stand, of respect for the court's order and his intention to be governed thereby.

[2] Language or conduct intended to incite others to a violation of the court's order is a contempt of court. U. S. v. Debs (C. C.) 64

Fed. 724; In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; U. S. v. Haggarty (C. C.) 116 Fed. 510; U. S. v. Gehr (C. C.) 116 Fed. 520. The effect of Stewart's policy, speeches, and conduct is seen in the events of the 17th of July.

[3] Mine No. 4, belonging to the Mammoth Vein Coal Mining Company, is situated about a quarter of a mile off the road leading from Hartford to Midland. It is about 2½ miles from Midland and about 3 miles from Hartford; Midland being almost north, and Hartford a little to the southwest. Huntington is situated about 5 miles a little north of east of mine No. 4. The towns of Hartford, Huntington, and Midland are mining towns. Practically all the miners living in those towns belong to the union. On the night of the 16th of July there was a meeting of union miners at Frogtown, a village on the road between mine No. 4 and Hartford, and about a mile from the former place. There is no direct testimony as to the purpose of this meeting. That must be inferred from what followed. During the night of the 16th the people living in No. 4 camp, about three-fourths of a mile from mine No. 4, and others living in the vicinity, were notified to leave. Between 3 and 4 o'clock on the morning of the 17th a number of shots were fired into the inclosure of mine No. 4. The employes at that mine were aroused and prepared for an attack. None was made at that time, and most of the employes went back to bed. The train on the Midland Valley Railroad, from Hartford to Ft. Smith, passed mine No. 4 about 7:30 in the morning. Shortly after the passing of the train an attack upon mine No. 4 began. It continued from that time until some time between 12 and 1 o'clock; a continual firing on the mine being kept up during all of that time. The shots were fired from such a distance as to prevent the employes within the inclosure from recognizing the persons who were doing the firing. From the testimony it is clear that several hundred men must have engaged in that attack. Arms were given out to the employes of the mine, and they were stationed at different points. The women and children at the mine were placed between the boilers. After the attack had continued for an hour or more, separate squads of employes endeavored to escape. Levi Brown with his wife and child, John Tony and wife, and Hobson and wife made their way to Prairie Creek, situated about a quarter or a half a mile from the mine, and were directed by certain parties there to take the main road going to Hartford. After proceeding along the road, they were shot at. They then left the road and took to the fields and woods, afterwards coming out upon a road that led to Mansfield. Another party, consisting of six or seven men, endeavored to escape by going in a northerly direction. In this party were Earl Sylesberry, John Baskins, Mike and Ewell Douthit, and a man by the name of Thomas. As they were emerging from a field, they were halted by a band of armed men. Those of the party from the mine that were armed were disarmed, and they were taken prisoners. To their number was added a man by the name of D. S. Stanley, who lived near the mine and was one of those who had been notified to leave during the night before. The reasons for the detention was

that the attacking party supposed that he had given information of their presence to the employes at the mine. This party was taken first to Prairie Creek and afterwards to an abandoned log cabin in the woods half a mile or more from the mine. According to the testimony, they were there turned over to James Slankard, the constable of that township. After they had been held there for an hour or more, a large number of men, estimated by one of the witnesses at between 100 and 200, assembled at this log cabin. The party in the cabin held as prisoners was directed to come out. When they were assembled on the outside, a man who was unknown to the witnesses, who testified as to the occurrence in this case, drew a pistol and shot Earl Sylesberry twice. John Baskins at this point started to run. The man who had shot Sylesberry then shot Baskins in the back. He then turned and fired another shot into Sylesberry's body, which was lying on the ground. Sylesberry and Baskins were killed. The testimony tends to show that Slankard intervened and directed the man who had done the shooting not to shoot any more. After some little consultation, the other members of the party who had been taken prisoners were directed to leave the country, and were told to make their way over the mountains. They left at once, and scattered in different directions. The Douthit boys made their way to Mansfield, and were there chased and fired upon by persons whom they did not recognize. The testimony tends to show that afterwards the bodies of Baskins and Sylesberry were placed in the log cabin, and it was set on fire. Thomas, one of the parties who had been held prisoner at the cabin, on the following Sunday, in company with the sheriff and the prosecuting attorney, visited the place. Human remains were found among the ashes and burning embers.

Recurring to the attack on the mine. Other employes of the mine continued to leave in squads. Mrs. Sylesberry, the mother of Earl Sylesberry, with three young children, made her way across the fields and woods to Midland. On leaving the mine she was shot at by the attacking parties. S. C. Moore, who was in charge of the mine at the time, left the mine between 11 and 12 o'clock with a party of 25 or 30, including some women and children. They were shot at as they left the mine, but all of them made their escape uninjured. Pat Malloy, with a few others, remained at the mine until between 12 and 1 o'clock. They then made their escape, and during the course of the afternoon reached Mansfield. There was a picnic that day at that place. All of Malloy's party were armed. They went to the express office and left their guns, directing that they should be shipped to Ft. Smith. Malloy and Harmon left the express office, which was at the depot, and went out upon the street. They were set upon by a crowd of men, and Harmon was badly beaten. Malloy ran and was chased by a number of armed men. He made his escape through a cornfield into the woods, where he remained until night. He then came into town with the intention of concealing himself in a box car, and thus getting away. As he approached the railroad track, a party of men fired some shots, and he supposed that they were firing at him. As it turned out they were not, but were firing at one of the

Douthit brothers. Malloy again ran, and during the night secreted himself in a freight car, and was taken east as far as Ola, from which point he made his way to his home at Clarksville. After Malloy and Harmon had left the depot at Mansfield, two other members of their party were attacked and beaten to insensibility. They were rescued through the interposition of W. B. Chilton, the agent at Mansfield. Throughout that entire day not a single arrest was made by any officer of any man among those who made the attack on the mine, or of the man who shot Sylesberry and Baskins, or of those who made the assault at Mansfield. The testimony shows that the news of the attack was telephoned to the different towns in that locality immediately after the attack was made. It was known at Greenwood before 8 o'clock. It was known at Hartford earlier than that. Neither the sheriff at Greenwood nor the deputy sheriff at Hartford appeared upon the scene until about 3 o'clock in the afternoon, at which time the property at No. 4, on the surface, had been burned, or blown up by dynamite, and no member of the attacking party was at that time visible.

All of the mines at Hartford and Huntington were operated by union men. At all of these mines whistles were blown, as usual, for work on the morning of the 17th. No miners appeared at any one of the mines except at No. 3 at Huntington. At that mine men enough appeared to work, and the mine was run for an hour or two, when, without giving a reason for their action, all the miners came out and left.

A subpoena has been issued for James Slankard as a witness in this case. The marshal reports that he cannot be found. He is one of the defendants in this case. The testimony introduced to sustain the charge against him was taken before the 17th of July. The motion to reopen all the cases pending prior to that day, including his case, as heretofore stated, was made, and that motion was overruled, except as to P. R. Stewart. In view of the testimony with reference to the conduct of James Slankard on the 17th of July, that order overruling the motion to reopen the case of James Slankard will be set aside, and the case will be opened as to him.

There can be no doubt that this attack was planned and made by the union men. Attachments were issued after the 17th of July against John Manick, Frank Gripando, Loyd Claborn, Pink Dunn, and George Burnett, for alleged participation in the attack on that day. The charge against Manick is supported by the testimony of Levi Brown. Camp No. 3 is situated about a quarter of a mile south of mine No. 4. It was composed of houses belonging to the Mammoth Vein Coal Mining Company, and occupied by its employes. It was situated about a quarter of a mile from Prairie Creek. John Manick and Frank Gripando, at the time of the shooting, lived at Prairie Creek. John Manick had lived there for a number of years. Gripando had not lived there so long, but had lived there prior to the assault made upon the employes of the coal company on April 6th, and ever since that time. With regard to John Manick, the testimony of Levi Brown is that, in going from mine No. 4 to Prairie Creek, he

saw John Manick at No. 3 camp with a burning board in his hands, and that the buildings in the camp were then in flames. The conclusion from that testimony is that John Manick was at the time engaged in setting fire to the houses of the camp. Manick testifies that he was not engaged in the attack at all, and did not set fire to the houses at No. 3 camp. He stated that he remained at Prairie Creek during the entire time that the attack was made upon the mine, but took no part in the attack. He also introduced two witnesses, B. F. Riley and his wife. Their testimony was that, at the time of the attack, they were living at No. 3 camp, and had lived there from the Sunday previous. They had just come there from the state of Wyoming, and were entire strangers in the community. They did not know John Manick. Mrs. Riley testified that the buildings at No. 3 camp were set on fire, and that she and her husband carried their trunks into an adjacent field, and afterwards they were assisted by some person, whom they did not know, to carry the trunks to Prairie Creek. When they reached Prairie Creek, they saw John Manick there, who, at their request, gave them some water. Mrs. Riley testified that No. 3 camp was on fire between 8 and 9 o'clock, as best she could remember, and that it commenced to burn before she left there. It will be borne in mind that she did not go directly from No. 3 camp to Prairie Creek. Taking the testimony of Riley and wife and the testimony of Levi Brown, the conclusion must be that Brown went to Prairie Creek before Riley and wife did, and that he saw John Manick at camp No. 3 with a fire brand in his hand before Riley and wife saw him at the well at Prairie Creek. It was shown in the testimony that Levi Brown had failed to identify John Manick at Greenwood at the time that the state grand jury, then in session at that place, was making an investigation of the occurrences of July 17th. A number of men, among whom was John Manick, were drawn up in line outside of the grand jury room, and Brown was asked by the grand jury to point out John Manick. He pointed out some person other than Manick. Whatever the circumstance may have been that prevented Brown from recognizing Manick on that day, the fact is that, at the time of giving his testimony in this case, he did recognize John Manick in open court, and pointed him out. Manick's testimony shows that there were about 40 families living at Prairie Creek. It also appears in testimony that on that particular morning there were a number of men about Prairie Creek. All of these persons knew Manick. With the knowledge of his whereabouts on that day so well known, according to his statement, it is a suspicious circumstance that, in proving his alibi, he should select as witnesses two persons who were, up to about 10 o'clock on that day, entire strangers to him, and did not produce persons with whom he was associated every day and who were present on that occasion. I am convinced that the testimony of Levi Brown with reference to John Manick is correct.

Brown also testified that when he went to Prairie Creek on that day he saw Frank Gripando among a number of men, and that Gripando was armed. A number of Italians were introduced who tes-

tified, through an interpreter, that Gripando assisted in conducting a number of women and children to the point of a certain ridge, where they would be out of danger of bullets. Gripando himself testified that he did not participate in the attack. Brown had been at mine No. 4 from the latter part of March, and knew Gripando. I am satisfied that his testimony is true, and that he recognized Gripando with a gun in his hand. He could not have had a gun on that occasion at that place without having the purpose to participate in the attack on the mine, and I am satisfied that he did so.

The testimony against Pink Dunn and George Burnett is that they were seen on the morning of the 17th going in the direction of No. 4 with guns in their hands. Later in the morning they turned back two women who were on their way from Midland to Hartford, stating that a fight was going on at No. 4, and that they could not go that way. When asked if there was not another way that they might go, Burnett replied that there was not, but Pink Dunn said that they could turn into another road a little distance further on, and thus avoid passing mine No. 4. They proceeded a little distance further, but they returned in a few minutes. They did not see either Burnett or Dunn on their return. F. M. Arnold testified that he had started on the morning of the 17th to go from Arkol to Hartford, and that he had been stopped by an armed man and told that he could not go that way. He turned towards Midland and met Pink Dunn and George Burnett and told them that he had been stopped, and that he was present at the time of the conversation between Dunn and Burnett on the one side and the two women on the other. Dunn and Burnett stated that they were union miners, and that they had left Midland about 9 or 10 o'clock, without any knowledge that an attack was being made on No. 4, and that they intended to go to the schoolhouse at Prairie Creek for the purpose of drawing the aid coming to them as union miners out of employment. They stated that their idea in taking their guns along was that they might shoot squirls on the road.

M. S. Ward testified that about three weeks before the attack he had a conversation with Burnett on the street in Midland, in which conversation reference was made to something about to happen at No. 4 mine. In this conversation Ward said to Burnett, "George, me and you are too old for that. We have done our part, and we cannot afford to have anything to do with that now." To that Ward testified that Burnett replied, "I am going." The fact that an attack was going on was generally known at Midland shortly after it commenced. It is incredible to me that Burnett and Dunn, both of whom are comparatively young men, could be members of the union, living so close to mine No. 4, and not have knowledge of the fact that an attack was going on that late in the morning of July 17th. I cannot believe that they were armed with guns for any other purpose than to participate in that attack. The conclusion, therefore, is that Manick, Gripando, Burnett, and Dunn all took part in the attack of July 17th, with full knowledge of the injunction.

With regard to Loyd Claborn, the testimony on the part of the

prosecution tends to show that he was at Prairie Creek on that morning, and that he was armed. He introduced the testimony of a number of witnesses who accounted for his whereabouts during the entire morning of that day and up until the afternoon, and who testified that for a great portion of that time he was lying sick at his father's house. In the case of *Gompers v. Buck Stove & Range Co.*, 221 U. S. 444, the court said:

"Without deciding what may be the rule in civil contempt, it is certain that, in proceeding for criminal contempt, the defendant is presumed to be innocent; he must be proven guilty beyond a reasonable doubt."

The testimony on behalf of Claborn is sufficient to raise a reasonable doubt in his favor, and he will be discharged. Burris, Robinson, Stewart, Manick, Gripando, Dunn, and Burnett will be adjudged guilty of contempt. The punishment of Burris will be 30 days in jail, of Robinson 60 days in jail, and of Stewart, Manick, Gripando, Dunn, and Burnett 4 months in jail. The place of imprisonment will be the county jail of the Ft. Smith district of Sebastian county, at Ft. Smith, Ark.

[4] It is proper to say, in this connection, that a conviction upon a charge of contempt for an offense which is also a crime does not bar a prosecution for the crime. *Merchants' Stock & Grain Co. v. Board of Trade*, 201 Fed. 20, 120 C. C. A. 582; *U. S. v. Sweeney* (C. C.) 95 Fed. 445.

LOUISVILLE & N. R. CO. et al. v. UNITED STATES et al.

(District Court, M. D. Tennessee, Nashville Division. September 1, 1914.)

No. 21.

1. COMMERCE (§ 98*)—INTERSTATE COMMERCE COMMISSION—REVIEW OF ORDERS.

On an investigation into the reasonableness of rates by the Interstate Commerce Commission, if upon the facts found its conclusion therefrom plainly involves an error of law, as where it rests under the undisputed facts upon an erroneous construction of the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), an order made by the Commission, based on such error of law, is subject to judicial review; but the question of the reasonableness of a rate is one of fact, and the conclusion of fact of the Commission that a given rate is reasonable or unreasonable will not be reviewed on the weight of the evidence, unless either there is no substantial evidence supporting such conclusion or it is contrary to the indisputable character of the evidence.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 148; Dec. Dig. § 98.*]

2. COMMERCE (§ 98*)—INTERSTATE COMMERCE COMMISSION—REVIEW OF ORDERS.

Where the party complaining of an order of the Interstate Commerce Commission does not exhibit to the court the evidence taken by the Commission, but in lieu thereof insists that the facts found by it are insufficient to support its conclusion as to the reasonableness or unreasonableness of a given rate, such conclusion should be accepted by the court as final, unless it appears, not only that the Commission undertook to em-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

body in such findings all the material facts established by the evidence, but in addition either that the evidential facts so found furnish no substantial support to such conclusion, or that the conclusion is contrary to the indisputable character of such evidential facts.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 148; Dec. Dig. § 98.*]

3. COMMERCE (§ 98*)—INTERSTATE COMMERCE COMMISSION—REVIEW OF ORDERS.

In determining whether the conclusion of the Interstate Commerce Commission as to the reasonableness or unreasonableness of a rate is supported by substantial evidence, the court does not consider the wisdom or expediency of the order based thereon, or whether on like testimony it would have made a similar ruling; nor does the validity of an order made by the Commission depend upon the correctness of each of its separate findings, the question being whether there was substantial evidence to support the order.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 148; Dec. Dig. § 98.*]

4. COMMERCE (§ 98*)—INTERSTATE COMMERCE COMMISSION—REVIEW OF ORDERS.

In rate-making cases the weight to be given to evidence relating to rates which the carrier insists had been enforced by competition is peculiarly a matter for the Interstate Commerce Commission, and in general, as the matter of fixing reasonable rates has been committed to the Commission, the courts, which have not been vested with any such power, cannot interfere with the rates fixed by the Commission, unless it is plainly made to appear that the orders are void.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 148; Dec. Dig. § 98.*]

5. COMMERCE (§ 98*)—INTERSTATE COMMERCE COMMISSION—ORDERS FIXING RATES—VALIDITY.

The evidential facts set forth in the report of the Interstate Commerce Commission, on which an order fixing new rates was based, when considered as a whole, *held* to afford substantial support to its conclusion that the old rates were unreasonable and that the new rates are reasonable.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 148; Dec. Dig. § 98.*]

6. CARRIERS (§ 32*)—INTERSTATE COMMERCE COMMISSION—ORDERS RESPECTING SWITCHING PRACTICE—VALIDITY.

The conclusion of the Interstate Commerce Commission that the switching practice of defendant railroad companies at Nashville, Tenn., in refusing to switch cars of coal to or from the tracks of a third company, except at prohibitive rates, while switching to and from the tracks of each other at a much lower rate, was unjustly and unduly discriminatory, *held* substantially supported by the facts set forth in the report of the Commission, considered as a whole, and an order requiring defendants to establish and maintain the same practice permitting the interswitching of coal to and from the tracks of such third company, as between the tracks of each other, *held* valid.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83-85; Dec. Dig. § 32.*]

In Equity. Suit by the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway against the United States and others. On motion for preliminary injunction Denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 216 F.—43

John Bell Keeble, of Nashville, Tenn., and Wm. A. Colston and Wm. A. Northcutt, both of Louisville, Ky., for petitioner Louisville & N. R. Co.

Claude Waller, of Nashville, Tenn., for petitioner Nashville, C. & St. L. Ry. Co.

Blackburn Esterline, Asst. Atty. Gen., and A. M. Tillman and Lee Douglas, U. S. Atty., both of Nashville, Tenn., for the United States.

Chas. W. Needham, of Washington, D. C. (Joseph W. Folk, of St. Louis, Mo., on the brief), for Interstate Commerce Commission.

A. G. Ewing, Jr., of Nashville, Tenn., for intervener City of Nashville.

T. J. McMorrough, of Nashville, Tenn., for intervener Davidson County.

T. M. Henderson and F. M. Garard, both of Nashville, Tenn., for intervener Traffic Bureau of Nashville.

Before WARRINGTON, Circuit Judge, and McCALL and SANFORD, District Judges.

PER CURIAM. The Louisville & Nashville Railroad Co. and the Nashville, Chattanooga & St. Louis Railway, hereinafter called the Louisville & Nashville Railroad and Nashville & Chattanooga Railway, respectively, having filed herein a petition against the United States of America to set aside certain orders made by the Interstate Commerce Commission in reference to rates for the interstate transportation of coal to Nashville, Tennessee, and the switching of interstate shipments of coal at Nashville, moved for an interlocutory injunction restraining the enforcement of these orders pendente lite; which motion was heard by three judges, as provided by the Urgency Deficiency Act of October 22, 1913, c. 32, 38 Stat. 220. The hearing was had upon the petition, the answers of the United States, and of the Commission, the City of Nashville, Davidson County, Tennessee, and the Traffic Bureau of Nashville, who intervened as defendants, under section 212 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1150 [U. S. Comp. St. Supp. 1911, p. 219]), and affidavits filed by the petitioners.

The orders sought to be enjoined were made by the Commission in proceedings instituted on the complaint of the Traffic Bureau of Nashville against the petitioners and the Illinois Central Railroad Co. and the Tennessee Central Railroad Co., hereinafter called the Illinois Central Railroad and the Tennessee Central Railroad, respectively, alleging, among other things, that the rate of \$1.00 per ton then charged by the petitioners for the interstate transportation of coal to Nashville from certain points in Kentucky, Tennessee and Alabama were unjust and unreasonable, and that certain switching practices of the petitioners at Nashville subjected the interstate traffic in coal to undue and unreasonable prejudice and disadvantage. Answers having been filed and evidence taken, the Commission made its written report, containing its findings of fact and conclusions thereon (Traffic Bureau of Nashville v. Louisville & Nashville Railroad, 28 Interst. Com. Com'n R. 533), and issued an order making such find-

ings and conclusions a part thereof, and, in accordance therewith, requiring that the Louisville & Nashville Railroad should, for not less than two years, cease from charging its then rates for the transportation of coal to Nashville from mines in Western Kentucky on its Owensboro and Henderson Divisions, and should establish and maintain rates thereon not exceeding 80 cents per ton; that the Nashville & Chattanooga Railway should, for a like period, cease from charging its then rates for the transportation of coal to Nashville from mines on its road in Alabama and Tennessee, through Alabama, and should establish and maintain rates thereon not exceeding 90 cents per ton; and that each of said companies should, for a like period, abstain from their then practice with respect to interswitching interstate carload shipments of coal at Nashville and from maintaining any different practice with respect to switching such shipments from and to the tracks of the Tennessee Central Railroad from that maintained with respect to similar shipments from and to their respective tracks, and should establish and maintain a practice permitting the interswitching of such shipments from and to the lines of each and every defendant.

The petitioners did not file the transcript of the record before the Commission, and do not insist, for the purposes of the motion, that the facts found by the Commission were either without substantial evidence to support them or contrary to the indisputable character of the evidence. The sole grounds of the motion for the interlocutory injunction are: (1) That the facts found by the Commission do not as a matter of law support the orders made by it; (2) that the Commission was without jurisdiction to make the orders; and (3) that the enforcement of the orders made by the Commission will result in the taking of petitioners' property without due process of law and in violation of the Fifth Amendment of the Constitution of the United States.

The petitioners furthermore state explicitly in their brief that in determining these issues the findings of fact made by the Commission in its report will be assumed to be "undisputed," but that they "contend that these findings of fact do not as a matter of law support the conclusions (and) the orders of the Commission complained of, and that the Commission was without jurisdiction to make the orders."

Order Fixing Rates. The report of the Commission set forth the geographical location of the various points involved under the rates in question, with the distances and routes of transportation between them, showing that the average distance to Nashville from Western Kentucky mines on the Louisville & Nashville Railroad was 108.5 miles, and from the Eastern Tennessee and Alabama mines on the Nashville & Chattanooga Railway, 140 miles (28 Interst. Com. Com'n R. at page 534). It then stated that the complainant had offered "innumerable exhibits" comparing the Nashville rate, on ton, car and train mile bases, with the rates on coal obtaining north of the Ohio river, the rates to East St. Louis, Louisville and other points on the Ohio and Mississippi river from mines in Kentucky, Tennessee and Virginia, the rates on coal prescribed by the Commission in a number

of cases, the rates on coal to Chattanooga and certain Southeastern destinations, the rates on coal from other mines to Nashville, and the rates on other commodities to Nashville and other destinations, and with the average per ton and per car mile rate received by the defendants and other carriers on all traffic; that "in all of these instances the Nashville rate yields the greatest earnings"; and that the defendants had sought "in elaborate detail" to analyze these comparisons and show that none was of any value in determining the reasonableness of the rates in issue. The report, however, as explicitly stated, did not attempt to set forth the detail into which the parties went in support of their contentions as to the conclusions that might be properly drawn from these exhibits, but stated, generally, that ton-mile statistics are far from infallible guides in fixing freight rates, that per-car earnings, with distance considered, are much more reliable, and that when the commodity moves in trainloads the earnings per train mile furnish the best criterion; that comparison of any kind, however, to be effective must be analogous, or nearly so, the rate charged or gross earnings derived for the transportation of a given commodity between two points furnishing a guide in arriving at the rate to be charged upon the same or nearly the same commodity between two other points similarly situated; that the comparisons made with coal moving to the lakes for transshipment, to tidewater and between points in central freight association territory were of little value because of the manifest difference in transportation conditions; and that as Chattanooga, Knoxville and East St. Louis had coal mines in their immediate vicinities, such juxtaposition of supply and market necessarily exercised a material influence over the rates from more distant mines, thereby lessening the strength of the comparison (28 Interst. Com. Com'n R. at page 535). The report then set forth, among other things, the following facts: That on steam coal the \$1.00 per ton rate to Nashville from the Western Kentucky mines on the Louisville & Nashville Railroad had been in effect since 1888, having remained unchanged for 25 years; that the capacity of coal cars used by the Louisville & Nashville Railroad in hauling from these mines to Nashville had in the meantime increased from 16 to 41 tons; that the tractive power of engines had also increased, so that instead of 660 gross tons handled between Guthrie, an intermediate point, and Nashville, in 1888, 1,165 gross tons were then handled, this being significant as tending to reduce the operating cost per unit of freight transported, although the hauling of coal in train loads into Nashville appeared to be the exception rather than the rule; that the volume of the tonnage had also increased from 193,000 tons handled in 1892 to nearly 450,000 tons in 1911; that little more than a suggestion appeared of record as to increased cost of labor and material, and that no attempt had been made to show operating costs; that the Nashville rate from the Western Kentucky mines produced a ton mile revenue of 9.2 mills for an average haul of 108.5 miles; that the Louisville & Nashville Railroad also hauled coal from these same Western Kentucky mines to Memphis, an average distance of 276 miles, for a rate of \$1.10,

yielding a per ton mile revenue of slightly less than 4 mills; that the routes from these mines to Memphis and to Nashville were identical as far as Guthrie, Kentucky, a point 216 miles distant from Memphis and 49 miles from Nashville, where the routes diverged, or, "in other words, the Louisville & Nashville charges only 10 cents per ton more when the additional haul beyond Guthrie is 276 (216) miles to Memphis than when it is 49 miles to Nashville"; that while the movement of coal to Memphis may be somewhat heavier than to Nashville there was nothing of record to indicate any substantial dissimilarity in operating conditions from these mines to either market; that the defendants had not undertaken to show any material difference in transportation conditions, but relied entirely upon their contention that the Memphis rate was dictated by water transportation down the Mississippi River from the Pittsburgh mines; that the history of the Memphis rate, which is set out in the report, did not support the theory that it was fixed by water competition, and that, on the whole, the Commission was unable to find any substantial dissimilarity attaching to the transportation of coal from Western Kentucky mines on the Louisville & Nashville Railroad to Memphis and to Nashville, except distance, which was greatly in favor of Nashville; that prior to June, 1913, the Louisville & Nashville Railroad had charged a rate of 60 cents for an average haul of 142 miles, in connection with the Louisville, Henderson & St. Louis Railroad, from the Western Kentucky mines to Louisville, and the Illinois Central Railroad had also charged the same rate for an average haul of 125 miles from these same mines to Louisville, such rate having been, however, advanced to 65 cents subsequent to the submission of the case; that the comparison with this rate was opposed by the defendants on the ground of water competition to Louisville from Pittsburgh and West Virginia mines; that the Commission found, however, that rail-carrier competition was the factor of prime consideration; that the conditions at Louisville were quite similar to those at Memphis, and at neither could they be said substantially to differ from those at Nashville; that while the Commission did not think a relationship in the matter of coal rates between these three cities should be established, a comparison of their rates properly might be drawn, giving some consideration to the fact that coal was actually moving in considerable quantities by water to Louisville, but not permitting it to vitiate the effect of the comparison; that measured by the rates to Memphis and to Louisville, the rate to Nashville was high; that the average loading of cars from the mines in question was 41 tons on the Louisville & Nashville Railroad and 34.5 tons on the Nashville & Chattanooga Railway, the \$1.00 rate producing a car revenue of \$41.00 in one instance and \$34.50 in the other, or per car mile earnings of 37.78 cents and 24.64 cents, respectively; that even if returned empty the car mile revenue for the loaded and empty movement was 18.89 cents and 12.32 cents, respectively, while the average loaded and empty car mile revenue for all traffic during 1912 was 10.54 cents for the Louisville & Nashville Railroad, 10.08 cents for the Nashville & Chattanooga Railway, 7.777

cents for the Illinois Central Railroad and 16.425 cents for the Tennessee Central Railroad; and that the average distance from the mines on the Illinois Central Railroad in the same Western Kentucky fields to Nashville was 167 miles, the coal reaching Nashville over the Tennessee Central Railroad, the rate thereon producing, if loaded at 40 tons per car, a revenue of \$40.00 per car, and earnings per loaded car mile of 24 cents, or 12 cents per car mile for the loaded and empty movement, while 34.5 tons to the car would produce a loaded car mile rate of 20.65 cents, or 10.325 cents per car mile loaded and empty (28 Interst. Com. Com'n R. 536-540).

After setting forth the foregoing facts, the report then states the conclusion of the Commission, as follows:

"As to the Louisville & Nashville, we are of opinion and find that the existing rate on coal to Nashville for Western Kentucky mines on its Owensboro and its Henderson divisions is unreasonable. We are of the same opinion and similarly find as to the Nashville, Chattanooga & St. Louis rate from its Tennessee and Alabama mines to Nashville. We further find that reasonable rates to Nashville from the Louisville & Nashville Western Kentucky mines on its Owensboro and its Henderson divisions should not exceed 80 cents per ton, and from the Nashville, Chattanooga & St. Louis mines in Alabama and in Tennessee, the movement from which is through Alabama, 90 cents per ton" (28 Interst. Com. Com'n R. at page 540).

It is earnestly contended by the petitioners that the various evidential facts set forth and found in the report of the Commission, which have been summarized hereinabove, do not, as a matter of law, support its ultimate finding or conclusion, above set forth, as to the unreasonableness of the old rates and the reasonableness of the new rates required; and that, hence, the order of the Commission, based on such erroneous conclusion, is invalid.

This contention obviously involves, in the first place, as its underlying logical foundation, the assumption that the Commission has undertaken to set forth in its report all the evidential facts leading to its ultimate conclusion as to the unreasonableness and reasonableness of such rates, respectively. However, the report affirmatively shows, upon its face, that the Commission did not undertake to set forth the details of the "innumerable exhibits" introduced by the complainant, bearing on the question of the comparison of rates; nor does it recite that the Commission had otherwise undertaken to set forth or find all the facts established by the evidence. It is to be noted in this connection that by section 14 of the Act to Regulate Commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3164]) the report is only required "to state the conclusions of the Commission, together with its decision, order or requirement in the premises," the supplemental provision that the report shall include the findings of fact on which an award is made only applying in case damages are awarded. And in the present case the Commission, after setting forth certain evidential facts, but without purporting to make a complete or detailed finding in regard thereto, stated, in substance, as above set forth, that it "found," as its ultimate conclusion, that the old rates were unreasonable and that the new rates which it required were reasonable.

But even if the report of the Commission had undertaken to set forth and to find all of the evidential facts upon which its ultimate finding or conclusion was based, we are of opinion that its ultimate finding or conclusion of fact as to the reasonableness or unreasonableness of the rates in question does not, upon the evidential facts found, necessarily involve an error of law rendering it invalid.

[1] It is true that if, upon the facts found by the Commission, its conclusion therefrom plainly involves an error of law, as where it rests, under the undisputed facts, upon an erroneous construction of the Act to Regulate Commerce, an order made by the Commission, based upon such error of law, is subject to judicial review. *Illinois Railroad v. Interstate Commerce Commission*, 206 U. S. 441, 457, 27 Sup. Ct. 700, 51 L. Ed. 1128; *Interstate Commission v. Northern Pacific Railway*, 216 U. S. 538, 545, 30 Sup. Ct. 417, 54 L. Ed. 608; *United States v. Baltimore Railroad*, 226 U. S. 14, 18, 33 Sup. Ct. 5, 57 L. Ed. 104; *Tap Line Cases*, 234 U. S. 1, 26, 34 Sup. Ct. 741, 58 L. Ed. 1185; *Los Angeles Switching Case*, 234 U. S. 294, 309, 34 Sup. Ct. 814, 58 L. Ed. 1319; *Louisiana Railway v. United States (Com. Ct.)* 209 Fed. 244. And see *Denver Railroad v. Arizona Railroad*, 233 U. S. 601-603, 34 Sup. Ct. 691, 58 L. Ed. 1111, as to a ruling of law imported from a general conclusion of facts.

Obviously, however, this rule does not authorize the court to review, as involving an error of law, the conclusion of the Commission upon a question of fact as to the reasonableness or unreasonableness of a given rate, depending upon a consideration of the weight to be given the various evidential facts found by it. The court cannot review the conclusion of the Commission on questions of fact, or substitute its judgment for that of the Commission upon matters of fact within the Commission's province. *Interstate Commission v. Delaware Railroad*, 220 U. S. 235, 251, 31 Sup. Ct. 392, 55 L. Ed. 448; *Los Angeles Switching Case*, 234 U. S. 314, 34 Sup. Ct. 814, 58 L. Ed. 1319. The question of the reasonableness of a rate is, however, one of fact. *Illinois Railroad v. Interstate Commission*, 206 U. S. 455, 27 Sup. Ct. 700, 51 L. Ed. 1128. And accordingly it is well settled that where all the evidence introduced before the Commission is exhibited to the court, its conclusion of fact that a given rate is reasonable or unreasonable, will be accepted by the court as final and not reviewed upon the weight of the evidence, unless either there is no substantial evidence supporting such conclusion or such conclusion is contrary to the indisputable character of the evidence; in which cases the conclusion involves an error of law and is therefore reviewable by the court. *Interstate Commission v. Union Pacific Railroad*, 222 U. S. 541, 547, 548, 32 Sup. Ct. 108, 56 L. Ed. 308; *Interstate Commission v. Louisville Railroad*, 227 U. S. 88, 91, 92, 100, 33 Sup. Ct. 185, 57 L. Ed. 431; *Florida Line v. United States*, 234 U. S. 167, 185, 34 Sup. Ct. 867, 58 L. Ed. 1267.

[2] It necessarily follows that where the party complaining of an order made by the Commission does not exhibit to the court the evidence taken before the Commission, but in lieu thereof, insists that the evidential facts found by the Commission are insufficient to support its conclusion as to the reasonableness or unreasonableness of a given

rate, such conclusion of the Commission should be accepted by the court as final and not reviewable upon the evidential weight of such facts, unless it appears, not only that the Commission undertook to embody in such findings all the material facts established by the evidence, but, in addition, either that the evidential facts so found furnish no substantial support to such conclusion, or that such conclusion is contrary to the indisputable character of such evidential facts; in which cases, the conclusions would involve an error of law reviewable by the court.

[3, 4] Furthermore, in determining whether the conclusion of the Commission is supported by substantial evidence, the court does not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling; and it ascribes to the findings of the Commission, which are made by law *prima facie* true, "the strength due to the judgments of a tribunal appointed by law and informed by experience." *Interstate Commission v. Union Pacific Railroad*, 222 U. S. at page 547, 32 Sup. Ct., at page 111, 56 L. Ed. 308. Nor does the validity of an order made by the Commission depend upon the correctness of each of its separate findings as indispensable links in the chain of proof upon which it is based, where the ruling may still be sustained although some of the collateral findings, which, if correct, would be confirmatory thereof, are eliminated; the question being "whether there was substantial evidence to support the order." *Interstate Commission v. Louisville Railroad*, 227 U. S., at page 98, 33 Sup. Ct., at page 189, 57 L. Ed. 431. And in rate-making cases the weight to be given to evidence relating to rates which the carrier insists had been enforced by competition, is peculiarly a matter for the Commission, "a body experienced in such matters and familiar with the complexities, intricacies and history of rate making in each section of the country." (*Id.*) And even the *prima facie* evidential effect of testimony may be sufficient to support the order of a rate-making Commission. *Louisville Railroad v. Kentucky Commission* (D. C., E. D. Ky.) 214 Fed. 465, 469. And, in general, as the matter of fixing reasonable rates has been committed to the Commission, the courts which have not been vested with any such power, cannot interfere with the rates fixed by the Commission, "unless it is plainly made to appear that those ordered are void." *Atchison Railway v. United States*, 232 U. S. 199, 221, 34 Sup. Ct. 291, 297, 58 L. Ed. 568. Like considerations must necessarily govern in determining the effect of evidential facts found by the Commission as substantially supporting its conclusions.

[5] Without determining the weight to be given to the many evidential facts set forth in the report of the Commission when separately considered, as, for example, the extent, if any, to which water or rail competition at Memphis or Louisville may properly affect the weight to be given to the rates to such points as a basis for comparison, we are of opinion, after careful consideration, in the light of the foregoing principles, that, even aside from the fact that the Commission does not appear to have undertaken to set forth in its report all the evidential facts upon which its conclusion as to the unreasonableness of the old rates and the reasonableness of the new rate were based, the evidential

facts which it did set forth in its report, when considered as a whole, afford substantial support to its conclusion in this matter; and that such conclusion is not contrary to the indisputable character of such evidential facts and does not necessarily involve any dominating error of law, but merely a determination of the precise evidential weight of such facts, a matter which, there being substantial evidence in support of its conclusion, is entirely within the province of the Commission, and as to which the judgment of the court cannot be substituted. It results that the conclusions of the Commission as to the unreasonableness and reasonableness of the old and new rates, respectively, must now be accepted by the court as final, and that the rate order in question cannot be properly enjoined on the ground that, as a matter of law, it is not supported by the facts found by the Commission.

And the old rates having been determined to be unreasonable and the new rates required to be reasonable, it necessarily follows that the Commission had jurisdiction, under the express provision of section 15 of the Act to Regulate Commerce, to make the order as to rates complained of.

There is furthermore no substantial evidence that the new rates prescribed by the order of the Commission are so low as to be confiscatory and in violation of the constitutional provisions against taking property without due process of law. *Interstate Commission v. Union Pacific Railroad*, 222 U. S. 547, 32 Sup. Ct. 108, 56 L. Ed. 308; *Louisville Railroad v. Siler* (C. C.) 186 Fed. 176, 189. And this is, in effect, conceded in petitioners' brief.

So much of the motion for an interlocutory injunction as relates to the order of the Commission in reference to the rates to be charged by the petitioners for the interstate transportation of coal to Nashville must hence be denied.

[6] *Order as to Switching Practices.* The Commission, in its report, set forth the following facts in reference to the Nashville switching situation: That the Louisville & Nashville Terminal Company is a corporation whose entire capital stock is owned by the Louisville & Nashville Railroad and the Nashville & Chattanooga Railway; that the Louisville & Nashville Railroad owns more than 70 per cent. of the capital stock of the Nashville & Chattanooga Railway; that the Terminal Company owns terminal stations at Nashville, with 1.07 miles of main line and 30.32 miles of sidings; that in 1896 the Terminal Company leased all of its property to the Louisville & Nashville Railroad and the Nashville & Chattanooga Railway jointly for 999 years, at an annual rental of 4 per cent. upon the cost, the amount to be paid by each lessee being determined on the basis of use, and the operating expenses of such properties being pro-rated upon the same basis; that both the Louisville & Nashville Railroad and the Nashville & Chattanooga Railway also individually own tracks which they operate independently of each other or of the Terminal Company, and upon which industries are located; that traffic of all kinds is freely interchanged by the Louisville & Nashville Railroad and Nashville & Chattanooga Railway to and from these industries as well as to and from those on the rails of the Terminal Company; that the tariffs of the

Louisville & Nashville Railroad and the Nashville & Chattanooga Railway provide that no charge will be made for switching between their respective lines at Nashville, the expense of this service presumably being absorbed by the line bringing in the traffic; that prior to 1907 neither of these railroads would switch freight of any kind to or from the Tennessee Central Railroad, but in that year, in deference to public opinion, they began switching all non-competitive traffic, *except coal*, to and from the Tennessee Central Railroad, at a charge for this service of \$3.00 per car; that under this restricted practice no coal had been interswitched between the Louisville & Nashville Railroad and the Nashville & Chattanooga Railway on the one hand, and the Tennessee Central Railroad on the other; that, although neither the Louisville & Nashville Railroad, nor the Nashville & Chattanooga Railway had ever even considered the switching of coal from the Tennessee Central Railroad, it developed at the hearing that the Nashville & Chattanooga Railway did have an effective rate applicable to interchange with the Tennessee Central Railroad, under which such movement could have been accomplished for 60 cents a ton, which rate, however, was cancelled shortly after the hearing; that while the switching tariff of the Tennessee Central Railroad was similar to those of the Louisville & Nashville Railroad and the Nashville & Chattanooga Railway, its refusal to switch coal from either of the other lines was in reality a retaliatory measure, and it had, as a cross-complainant, favored the prayer of the complainant; that there was little doubt as to the competitive character of the traffic in coal; and, in short, that the "joint and the separately owned terminals of each of these two defendants are open to all of the traffic of the other; are open to all non-competitive traffic to and from the Tennessee Central except coal, and, up to shortly after the hearing, those of the Nashville, Chattanooga & St. Louis were open as to this coal, but at a prohibitive rate" (28 Interst. Com. Com'n R. 540-542).

After setting forth the foregoing facts and the contentions of the respective parties, the report states the conclusion of the Commission as follows:

"Our conclusion is that the practice of defendants with respect to switching coal at Nashville is unreasonable and unjustly discriminatory; that the present tariff of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis unjustly discriminate against shipments of coal from the Tennessee Central and unduly prefer shipments of coal from the lines each of the other, we find that a just and reasonable practice with respect to switching at Nashville to be observed by all defendants will permit the switching of coal from the interchange of each carrier to industries on the rails of the other" (28 Interst. Com. Com'n R. at page 542).

The order issued by the Commission in accordance with these findings, which is hereinabove set out, provided, in effect, that the petitioners should for not less than two years abstain from their then practice with respect to interswitching car load shipments of coal at Nashville and should establish and maintain the same practice in respect to switching such shipments to and from the tracks of the Tennessee Central Railroad as they might contemporaneously maintain with respect to similar shipments to and from their own respective tracks.

The determination whether in particular instances there has been an

undue or unreasonable prejudice or preference is a question of fact. *Interstate Commission v. Alabama Railway*, 168 U. S. 144, 170, 18 Sup. Ct. 45, 42 L. Ed. 414. It necessarily follows that the court in determining whether the conclusions of the Commission as to the discriminatory and preferential practices is supported by the evidential facts set forth in the report, is to be governed by the same considerations as those hereinabove set forth in reference to its conclusion as to the reasonableness or unreasonableness of rates. And, as in the case of rates prescribed by the Commission, the court cannot interfere with practices established by it, "unless it is made plainly to appear that those ordered are void." *Atchison Railway v. United States*, 232 U. S. at page 221, 34 Sup. Ct., at page 297, 58 L. Ed. 568.

After careful consideration of the evidential facts set forth in the report of the Commission in reference to the switching practice of the petitioners at Nashville, without determining the weight given to such facts, when separately considered, we are of opinion that such facts, when considered as a whole, afford substantial evidence supporting the conclusion of the Commission that such switching practice, which in effect prohibited the interswitching of coal to and from the tracks of the Tennessee Central Railroad, was unreasonably and unjustly discriminatory, that it unjustly discriminated against shipments of coal from the Tennessee Central Railroad and unjustly preferred such shipments from the lines of each other, and that a just and reasonable practice would permit the interswitching of coal from the lines of each of these carriers to industries on the rails of the others; and that such conclusion is not contrary to the indisputable character of the evidential facts set forth, and does not involve, in the determination of their weight, any dominating error of law. And in this connection we are of opinion that the case of *United States v. St. Louis Terminal*, 224 U. S. 383, 32 Sup. Ct. 507, 56 L. Ed. 810, to which the Commission refers in its report, although arising under the Anti-Trust Act, throws, by analogy, a persuasive light upon the discriminatory and preferential character of the practices in question.

It results that the conclusion of the Commission in the matter of the switching practice must now be accepted by the court as final, without substituting its own judgment therefor on the weight of the evidence, and hence that the order in question cannot be properly enjoined on the ground that, as a matter of law, it is not supported by the facts found by the Commission.

And the practice of the petitioners having been determined to be unreasonable and unjustly discriminatory, and the new practice required, to be just and reasonable, it follows, in our opinion, that the Commission had jurisdiction under the express provisions of the Act to Regulate Commerce to make the order as to switching practices complained of. By section 3 of the Act it is made unlawful for any common carrier to give any undue or unreasonable preference or advantage to any particular person, locality or particular description of traffic, in any respect whatsoever, or to subject the same to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and it is provided that all common carriers "shall afford all reasonable, proper and

equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding and delivery of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in the rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks and terminal facilities to any other carrier engaged in like business." And by section 15 of the Act it is provided that if the Commission, after hearing, shall be of opinion that any rates, charges, regulations or practices whatsoever of any carrier, are "unjust and unreasonable, or unjustly discriminatory, or unduly preferential," it is authorized and empowered to prescribe the just and reasonable rates or charges to be thereafter observed, and the just, fair and reasonable regulation or practice to be thereafter followed, and to order the carrier to desist from such violation.

It is not contended that the order in question requires the petitioners to allow the Tennessee Central Railroad the physical occupancy or use of their tracks or terminal facilities by running its trains or locomotives thereon for the delivery of coal destined to industries along their lines; and obviously its only effect is to require the petitioners to receive cars of coal from the Tennessee Central Railroad at junction points and to switch and deliver the same to industries along their respective lines, in like manner as they receive such cars from one another and switch and deliver the same, upon a just, reasonable and non-prohibitive switching charge, which they may themselves establish, but which shall be the same as they shall respectively make to one another.

We think it clear that this order does not require the petitioners to give the use of their tracks and terminal facilities to the Tennessee Central Railroad, within the meaning of the proviso contained in section 3 of the Act to Regulate Commerce, or constitute an appropriation of such tracks and terminals for the use of the Tennessee Central Railroad, but that it is merely a regulation of the business of the petitioners in the interchange of traffic, within the express authority conferred by the Act. *Pennsylvania Company v. United States* (D. C.) 214 Fed. 445. This question is in our opinion ruled by the opinion in *Grand Trunk Railway v. Michigan Commission*, 231 U. S. 457, 468, 34 Sup. Ct. 152, 58 L. Ed. 310, involving the construction of a Michigan Statute similar in its essential respects to the provisions of the Act to Regulate Commerce. Nor is this conclusion at variance with the case of *Louisville Railroad v. Stock Yards*, 212 U. S. 132, 145, 29 Sup. Ct. 246, 53 L. Ed. 441, which involved the entirely different question of the right to compel a carrier to accept cars "offered to it at arbitrary points near its terminus for the purpose of reaching and using its terminal station." Neither do we find any irreconcilable conflict between the opinion of the Commission in the instant case and that in *Waverly Works v. Pennsylvania Railroad*, 28 Interst. Com. Com'n R. 621.

There is furthermore no evidence that the switching practices prescribed will violate the constitutional provision against taking property without due process of law. See *Grand Trunk Railway v. Michigan Commission*, 231 U. S. 468, 34 Sup. Ct. 152, 58 L. Ed. 310. And it

may well be assumed that the petitioners will not themselves establish a switching charge so low as to be confiscatory.

It results that so much of the order of the Commission as relates to switching practices cannot be now enjoined.

An order will accordingly be entered denying the petitioners' motion for an interlocutory injunction.

HEYMAN v. THIRD NAT. BANK OF JERSEY CITY.

(District Court, D. New Jersey. August 18, 1914.)

1. BANKRUPTCY (§ 164*)—VOIDABLE PREFERENCE—SET-OFF.

A bankrupt, who was indorser on notes held by a bank, also had a deposit in such bank, and about a week before the bankruptcy, and before any of the notes were due, gave the bank a check, which it at once had certified and charged to his account, later, and after the bankruptcy, applying the sum in payment of one of the notes, then matured, and in part payment of another, unmatured. *Held*, that the transaction was not an exercise by the bank of the right of set-off given by Bankr. Act July 1, 1898, c. 541, § 68a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), since it took place prior to the bankruptcy and when the notes, not then matured, were not subject to such right; that, in view of the unusual circumstances of payment before due and the certification and charging of the check at once by the bank on which it was drawn, such bank must be deemed to have had reasonable cause to believe that the bankrupt was insolvent, and that the payment would effect a preference which rendered it voidable, under section 60b (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3446]), as amended by Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (U. S. Comp. St. Supp. 1911, p. 1506).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. § 164.*]

2. BANKRUPTCY (§ 165*)—PREFERENCES—WHEN VOIDABLE.

Under Bankr. Act 1898 (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3446]) § 60b, as amended by Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (U. S. Comp. St. Supp. 1911, p. 1506), the intent of an insolvent debtor to give a preference is not essential to render it voidable, but the effect of the transfer and reasonable cause to believe that a preference would be effected on the part of the creditor are substituted therefor, which necessarily includes, as an element, reasonable cause to believe the debtor to be insolvent, and, while mere suspicion is not sufficient if the facts and circumstances known to the creditor are sufficient to put a reasonable man on inquiry, he is chargeable with knowledge of the facts which such inquiry would disclose.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. § 165.*]

In Equity. Suit by Samuel Heyman, trustee in bankruptcy of Orlando Ricciardelli, against the Third National Bank of Jersey City, to recover alleged preferences. The master advised a decree dismissing the bill, to which both parties except. Exceptions of complainant sustained.

Frank W. Hastings, Jr., of Jersey City, N. J., for trustee.

Fisk & Fisk, of Jersey City, N. J., for Third Nat. Bank of Jersey City.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

RELLSTAB, District Judge. For a number of years prior to the 8th of December, 1911, Orlando Ricciardelli (the bankrupt) kept an active banking account with the defendant. On that date he was contingently liable to the defendant as indorser on three unmatured promissory notes made by his wife, and discounted by the bank, the avails of which had been credited to his account. The first of these notes, for \$900, fell due on December 20, 1911, the second, for \$1,600, on January 13, 1912, and the third, for \$2,000, on February 15, 1912. On December 8, 1911, Ricciardelli gave the bank a check for \$1,000 on account of such obligations. This check, payable to the order of his wife and by her indorsed, was drawn on his account in such bank. It was certified by the bank and charged against such account the same day, but was held by it until December 15th, when said bank applied \$900 thereof in payment of the \$900 note and the remaining \$100 on account of the \$1,600 note. In the meantime, viz., December 14th, a petition in involuntary proceedings in bankruptcy was filed against Ricciardelli, upon which an adjudication was subsequently entered.

The trustee's action is to recover this \$1,000 thus appropriated by the bank, on the ground that it is a voidable preference, within section 60b of the Bankruptcy Act. To constitute such a preference, and the master so held, the following four elements are necessary:

"First, the transfer must be made from an insolvent person to a creditor; second, the effect of such transfer must be to enable one creditor to obtain a greater percentage of his or its debt than others in the same class; third, the creditor receiving it must have had reasonable cause to believe that the effect would be a preference; and fourth, the transfer must have been made within four months prior to the bankruptcy."

[1] Both parties concede that this is a correct statement of the requisites to an avoidable preference. The master found that all of these requisites existed, save the third, and advised a decree in favor of the bank. Both parties excepted to parts of the finding of the master. The exceptions of the bank challenge the conclusion that the payment of the \$1,000 was a transfer, within section 60 of the act, and raise the contention that such moneys were appropriated by the bank in the exercise of its right of set-off under section 68 of the act. The exceptions of the trustee attack the master's denial of the trustee's right to recover, and insist that the bank did have reasonable cause to believe that the payment of said \$1,000 would effect a preference. The pertinent parts of these two sections are as follows:

"Sec. 60 (a). A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, * * * made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. * * *

"(b) If a bankrupt shall * * * have made a transfer of any of his property, and if, at the time of the transfer, * * * and being within four months before the filing of the petition in bankruptcy * * * the bankrupt be insolvent and the * * * transfer then operate as a preference, and the person receiving it * * * shall then have reasonable cause to believe that the enforcement of such * * * transfer would effect a preference,

it shall be voidable by the trustee and he may recover the property or its value from such person. * * *

"Sec. 68 (a). In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

Money deposited with a bank in the ordinary course of business creates the relation of debtor and creditor. *N. Y. County National Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, 11 Am. Bankr. Rep. 42. Generally stated, money thus deposited may be appropriated by the bank to pay any matured debt due it from the depositor. The Bankruptcy Act did not create the right of set-off, but provided a method by which it could be enforced even after bankruptcy. *Studley v. Boylston Bank*, 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. 1313, 30 Am. Bankr. Rep. 161.

Section 1 (11) construes "debt" to "include any debt, demand, or claim provable in bankruptcy."

Section 63a defines a provable debt as one inter alia "(4) founded upon * * * a contract express or implied." The liability of an indorser on commercial paper, not absolute until after the filing of the petition in bankruptcy, is a debt provable in bankruptcy. *Moch v. Market St. National Bank*, 107 Fed. 897, 47 C. C. A. 49, 6 Am. Bankr. Rep. 11. Such a debt may be used to enforce the right of set-off within section 68. In *re Semmer Glass Co.*, 135 Fed. 77, 67 C. C. A. 551, 14 Am. Bankr. Rep. 25. But obviously the regulation of the right of set-off in the Bankruptcy Act does not relate to the acts of the parties before the commencement of bankruptcy proceedings. It carries forward the equitable principle underlying the doctrine of set-off, and applies it to unmatured debts in order to facilitate the administration of the bankrupt's estate and the doing of justice to all the creditors. Before the commencement of such proceedings, therefore, the liability arising from the indorsement of unmatured commercial paper is not a debt usable to set off a fixed indebtedness. *Irish v. Citizens' Trust Co. (D. C.)* 163 Fed. 880, 21 Am. Bankr. Rep. 39. Undoubtedly, at any time before the commencement of bankruptcy proceedings, mutual dealers may adjust their accounts and consider unmatured obligations in such adjustment. But such adjustment is not the result of exercising the right of set-off; it rests in contract. The right of set-off, however, where not controlled by statute, is based on commercial equities having the force of law, and may be exercised by one regardless of the wishes of the other. In the case at bar, the bank had no right to set off the unmatured notes until after the bankruptcy proceedings were begun. If it had waited until the filing of the petition before attempting to enforce the indorser's liability on such notes, it could at such time have enforced the right of set-off given by the Bankruptcy Act against any deposit that may then have stood in the bankrupt's name. It did not do this, however, but about a week previous to such filing accepted the bankrupt's check drawn against such deposit on account of such notes. The physical holding of such check

by the bank until the first of such notes became due is of no moment upon the question whether a right of set-off was being exercised, as the bank, on the same day it secured the check, had it certified and charged to the drawer's account. The immediate effect of charging such check to the drawer's account was to transfer \$1,000 from the depositor to the bank, and thus diminish by that amount (if it can be sustained) the estate to come into the trustee's hands, a diminution not the result of the exercise of the right of set-off, for, as noted, at that time no right to set off an unmatured obligation existed, but through a payment on account of contingent liabilities, and which did not mature until after the bankruptcy proceedings were begun. The conclusion reached on this branch of the case is in accord with *In re National Lumber Co.*, 212 Fed. 928, 129 C. C. A. 448, 32 Am. Bankr. Rep. 389, decided by the Circuit Court of Appeals of this circuit, and reported since the preparation of this opinion. The master rightly treated the transfer of property as a payment on account. Is it voidable under section 60?

No contention is made that the master erred in his findings that Ricciardelli was insolvent at the time he gave such check, nor that the effect of sustaining it will give the bank a percentage of its debts, greater than other creditors of the same class. The controversy is thus narrowed to the question whether the cashier of the bank, at the time he received such check, had reasonable cause to believe that its enforcement would effect a preference.

[2] Intent to prefer, since the amendment of 1910, is no longer material. The effect of the transaction is substituted for the intent of the debtor. Actual knowledge, or even actual belief, that a preference will result is not required. Neither knowledge nor belief, but reasonable grounds to believe, is made the criterion of proof in such cases. *Walbrun v. Babbitt*, 83 U. S. (16 Wall.) 577, 582, 21 L. Ed. 489; *Merchants' National Bank v. Cook*, 95 U. S. 342, 346, 24 L. Ed. 412; *In re C. J. McDonald & Son* (D. C.) 178 Fed. 487-492, 24 Am. Bankr. Rep. 446, affirmed 184 Fed. 986, 106 C. C. A. 585, 25 Am. Bankr. Rep. 948; *Pratt v. Columbia Bank* (D. C.) 157 Fed. 137, 139, 18 Am. Bankr. Rep. 406-413; *In re Neill-Pinckney-Maxwell Co.* (D. C.) 170 Fed. 481, 22 Am. Bankr. Rep. 401; *Dulany v. Waggaman*, 22 Am. Bankr. Rep. 36, 46; *Herron Co. v. Moore*, 208 Fed. 134, 125 C. C. A. 356, 31 Am. Bankr. Rep. 221; *Collier on Bankruptcy* (10th Ed.) p. 819 et seq.

However, as a voidable preference within this section of the Bankruptcy Act cannot exist without the debtor's insolvency at the time of the transfer (a solvent debtor having the right to prefer a creditor), it follows that the facts constituting "reasonable cause," from which the potent belief is to be imputed to the creditor, include the element of insolvency. *In re Chicago Car Equipment Co.*, 211 Fed. 638, 128 C. C. A. 142, 31 Am. Bankr. Rep. 617; *Rogers v. American Halibut Co.*, 31 Am. Bankr. Rep. 576. What is such reasonable cause depends upon the particular facts of each case. While mere suspicion that a preference may result is insufficient (*Grant v. Nat. Bank*, 97 U. S. 80, 24 L. Ed. 971; *Collier*, supra, pp. 822, 823, and cases cited),

yet, as was said in *Re Eggert*, 102 Fed. 735, 43 C. C. A. 1, 4 Am. Bankr. Rep. 449:

"If facts and circumstances with respect to the debtor's financial condition are brought home to him, such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose."

The test here laid down has met the approval of later cases (*In re C. J. McDonald & Son*, *supra*; *Herron Co. v. Moore*, *supra*; *In re Thomas Deutschle & Co.* [D. C.] 182 Fed. 435, 25 Am. Bankr. Rep. 348; *Newman v. Dry Goods Co.*, 174 Mo. App. 528, 160 S. W. 825, 31 Am. Bankr. Rep. 399), and in my judgment must be applied in the case at bar.

The master's treatment of the question whether reasonable cause to believe existed presents the peculiar situation of one who, after having correctly stated that the inquiry relates to the effect of the transfer, proceeds to discuss the evidence as if the inquiry related to the intent of the debtor. The cases cited and discussed by him as laying down the rules that must determine the question were all dealing with the law as it was before the amendment of 1910, which, as noted, substituted the effect of the payment for the intent in making it. While these cases are still authority for the tests to be applied in determining whether a reasonable ground for belief has been established, they are of little help upon the narrower or reduced scope of the inquiry which the amendment of 1910 purposely effected. Manifestly, with the mental attitude of the debtor eliminated, as a dominating factor, from the inquiry, neither his belief in, nor assertion of, his solvency, as evidencing his intent in the transaction, is of any value in considering the question whether the creditor had reasonable ground to believe that the result of such transfer would give him a preference; that is, whether it would so diminish the debtor's estate that, as between the payee of the challenged payment and the other creditors of the same class, the former would obtain a greater proportion of his claim. That the master was misled in his conclusions by not keeping in mind this change in the statutory law is evidenced by his language following his deduction of the rules laid down by the cases cited by him, viz., "We come now to considering whether, in the light of these rules, the complainant has shown, by the weight of the proof, that the bank had reasonable cause to believe that Ricciardelli intended to give a preference;" and that following his reference to some of the evidence, viz., "This is all the material testimony touching this branch of the case. This evidence does not, in my opinion, show that the bank had reason to believe that a preference was intended."

The master having thus evidenced his misapprehension of the determining factor of the issues before him, and I having reached a conclusion adverse to his recommendation, it is deemed advisable to make an extended reference to such of the evidence as bears on the question of reasonable cause to believe that a preference would be effected. As such cause for belief must have existed at the time of

the payment, only the occurrences at the time of giving the check, or within a reasonable time prior thereto, are material.

The bankrupt had dealt with the bank six or seven years. Drafts drawn on him in favor of certain of his creditors from time to time came into the bank's possession for collection. Within a week or so before December 8th, two drafts drawn on the bankrupt in favor of E. P. Scholl & Co. for shipments of macaroni, and with whom Ricciardelli had been doing business for several years, came to the bank for collection and on presentment were dishonored. This occasioned a conversation between Mr. Scholl of such company and Mr. Castens, the cashier of the bank, and several talks with Ricciardelli. According to the testimony of Scholl, the talk between him and such cashier was on December 7, 1911. He advised the cashier (in substance) that Ricciardelli refused to talk with him about the protesting of such drafts; that he wanted an extension of time without giving security; that the Naples Bank (which had forwarded such drafts for collection) would take immediate action if the drafts were not paid; that Ricciardelli, instead of taking such macaroni to his place of business, had taken the unusual proceeding of selling the merchandise (for the payment of which the drafts had been drawn) at the dock where it had been unloaded; that Ricciardelli was acting foolishly; that there was no necessity for him to fail; and that he wanted him (the cashier) to talk with Ricciardelli, as he was the only man who could handle him in the circumstances.

Mr. Castens (the cashier) recalls the talk over the telephone with Mr. Scholl about the unpaid drafts, but thinks that it was earlier than December 7, 1911. He says in substance that some time in the week prior thereto some one (he did not recall whether it was Mr. Scholl or not) had told him that Ricciardelli was selling the macaroni at the dock; that he had been told that Ricciardelli's teamsters were removing large quantities of goods from his stores; that when the drafts came he called up Ricciardelli and asked him about them; that sometimes they called him up two or three times a day; that Ricciardelli said he would not pay them for the reason that the macaroni was of an inferior quality, but that he would pay if a reduction was made, and that Scholl had refused to make a reduction. Castens further says that he does not recall whether Scholl said anything about bringing legal proceedings against Ricciardelli; that before December 8, 1911, within a day or two after his talk with Scholl, he had a talk with Ricciardelli about such conversation; that he did not advise Ricciardelli to pay the drafts as Scholl wanted him to; that on December 8th he telephoned or sent word to Ricciardelli to come and see him; that he "understood Mr. Scholl was going to make some trouble for him, and I (he) wanted to know where he stood, and he told me that he was solvent but he owed us some money"; that he does not recall whether he told him anything that Scholl had told him previously; that at that time Ricciardelli repeated the reason for not paying the drafts; that he said nothing to him (Ricciardelli) about payment upon the note or anything that caused him to give such check; that he was not particularly alarmed

about what Scholl told him; that the last financial statement he saw was probably six months before, made up by Mr. Scholl; that he made no inquiry at that time "as to a detailed nature of his financial condition"; that he had sent for Ricciardelli on account of these drafts; that on December 8th (date the check was given) he did not ask Ricciardelli or his wife to make payment on account of the notes; that about that time Ricciardelli also delivered to him warehouse receipts for goods stored in his name; that the giving of the check to the bank was entirely unexpected; that he was very much surprised at the turning over of the warehouse receipts; that Ricciardelli had never in his previous dealings made payments or pledges of goods on account of notes before they were due; that he could not tell why the check was certified, and that it was not customary for the bank to certify a check against the maker's deposit, given on account of notes held by the bank; that on certifying the check it was charged to Ricciardelli's account the same day (December 8, 1911); that he made no inquiry regarding Ricciardelli's financial condition after his talk with Scholl and before the payment of the \$1,000 check; that the warehouse receipts were not given with the check, but afterwards, and were not pledged to pay the notes, but to borrow money; that no loan was made by the bank on such receipts; that these were retained until the receiver took possession.

Orlando Ricciardelli (bankrupt) testified in substance that he had done a big business with the bank for several years; that he told Castens to stop payment on Scholl's drafts because the macaroni was not good; that, after refusing to pay such drafts, Mr. Castens called him up frequently over the telephone about the Scholl matter; that such check was made out for him by some one at the bank; that it was given because Mr. Castens said that Scholl wanted to put an attachment on the deposit, and that the bank wanted the money; that he (Ricciardelli) said, "If you are afraid, you can have the money;" that he also gave the bank negotiable warehouse receipts for goods stored, to secure his indebtedness and to borrow more money to pay his debts.

Assuming the correctness of the bank's contention that the cashier made no request for the payment of money on account of such notes, that the payment was unexpected, and that the taking over by the bank of the negotiable warehouse receipts was not to secure the remainder of the bankrupt's obligations, but for the distinct purpose of securing an additional loan, the proven facts show such a situation, beginning with the dishonoring of such drafts and ending with the acceptance of the \$1,000, as to force the deduction that Mr. Castens knew of sufficient facts to require him to make inquiry whether such payment would give the bank a preference. As stated, it is sufficient if the facts are "such as would put an ordinary prudent man on inquiry." The payment was, on account of unmatured obligations, an admittedly unusual proceeding. It was made at the close of an unusual series of acts by the payer, known to the payee; i. e., disposing of a large shipment of merchandise before it reached the consignee's place of business, after refusal by the payer to honor the drafts cov-

ering such shipment, and the removing of large quantities of goods from such place of business. It came after repeated interviews between the cashier and the bankrupt, during which the cashier according to (his testimony) told the bankrupt that he "understood Mr. Scholl was going to make some trouble for him," and "I (he) wanted to know where he stood." The check was made out for the bankrupt and signed by him at the bank in the presence of the cashier and a lawyer (not called at the hearing). It was immediately certified by direction of a bank official, an admittedly unusual proceeding, as the deposit drawn upon was in the control of the bank which was to receive the proceeds. It was charged at once against the account. Whether the certification and charge were made before it obtained the indorsement of the wife, and came into the final possession of the bank, does not appear. It was held by the bank after it was charged against the deposit until the first note to be paid thereby fell due, a seemingly unusual course. It was immediately followed by a refusal to advance him any more money, although he offered security of a more tangible character than that represented by the paper to which such payment was to be applied.

The facts of the case, however, negative the idea that the cashier of the bank took no active steps to secure this payment. The testimony of Ricciardelli shows the contrary. The master did not find him unworthy of belief, and I cannot so treat him. Mr. Castens himself testifies that he frequently talked to Ricciardelli about the unpaid drafts; that he asked Ricciardelli to come to the bank on the day such check was given; and that he told him that Scholl was going to make trouble for him on account of such unpaid drafts. This persistent activity on the cashier's part cannot be attributed merely to the fact that the bank had had these drafts for collection. Ricciardelli's indebtedness to it, and the knowledge that he was acting strangely in disposing of his merchandise, were calculated to excite its fears as to Ricciardelli's attitude concerning his obligations to it. Its interests, therefore, rather than the interests of Scholl & Co., whose drafts had been protested, may safely be assumed to have been the motive for Casten's activity (if not anxiety) in keeping in constant touch with Ricciardelli during the few days preceding such payment. That in such interviews the bank sought to secure itself upon the obligations soon to fall due is as probable as it is commendable, and that pressure was brought on Ricciardelli to make such payments is a probability arising from the very persistency of Castens. Ricciardelli's testimony in this respect is strongly corroborated by the probabilities of the situation made up by these interviews and their manifest purpose. But reasonable cause for belief does not require activity upon the part of him who is to be charged therewith. It may, and as a legal proposition must, arise from inactivity, if affirmative action was required.

The occurrences of the two weeks preceding such payment brought home to the bank through its cashier were such as to require it to take affirmative steps to ascertain whether the debtor was solvent. If he was, he had a right to prefer. If not, he had not. Such steps

were not taken. True, the bankrupt was asked "where he stood," and he replied, according to Mr. Castens, that "he was solvent." This is not an unusual response by a failing debtor. None more hopeful than an honest debtor of his ability to pull through a financial crisis; and it is not necessarily a discrediting factor that he alone believes his assets are sufficient to pay all obligations. Such assertions, however, are not always to be taken at their face value, and they seldom are by experienced business men. Actions speak louder than words, and their voice is not to be stilled by mere assertions. The inquirer is not to rest content with mere assertions by the debtor that he is solvent, and perfunctorily making inquiries is no better than making none. His answers should be tested in the ordinary way to elicit the truth, and the inquiry pressed with reasonable intrusiveness. In *re John J. Coffey*, 19 Am. Bankr. Rep. 149; *McGirr v. Humphreys Grocery Co.* (D. C.) 192 Fed. 55, 26 Am. Bankr. Rep. 518. If he fails to do this, he is chargeable with knowledge of the facts which such inquiry and testing would have disclosed, and, if such facts would have given him reasonable cause to believe that a preference would result from the transaction, such transaction will be voidable at the suit of the trustee. A bank cashier, than whom, because of exceptional opportunities and facilities to ascertain the financial standing of its customers, none is more competent to correctly weigh assertions made by a customer, is not likely to be misled by such statements; and when, as in this case, he is possessed of the facts which in their lesser effect cast doubt on its accuracy, his duty is to prosecute his inquiries further and not to halt them by the fear that an unsatisfactory disclosure would result. Properly directed inquiries, if instituted by the cashier at the time when he accepted the \$1,000 check or at any time between that date and the earlier dates when he learned of Ricciardelli's sale of merchandise at the dock and his removal of large quantities of goods from his store, would have disclosed that he was insolvent, and therefore unable to pay the remaining creditors as large a proportion of his estate as the bank would obtain by taking such check. The unusual in business, as well as in other transactions, challenges the attention, and the failure of the bank to prosecute the prescribed inquiry cannot be permitted to inure to its benefit to the prejudice of the depositor's other creditors of the same class.

On the whole record, the mind is forced to the pronouncement that the bank had reasonable cause to believe that the enforcement of the check for \$1,000, given by Ricciardelli, would effect the preference voidable by section 60 of the Bankruptcy Act.

The master's ultimate finding is therefore disaffirmed, and the trustee is entitled to recover such sum, with his costs to be taxed. A decree to this effect may be entered.

SEATTLE, R. & S. RY. CO. v. CITY OF SEATTLE et al.

(District Court, W. D. Washington, N. D. August 25, 1914.)

No. 1932.

1. STREET RAILROADS (§ 61*)—FRANCHISES—RIGHT TO REPEAL—WAIVER.

A city by ordinance granted a franchise to a street railroad company, subject to repeal for a violation of its conditions. Claiming such violation, and a disagreement having arisen, it brought two suits against the company to enforce the same. Afterwards it amended the franchise ordinance, by changing in part the line of the road. Still later it passed ordinances repealing the franchise ordinance. It did not, however, dismiss the suits, which were subsequently litigated to a final determination; one being taken to the Supreme Court of the United States. After passage of the repealing ordinances, the city required the company to make improvements and betterments at a cost of \$50,000, passed an ordinance fixing a schedule for the operation of its cars, received taxes on its property, a material part of which was for franchise valuation, aggregating \$47,000, and also a percentage of its gross earnings fixed by the franchise ordinance, and finally instituted proceedings to condemn its property, including its franchise, for a municipal line. *Held* that, if the company failed to comply with the requirements of the franchise ordinance, the city had two remedies—first, to compel compliance with its conditions; or, second, to declare a forfeiture of the franchise right by repeal; that having elected to pursue the first remedy, and persisted therein, and having by many acts recognized the franchise as still in force, it waived the right to repeal it, and the repealing ordinances were inoperative and could not be enforced.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 50-54; Dec. Dig. § 61.*]

2. STREET RAILROADS (§ 61*)—FRANCHISES—RIGHT OF FORFEITURE—WAIVER.

When a municipal corporation, after knowledge of an act or omission constituting a ground of forfeiture of a franchise granted, does any act which unequivocally recognizes the franchise as still existing and in force, a waiver of the forfeiture will be inferred.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 50-54; Dec. Dig. § 61.*]

In Equity. Suit by the Seattle, Renton & Southern Railway Company against the City of Seattle and others. On final hearing. Decree for complainant.

See, also, 190 Fed. 75.

On December 23, 1910, complainant commenced an action against the city of Seattle and members of the city council, alleging in substance that it was a corporation, and the owner of and operating an interurban line of railway extending from the city of Seattle to the city of Renton, King county, Wash.; that such line was completed and put in operation about the year 1906; that said railway had been in daily continuous operation, carrying passengers and freight and interchanging loaded and empty freight cars with the Columbia & Puget Sound Railway Company and the Northern Pacific Railway Company, having direct physical connection with such two companies in the city of Renton, and also carrying express and United States mail; that the railway was constructed and operated over and along a right of way owned by the company or its predecessors, from Fourteenth Avenue South to the city of Renton, and over Washington street in the city of Seattle, and that the only portion of the road operated upon any street in the city of Seattle was that part operated along Washington street from Fourteenth Avenue South to Railroad avenue; that one Bowman obtained a certain franchise from the defendant city to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

operate a line of railway on said Washington street between Railroad avenue and Fourteenth Avenue South, thence over private property to the then city limits of the city, and constructed a line of railway thereon; that complainant became the owner by purchase of all of said railway property, including all rights, privileges, franchises, etc.; that the line so constructed was operated under and by virtue of the terms and conditions of said franchise and its amendments, until May, 1908; that in 1906 William R. Crawford, the president of the complainant, on behalf of the complainant company, obtained from the city of Seattle a franchise over the streets covered by the Bowman ordinance, and others, being Ordinance No. 15,919; that on the 18th day of May, 1908, the said Crawford assigned to the complainant all rights under said ordinance, together with all rights acquired under certain other ordinances passed by the defendant city; that on December 5, 1910, two resolutions were passed by the city council, charging complainants with noncompliance with the provisions of the franchise ordinances, and it was threatened to repeal the same. On December 23d this action was commenced, and on motion of the complainant a preliminary injunction was issued by Judge Hanford, but before the injunction was served the ordinances repealing the franchise ordinances were passed. Thereupon, on December 29th, a supplemental complaint was filed, and the matter came on for hearing on the pleadings of the complainant and the answer of the defendants, before Judge Donworth, who restrained the defendants until the final hearing of this cause, unless otherwise ordered by the court, from taking any further proceedings "that will interfere with or in any way prevent the operation of complainant's line of railway." Thereafter, on application by some of the bondholders, receivers were appointed for the railway company by the state court, who took possession of the property and hold the same now. On November 8, 1911, a cross-bill was filed by the defendant city, praying that the repealing ordinances be held valid, and that a forfeiture of the franchise be adjudged. A motion to strike the cross-bill was filed. Nothing further was done until June, 1914, when a motion was brought on for hearing to modify the restraining order. By agreement of all of the parties, the cause was assigned for hearing upon the merits, and the city withdrew its cross-bill, and a second supplemental complaint was filed, and answer thereto, in which the defendant prays "that the action of the complainants herein be dismissed with prejudice, and that said ordinances * * * repealing the franchise of the complainants herein be held valid, and that a forfeiture of said franchise be duly adjudged."

The testimony upon the trial at the final hearing fairly shows: That the complainant is operating a line of railway under the provisions of Ordinances No. 15,919, No. 25,038, and No. 2,088. The line operated extends from Stewart street, over and along Fourth and Fifth avenues, Dearborn street, and Rainier avenue, to Renton. The track from Third avenue to Fifth avenue, including the Y on Stewart street and second track on Fourth avenue, from Stewart to Pike street, was constructed since December 23, 1910. Prior to the autumn of 1909, the line extended from Railroad avenue along Washington street to Fourteenth Avenue South, thence to the city limits, and was extended to Renton in the fall of 1906. This was operated under franchise No. 1,441, granted to S. L. Bowman, who sold the same to the Seattle, Renton & Southern Railway Company. W. R. Crawford, who was president of the company, on behalf of the company, for the purpose of getting into the business district of the city at Pike street, was granted franchise No. 15,919, under which, together with the amendments thereto, the complainant is now operating. The complainant owned a private right of way along the line of its road between Washington street and Renton. By the provisions of Ordinance No. 15,919, the complainant was required to convey to the city all of its interest in this land for street purposes, and release all rights in the Bowman ordinance, and was also required to pay to the city 2 per cent. of its gross annual earnings. The transfer of the right of way to the city and release of rights in the Bowman ordinance was duly made, as provided by the ordinance, which ordinance further provided that the grantee shall keep on deposit in the city treasury to the credit of the board of public works \$1,000 as an "emergency fund," to enable the board to repair any dangerous places along the street of the right of way required to be made under said franchise, which was done.

It also provides that a bond in the sum of \$15,000 shall be filed, conditioned that the grantee shall construct, acquire, and put into operation in good faith the said line of railway, etc., and further provides that "this grant is subject to the right of the city of Seattle to at any time hereafter repeal, change, or modify this ordinance if the franchise granted hereby is not operated in accordance with the provisions of this ordinance, or at all, and the city of Seattle reserves the right at any time hereafter to so repeal, change or modify this grant," and further provides "that the grantee * * * may * * * take a passenger fare * * * not to exceed five cents for a single continuous ride one way over any line or lines owning, controlling or operating * * * between points situated within the city limits or the town of Columbia, * * *" and that the grantee shall keep on sale for \$1 each, at its main office and at such other places as are reasonably convenient within the city, commutation tickets, entitling the purchaser to twenty-five rides with the same privileges as in the case of cash fares, except that grantee shall be entitled to charge five cents upon through or "express" cars, and that school children going to and returning from school shall ride for half fare. They shall be entitled to 2 tickets for 5 cents or 50 tickets for \$1. The ordinance further provides that the payment of the fares, either cash or ticket, shall entitle the passenger to a transfer to any line of any street railway company operating within the city limits which shall give and receive transfers to and from the line of the grantee, on the basis of settlement that the transfer is to be redeemed at or for such proportionate part of the fare paid as the run or local route of the car on which the transfer is received bears to the run or local route of the cars from which the transfer is issued and on which the transfer is received, such transfers to be good upon the first connecting car at the point of transfer, going in the same general direction. Prior to 1909 the line of railway operated by the complainant extended from Railroad avenue, over Washington street, to the city limits. The grade upon Washington street was 13½ per cent., and cars could only be operated by the use of a counterweight. This was not satisfactory, and when the line was constructed over Fourth avenue to Pike street, the Washington street line was abandoned, and the line extended to and over Dearborn street. The complainant took over the system owned by the Seattle, Renton & Southern in harmony with the provisions of Ordinance No. 15,919, and thereafter double-tracked the system to Kenyon street and made other necessary improvements. About one mile was double-tracked in 1908, and about four miles afterwards, including Fourth avenue, from Washington to Stewart street, in 1909. Complainant paid for improvements after May, 1908, and up to December 23, 1910, exclusive of cars, something over \$200,000.

After the passage of Ordinance No. 15,919, the limits of the city were extended, and the company failed to carry the passengers for a 5-cent fare from within the city limits beyond the old limits, after the extension of the city's boundaries, and failed to give and receive transfers to and from connecting lines. The railway company also failed to furnish sufficient accommodations for the carrying of the passengers or parties desiring to be transported over the lines during the rush hours of the day, and the cars were overcrowded, and many persons were not able to secure accommodations within a reasonable time. This condition, however, was materially improved after the abandonment of the Jackson street line and the increase of the number of cars; nine steel cars having been added, some of which were purchased by the company and received prior to December 23, 1910, but had not been used because of the regrading of the streets in the city, and they could not be operated over the Jackson street incline. The complainant expended, in compliance with demands made by the city, after the 23d of December, 1910, on Main street, between Fourth avenue and Fifth avenue, on Washington street, near Twelfth Avenue South, on Fourteenth avenue, between Pike and Stewart streets, and on Stewart street, between Third and Fifth avenues, a sum approximating \$50,000. The complainant and the receivers, since the last date named, have expended for new equipment and betterments to the line of railway a sum in excess of \$145,000.

On the 5th day of December, 1910, resolutions Nos. 3,039 and 3,040 were passed by the city council, which were based upon charges filed by the super-

intendent of public utilities, charging the company with "failure to provide adequate local service and sufficient number of places where commutation tickets were sold; failure to provide a sufficient number of local cars, so that the users of commutation tickets who lived north of Kenyon street could avail themselves of the 4-cent fare; failure to replace old-style, inadequate cars with sufficiently modern equipment; failure to repair promptly, on order of board of public works, the defective track pavement and special work within the right of way; failure to install safeguards provided by the state law, until serious accidents have resulted; failure to observe provisions of Ordinance No. 24,721, providing for the proper sanitation of the cars. Many of the requests made by the city were complied with by complainant. The matter of 5-cent fares beyond the limits of the city, at the time the ordinance passed, and the matter of providing for transfer from complainant's line to other car lines in the city, were two propositions upon which no concessions were granted. The line of complainant being considerably longer than any other line in the city, the complainant was unable to make arrangements upon a basis of settlement for such proportionate part of the fare paid as the run on the local route of the car on which the transfer is issued bears to the sum of the runs on the local routes of the cars upon which the transfer is received, as computed by complainant. The superintendent of public utilities estimated a settlement upon a basis of 59½ per cent. to complainant and 40½ per cent. to the other lines. Complainant was willing to adopt such scale, but the other line declined, except on a 50-50 per cent. basis. Complainant contended that the limits of the city as fixed at the time of the passage of the ordinance was the point which should determine the 5-cent rate. The complainant further contended that the matter of fares was within the exclusive jurisdiction of the public service commission of Washington (Laws Wash. 1907, c. 226). The public service commission, by order entered on the 12th day of October, 1910, did assert jurisdiction over the complainant road in a matter pertaining to the operation of the said road, in cause No. 168, pending before the said commission, entitled "The Railway Commission of Washington ex rel. George W. Salisbury, Complainant, v. The Seattle, Renton & Southern Railway Company." To enforce these provisions of the ordinance, several actions were prosecuted in the courts of the state on behalf of the city in the name of private individuals, at the expense, however, of the city, and pursuant to resolutions of the city council. These were litigated to a final determination, the hearing in the respective cases being before the Supreme Court in January and June, 1911. See *State v. Seattle, R. & S. R. Co.*, 62 Wash. 124, 113 Pac. 260; *Id.*, 62 Wash. 544, 114 Pac. 431; *Id.*, 64 Wash. 167, 116 Pac. 638. It further appears that on several occasions prior to this date the superintendent of public utilities had reported to the city council the inefficient service and noncompliance with the provisions of the ordinance on the part of complainant, and recommended the revocation of its franchise. The city council declined to take any affirmative action upon these charges, and did not act until the charges last referred to were filed, and after a public hearing had been granted by the city council, which was held in a public hall in the city of Seattle, where large numbers of people residing in the community met with the city council and gave their views of the conditions then existing. On December 23, 1910, the repealing ordinances were enacted.

In September, 1910, the city council passed Ordinance No. 25,038, amending Ordinance No. 15,919, in which part of the route over some streets was changed. On January 9, 1911, the city council passed Ordinance No. 26,069, entitled: "An ordinance declaring the advisability of a city electric railway on Rainier avenue, and other streets, avenues and ways, and providing for the same, specifying and adopting the system or plan proposed, declaring the estimated cost thereof, as near as may be, and providing for the submission of such system or plan, and the incurring of an indebtedness therefor to the qualified voters of the city for their adoption and assent thereto, or for their rejection thereof, at a special election to be held on the day of the general city election, on the 7th day of March, 1911." This ordinance, containing the exercise of the common user rights reserved to the city by Ordinance No. 15,919, as amended by Ordinance No. 25,038, was submitted to a vote of the people at such special election, and was adopted by the

voters, and on the 13th of October, 1911, the city council passed, and the mayor approved, Ordinance No. 28,138, entitled "An ordinance providing for the condemnation, appropriation and damaging of all that certain line of electric street railway herein described, owned and operated by the Seattle, Renton & Southern Railway Company, within the limits of the city of Seattle, together with all private rights, privileges, easements and equipment, and appurtenances, if any, appertaining thereto and used in and about the operation and maintenance thereof, and of all right, title or interest of said company, and of all other persons or corporations therein, and providing for the payment of the just compensation to be made therefor." Thereafter, on the 30th of April, 1912, the city of Seattle commenced a condemnation proceeding in the state court against the complainant railway, seeking appropriation of its lines within the city of Seattle, pursuant to this ordinance. The petition of appropriation included the physical properties of the railroad company and also its franchises.

On the 23d day of February, 1913, the state court entered its order of adjudication of public use in said cause. The receivers not having been made parties, the Supreme Court, on certiorari proceedings, set aside the order of adjudication. On the 20th of February, 1911, the council of the defendant city passed Ordinance No. 26,451, providing a schedule for the operation of the passenger cars of the complainant company over certain streets along its line in the city, and the complainant company conformed to such schedule upon request by the defendant city, until the ordinance was repealed. On the 6th day of May, 1912, the city council passed Ordinance No. 29,364, being an ordinance providing for the laying off, extending, widening, and altering, etc., of Rainier avenue, from Jackson street to Thistle street, and from Fifty-First avenue south to the southerly boundary of the city of Seattle; and thereafter, on the 14th day of May, the city of Seattle instituted in the state court a condemnation suit under said ordinance, served process on the complainant by personal service, and upon the trial before a jury the city introduced in evidence exemplified copies of Ordinance No. 15,919 and of the deed from the complainant company to the city, transferring a certain right of way for street purposes, as provided in Ordinance No. 15,919, for the purposes there declared of showing that the railway company was not entitled to compensation for any portion of its private right of way north of Kenyon street, because said deed had been executed conformably to the terms of said ordinance.

The complainant company and its receivers have paid municipal taxes due the city of Seattle in the amount provided by law—for the year 1911, \$11,396; for the year 1912, \$13,890; and for the year 1913, \$22,631. For the said years the franchise of the complainant company over the streets of the city comprised a material valuation for tax purposes. The complainant company, prior to the year 1912, paid to and the city received annually the 2 per cent. upon the gross earnings of the company, pursuant to the provisions of Ordinance No. 15,919 and amendments thereto. The city refused to receive the 2 per cent. of such receipts for the years 1912 and 1913. The city has retained all of the deposits made pursuant to the provisions of the ordinances under which franchises have been granted, and likewise has accepted and holds the bond for \$15,000, provided by ordinance, which bond has been kept alive by the receivers by the payment of the annual premiums. The complainant company, or its receivers, pursuant to the ordinances of the city, paid all charges for inspection of improvements made on its line in the city upon statements rendered by the proper department of the city to the present time.

Harold Preston, of Seattle, Wash., for complainant.

James E. Bradford and Ralph S. Pierce, both of Seattle, Wash., for defendants.

Before CUSHMAN and NETERER, District Judges.

NETERER, District Judge (after stating the facts as above). The complainant contends, in oral argument, no briefs being filed, first, that

the reserved power of the city to repeal the franchise ordinance is equivalent to the rescission clause in a private contract, and the franchise being a contract between the parties (*Dern v. Salt Lake City Ry. Co.*, 19 Utah, 46, 56 Pac. 556), it is governed by the general rules applicable to contracts, and that before the city could repeal the franchise and declare a forfeiture, it must return, or offer to return, the strip of land along and over which the road in issue is built, and the Bowman franchise, received in consideration of the passage of the franchise Ordinance No. 15,919, and having failed to place the parties in statu quo, it cannot maintain this action (*Andrews v. Hensler*, 6 Wall. 254, 18 L. Ed. 737; *German Savings Inst. v. Machinery Co.*, 70 Fed. 146, 17 C. C. A. 34; *Kauffman v. Raeder*, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247; *Minah Consolidated Mining Co. v. Brisco* (C. C.) 47 Fed. 276; *Doughten v. Bldg. Assn.*, 41 N. J. Eq. 556, 7 Atl. 479; *Hanna v. Haynes*, 42 Wash. 284, 84 Pac. 861; 28 Cyc. 384); second, that either party may waive any breach of the conditions of the franchise ordinance contract, and that anything that would constitute a waiver of a breach in a contract constitutes a waiver of the conditions of the ordinance, and that defendant had waived all delinquencies of complainant, if any; and, third, that even though the court should find that the complainant had made default in some of the conditions of the ordinance, that complainant had two remedies—(a) to compel compliance with the conditions of the ordinance; or (b) to rescind the ordinance—and, having elected to enforce the provisions of the ordinance, cannot claim forfeiture, and that from the evidence it must be concluded that the complainant has expended large sums of money in building up the railway, and that there are not now any delinquencies on complainant's part, and a court of equity would not, under such circumstances, destroy property that is being built up. The respondent vigorously contends that the city was not, under the reserved power of the ordinance, required to tender the right of way strip, and that the acts done by the city did not constitute an election or waiver, and, a forfeiture having been declared by the city, the court should so decree.

The following authorities are cited by the city: *Benton v. Seattle Electric Co.*, 50 Wash. 161, 96 Pac. 1033; *Ewing v. City of Seattle*, 55 Wash. 229, 104 Pac. 259; *Farnsworth v. Minnesota & Pac. R. R. Co.*, 92 U. S. 49, 23 L. Ed. 531; *Sioux City St. Ry. Co. v. Sioux City*, 138 U. S. 98, 11 Sup. Ct. 226, 34 L. Ed. 901; *Tacoma Ry. & P. Co. v. City of Tacoma*, 140 Pac. 565; *State of Wash. ex rel. Sylvester v. Super. Court*, 60 Wash. 279, 111 Pac. 19; *Farmers' Loan & Trust Co. v. City of Galesburg, Ill.*, 133 U. S. 156, 10 Sup. Ct. 316, 33 L. Ed. 581; *Wheeling & E. C. R. Co. v. Triadelphia*, 58 W. Va. 487, 52 S. E. 499, 4 L. R. A. (N. S.) 333; *Union St. Ry. v. Snow*, 113 Mich. 694, 71 N. W. 1073; *Daly v. City of Carthage*, 143 Mo. App. 564, 128 S. W. 266; *City of Belleville v. Citizen's Horse Ry. Co.*, 152 Ill. 171, 38 N. E. 585, 26 L. R. A. 681; *Southern Bell Telephone & Telegraph Co. v. City of Richmond* (C. C.) 98 Fed. 672; *Boston Electric Light Co. v. Boston Terminal Co.*, 184 Mass. 566, 69 N. E. 346; *Los Angeles Ry. Co. v. City of Los Angeles*, 152 Cal. 242, 92 Pac. 490, 15 L. R. A. (N. S.) 1269, 125 Am. St. Rep. 54; *Peterson v. Tacoma Ry. & P. Co.*, 60

Wash. 406, 111 Pac. 338, 140 Am. St. Rep. 936; *Com. Elec. L. & P. Co. v. Tacoma*, 17 Wash. 670, 50 Pac. 592; *Tacoma v. Boutelle*, 61 Wash. 434, 112 Pac. 661; *State v. West End Light & Power Co. (Mo.)* 152 S. W. 79; 2 *Pomeroy's Equity Jurisprudence*, § 805, p. 1423.

[1] The conclusion we have reached makes it unnecessary to discuss the question of tender. We think the election of remedy and waiver determine the issue, and these, being so interwoven, will be discussed together.

We do not deem it necessary to enter upon an extended discussion as to whether the complainant made default in the conditions of the ordinance. The condition of the streets over which its franchise extended during the time covered by the controversy by reason of street improvements was unusual. Upon the matter of fares and transfers there must have been an honest difference of opinion (*Seattle Electric Co. v. City of Seattle* [D. C.] 206 Fed. 955), and that issue was on the date of the passage of the repealing ordinances pending in the state court for adjudication. That the community was not adequately served during a portion of the time in issue cannot be doubted. Whether the conditions referred to were such as to justify complainant will not be entered upon.

[2] The city, upon the failure of the complainant to carry out the provisions of the franchise ordinance, if default was made, had two remedies: First, to compel compliance with the provisions of the ordinance; or, second, to declare a forfeiture of the franchise right. The election of one remedy with full knowledge is an irrevocable bar to the other. *The Fred E. Sander* (D. C.) 212 Fed. 545; *Thompson v. Howard*, 31 Mich. 309; *Achey v. Creech*, 21 Wash. 319, 58 Pac. 208; *In re Pederson's Estate*, 97 Minn. 491, 106 N. W. 958.

The city, in June, 1910, commenced two actions for the enforcement of the fare and transfer provisions of the ordinance, respectively, in the state court, in the name of *State ex rel. Linhoff v. Seattle, R. & S. R. Co.*, 62 Wash. 544, 114 Pac. 431, and *State ex rel. Dennison v. Seattle, R. & S. R. Co.*, 64 Wash. 167, 116 Pac. 638, respectively. This was an election on the part of the city to compel compliance with the conditions of the franchise ordinance. This election was confirmed in September, 1910, when an ordinance was passed by the defendant city, amending Ordinance No. 15,919, changing the route over some of the streets in the franchise, and while the repealing ordinances were passed on December 23, 1910, the city did not abandon the actions, but in January and February, 1911, the causes were tried in the state trial court, and thereafter, during the same year, were tried before the Supreme Court of the state, and later one of the causes appealed to the Supreme Court of the United States, 231 U. S. 568, 34 Sup. Ct. 185, 58 L. Ed. 372; the city's counsel appearing on behalf of the complainant before each of the courts named, at the expense of the city.

"When the state, or any subordinate governmental body to whose charge the matter has been committed, after knowledge of the act or omission constituting a ground of forfeiture, does any act which unequivocally recognizes the franchise as still existing and in force, a waiver of the forfeiture will be inferred." *Santa Rosa City Ry. v. Railway Co.*, 4 Cal. Unrep. 950, 38 Pac. 986.

The defendant contends that the Santa Rosa City Railway Case is distinguishable from the instant case in this: That in that case the forfeiture had not been declared when the amended ordinance was passed, while in the instant case the forfeiture was declared after the amended ordinance was enacted, and that, the conditions of the ordinance being continuing, that subsequent default would be presumed. The continued conduct of the city in harmony with the remedy selected, and the spirit of the amendment, when considered with the recognition given the franchise ordinance in the ordinances subsequently passed with relation to the municipal line, the condemnation of complainant's railway line, and condemnation of land for widening of Rainier avenue, and reception of benefits as disclosed, we think, answers the argument. A party cannot "blow hot and cold at the same time." The city cannot "eat its cake and keep it, too." The enforcement of the provisions of the franchise ordinance and repealing the ordinance are inconsistent, and both remedies cannot be pursued. *Farmers' Loan & Trust Co. v. City of Galesburg*, 133 U. S. 156, 10 Sup. Ct. 316, 33 L. Ed. 573; *Robb v. Vos*, 155 U. S. 14, 15 Sup. Ct. 4, 39 L. Ed. 52; *Allen v. Webb*, 24 N. H. 278; *Weeks v. Robie*, 42 N. H. 316; *Pfeiffer v. Marshall*, 136 Wis. 51, 116 N. W. 871; *Genet v. Delaware & H. Canal Co.*, 28 App. Div. 328, 51 N. Y. Supp. 377; *Smith v. Berryman*, 173 Mo. App. 148, 156 S. W. 40; *State v. People's Ice Storage & Fuel Co.*, 246 Mo. 168, 151 S. W. 101; *Pickle v. Anderson*, 62 Wash. 552, 114 Pac. 177; *Holt Mfg. Co. v. Strachan*, 77 Wash. 380, 137 Pac. 1006; *Conrow et al. v. Little et al.*, 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693; *A. Klipstein & Co. v. Grant*, 141 Fed. 72, 72 C. C. A. 511; *German Savings Inst. v. Machinery Co.*, 70 Fed. 146, 17 C. C. A. 34.

The fact that the city passed the amendatory ordinance, and failed in even an attempt at abandonment of the remedy selected by dismissing the actions commenced, upon passing the repealing ordinances and continuing to pursue the remedy selected, strongly emphasized the election of remedy theretofore made and subsequent affirmance; but, in addition, it passed an ordinance fixing a schedule for the operation of complainant's cars operated under the franchise in issue, and passed the further ordinances in which special recognition was given to the validity of Ordinance No. 15,919, as disclosed in the statement of facts preceding this opinion. The city required the expenditure of more than \$50,000 in street improvements and betterments along the complainant's tracks, and received \$47,917 in city taxes, a material part of which was for franchise valuation, received 2 per cent. on the gross earnings of the complainant pursuant to the ordinance for the years prior to 1912, retained the deposit made by the complainant for street improvements pursuant to the ordinance, and presented bills for inspection by the utilities department for the improvements and betterments covering the entire period of time to the present. The city cannot derive any benefits from the franchise and yet rescind the ordinance which gives it life. The franchise must be nullified in toto or not at all. *Lyon v. Bertrand*, 20 How. 149; *Stuart v. Hayden*, 72 Fed. 402, 18 C. C. A. 618. The contention of the defendant on the argument that the restraining order prevented it from enforcing the repealing ordinances,

and what was done was simply in harmony with keeping the property in statu quo, and not done with any intent or purpose of giving Ordinance No. 15,919, and amendments, recognition or vitality, cannot overcome the affirmative acts disclosed by the record, in the absence of an agreement or understanding between the parties that such acts should not be considered an affirmation. *McNaught v. Equit. Life Assurance Society*, 136 App. Div. 774, 121 N. Y. Supp. 448.

After the reception and holding of the taxes and the gross per cent. provided by the ordinance, and benefit of the sums expended for street improvements, deposit made by complainant pursuant to the franchise ordinance, payment of inspection charges to utilities department of the defendant for improvements and betterments made, and recognition of the validity of the franchise ordinance, as disclosed by the record, all done after the selection of remedy as stated in this opinion, the city will not be permitted to contend that the repealing ordinances have any vitality. To hold otherwise appears to us, under the record, would be violative of the principle of fair dealing and sound morality.

The repealing ordinances will be held inoperative, and defendant enjoined from enforcing any of the provisions thereof.

UNITED STATES v. NEW YORK, O. & W. RY. CO.

(District Court, N. D. New York. September 11, 1914.)

1. MASTER AND SERVANT (§ 13*)—INTERSTATE COMMERCE—HOURS OF SERVICE LAW—"CASUALTY"—SICKNESS.

The word "casualty," as used in Hours of Service Law (Act March 4, 1907, c. 2939) §§ 2, 3, 34 Stat. 1416 (U. S. Comp. St. Supp. 1909, pp. 1170, 1171), means a happening or coming to pass without apparent cause, without design on the part of the agent, in an unaccountable manner, or as a mere coincidence or accident, coming by chance, accidental, fortuitous, indeterminate, etc., that which happens by chance, accident, or contingency, and hence included sudden illness of a train dispatcher, requiring defendant railroad company to work a copy operator in the dispatcher's office as a dispatcher for a longer period than 9 hours in a 24-hour period, which therefore did not constitute a violation of the act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*]

For other definitions, see Words and Phrases, First and Second Series, Casualty.]

2. MASTER AND SERVANT (§ 13*)—HOURS OF SERVICE LAW—TRAIN DISPATCHERS—OVERTIME—"UNAVOIDABLE CASUALTY"—DEATH IN FAMILY.

Where a train dispatcher was compelled to be off duty because of the sudden and unexpected death of his mother, who was a member of his household, and the railroad company was required to work a copy operator as a dispatcher for a longer period than 9 hours in 24, had a sufficient number of employes for all ordinary contingencies, such facts constituted an "unavoidable casualty," within the exception of Hours of Service Law (Act March 4, 1907, c. 2939) §§ 2, 3, 34 Stat. 1416 (U. S. Comp. St. Supp. 1909, pp. 1170, 1171).

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*]

For other definitions, see Words and Phrases, First and Second Series, Unavoidable Casualty.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

8. MASTER AND SERVANT (§ 13*) — PERIOD OF SERVICE — HOURS OF SERVICE LAW—TRAIN DISPATCHERS.

Hours of Service Law (Act March 4, 1907, c. 2939) §§ 2, 3, 34 Stat. 1416 (U. S. Comp. St. Supp. 1909, pp. 1170, 1171), provides that no operator, train dispatcher, or other employé, who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements, shall be required or permitted to be or remain on duty for a longer period than 9 hours in any 24-hour period in all towers continuously operated night and day, except in cases of emergency, when the employés may be permitted to remain on duty for 4 additional hours on not exceeding 3 days in any week. *Held*, that where, by reason of the disability of a train dispatcher, a copy operator, whose ordinary business did not involve the use of the telegraph for the transmission of train orders, except in emergencies, was required to remain on duty for a longer period than 9 hours in 24, and for a portion of such time was required to transmit train orders, the fact that he was not required to transmit such orders during a period longer than 8 hours did not exempt him from the application of Hours of Service Law (Act March 4, 1907, c. 2939) §§ 2, 3, 34 Stat. 1416 (U. S. Comp. St. Supp. 1909, pp. 1170, 1171).

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*]

Action for penalties by the United States against the New York, Ontario & Western Railway Company. Judgment for defendant.

Thos. H. Dowd, of Cortland, N. Y., Asst. U. S. Atty.

C. L. Andrus, of Stamford, N. Y., for defendant.

RAY, District Judge. The defendant, the New York, Ontario & Western Railway Company, operates a railroad from Weehawken, N. J., to Oswego, N. Y., with a division headquarters at the city of Norwich, N. Y., where at the time in question it employed train dispatchers and also assistants, or copy operators, so called, both day and night. It was the duty of these copy operators to copy the records of the movements of trains and act generally in a clerical capacity for the dispatcher, but two of them were in fact competent in emergencies to act as dispatcher. However, it was no part of the duty of either of them, when or while acting as copy operator, to direct or control the movement of trains.

On November 14, 1912, and July 22, 1913, and at all intermediate dates, the defendant had three regular train dispatchers in its employ at the Norwich office, and also three assistants or copy operators. The hours of service of these dispatchers, or "tricks," as they are called, at the times in question, were as follows: Dispatcher Marshall, from 7 a. m. to 3 p. m.; Dispatcher Doody, from 3 p. m. to 11 p. m.; Dispatcher Brookins, from 11 p. m. to 7 a. m. On the dates in question one Towner was copy operator, and his trick, or hours of service, was from 8 a. m. to 4 p. m. At midnight on each of the occasions in question he had been off duty 8 hours.

In the evening of November 14, 1912, the mother of Dispatcher Brookins, and who was a member of his household, died suddenly and unexpectedly. In consequence of such death Brookins, who was to go on duty and relieve Doody at 11 p. m. reported his inability to do so.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In this emergency the superintendent in charge of this division and at this Norwich office continued Dispatcher Doody on duty until midnight, when he called Copy Operator Towner, who had had 8 hours' rest, to relieve him. This Towner did, and he served as dispatcher until 7 a. m., when Marshall came on duty. Towner was the only available man for the purpose at the time.

On the evening of July 22, 1913, Dispatcher Brookins, whose hours of duty commenced at 11 p. m., was taken ill, suddenly and unexpectedly, and, as his illness continued and increased, he was unable to report for duty, and thereupon in this emergency the superintendent continued Dispatcher Doody on duty until 12 o'clock midnight, as before, when Copy Operator Towner, the only available man, and who had been off duty since 4 o'clock p. m., was called to relieve Doody, which he did. Towner served as dispatcher until 7 a. m., when he was relieved by Marshall as before.

So far as disclosed by the evidence, there had been no previous time when these dispatchers and their copy operators had not been able to properly fill and fully perform the duties of their positions without the necessity of overtime work. During all of this time the defendant had in its employ at this office, or within call, operators qualified to take the place of copy operators who should be called upon to discharge the duties of dispatchers. Upon neither of the occasions aforesaid did Operator Towner act as an operator, train dispatcher, or other employé, who by the use of the telephone and telegraph dispatches reported, transmitted, received, or delivered orders pertaining to or affecting train movements, for a longer period than 9 hours in the 24-hour period; but upon each occasion such operator reported, transmitted, received, or delivered orders pertaining to or affecting train movements only from 12 o'clock midnight until 7 o'clock a. m.

[1] In view of these undisputed facts, the defendant insists that the requirement of Copy Operator Towner that he remain on duty, working as dispatcher part of the time, as stated, on both occasions, was because of a casualty, or act of God, and that the provisions of the federal Hours of Service Act prohibiting employment for more than 9 hours in the 24-hour period does not apply. After providing for the time beyond which in any 24 hours the operator cannot be employed without incurring the prescribed penalty, the act provides as follows:

"Provided that the provisions of this act shall not apply in case of casualty, or unavoidable accident, or the act of God."

As to the transaction of July 22, 1913, the sudden and unexpected sickness of Brookins absolutely disabled him. It was not an accident, within the commonly accepted definition of the word. Was it a casualty? Brookins was a part of the railroad itself, in that he was one of its employés engaged in the running and operation of its trains. Without Brookins and others like him the road could not operate, and hence, when he broke down suddenly and unexpectedly, the railroad itself, through its operating forces, was acted upon. If Brookins, *on his way* to take his trick, had been run over by an automobile and killed or seriously injured, without fault on his part, so as to disable him, there would have occurred, not only an accident (unavoidable so far as he

and the defendant railroad were concerned), but a casualty. In my judgment in such a case the provisions of the act would not apply. "Casual," according to the Century Dictionary, means:

"Happening or coming to pass without apparent cause, without design on the part of the agent, in an unaccountable manner, or as a mere coincidence or accident; coming by chance; accidental; fortuitous; indeterminate; as a casual encounter."

And "a casual" is one who is admitted into a hospital or a work-house at irregular and uncertain periods, or because of some accident. "Casualty" is defined by the same authority as:

"Chance, or what happens by chance; accident; contingency. (2) An unfortunate chance or accident, especially one resulting in bodily injury or death. Specifically, disability or loss of life in battle or military service from wounds," etc.

Here, as to July 22, 1913, Brookins without fault, at home, resting, and preparing to take his trick at 11 p. m., was taken sick without fault on his part and disabled. It was unforeseen, and unexpected, and unusual. It happened and began to be without design. It was a fortuitous event. If this sickness was the result of some act of Brookins, as overeating, or eating impure food, or exposure, it was an event happening without the concurrence of his will, or that of the cook or any other person. The Century Dictionary says:

"Accident. In general, anything that happens or begins to be without design, or as an unforeseen effect; that which falls out by chance; a fortuitous event or circumstance. (2) Specifically, an undesirable or unfortunate happening; an undesigned harm or injury; a casualty or mishap. In legal use, an accident is (a) an event happening without the concurrence of the will of the person by whose agency it was caused."

Sudden illness has been stated to be an act of God. *Gleeson v. Virginia Midland Railroad Co.*, 140 U. S. 435-439, 11 Sup. Ct. 859, 861, 35 L. Ed. 458. It was not so decided as the precise point was not involved; but the opinion of the court by Mr. Justice Lamar said with evident approval:

"Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, *sudden deaths and illnesses*, have been held to be 'acts of God.'"

In *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393, it was held that:

"An unavoidable accident is synonymous with inevitable, and means any accident produced by physical causes which are irresistible, such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death, or illness."

In *The Majestic*, 166 U. S. 375, 386, 17 Sup. Ct. 597, 41 L. Ed. 1039, it was said that the "act of God" which would exempt one from liability is an act in which no man has any agency whatever. In *Bullock v. White Star Steamship Co.*, 30 Wash. 448, 70 Pac. 1106, it was held that an "act of God" such as would relieve from the performance of a contract must be such as a person of reasonable prudence and foresight could not have guarded against. In the case of lightnings, storms, earthquakes, and inundations, no man has any agency whatever so far as their occurrence is concerned. In the case of illnesses, or even death it may be brought on by the willful act or willfully negligent act or acts

of the sufferer, or it may not be. In the case of death it might be suicide, and in the case of sickness it might result from an attempt to commit suicide. Here there is no claim, pretense, or suggestion that Brookins willfully or intentionally brought on his sudden sickness, or was guilty of any act of commission or omission which did, and I think the transaction of July 22, 1913, is within the proviso that:

"The provisions of this act shall not apply in case of casualty, or unavoidable accident, or the act of God."

[2] The other transaction, the sudden and unexpected death of the mother of Brookins, who was living with him in his own household, and which death occurred in the evening of November 14, 1912, and which caused Brookins to remain away, and made it necessary to put Towner on his trick, presents a different question in this: The death of Mrs. Brookins, the mother of Brookins, the dispatcher, did not *directly* act or operate on or directly affect the defendant railroad company, and Brookins himself was not made physically ill or sick, so he could not have reported for duty and undertaken to guide and control the movement of trains by means of the telegraph lines. Assuming, as we must, that he loved his mother, for whom he was caring in his own household and family, the shock of her sudden and unexpected death would more or less shock and unnerve him, or any son under similar circumstances. Thus unnerved, he would be more or less incapacitated from properly performing the duties of a train dispatcher. The death of the mother was either a casualty, an unavoidable accident, or the act of God; but it did not operate or act upon the railroad company, or its employé, or interfere with either, except in the indirect manner referred to. The language of the act (Act March 4, 1907, c. 2939, §§ 2, 3, 34 Stat. 1416 [U. S. Comp. St. Supp. 1909, pp. 1170, 1171]):

"Provided, that no operator, train dispatcher, or other employé, who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements, shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employés named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week"

—must be reasonably construed to effect the purpose of its enactment. If we read the words, "shall not apply in *any* case of casualty or unavoidable accident or the act of God," as applicable whenever there is *a sudden death* in the household of the railroad employé (that of a relative, of course), the transaction of November 14, 1912, is within the proviso of the act, and the provisions of the act have no application whatever, and the complaint must be dismissed.

It must be conceded that the main purpose of the section quoted—that part relating to train operators, who direct and control the movement of trains by telephone or telegraph—was to secure the presence of operators who are not overworked, tired out, sleepy, dull for want of sleep, etc., and thus secure, so far as such precautions can, the safety of the traveling public. It was not the purpose to compel a railroad

company to put a train dispatcher in its employ on duty in case when, because of casualty, or unavoidable accident, or the act of God, such employé had been made, recently, of course, incompetent to properly perform his duties, but rather in such a case to allow the railroad company to keep other employés on duty overtime. It was not the intention of Congress to jump either the railroad company or the traveling public from "the frying pan into the fire." It would be and is the duty of a railroad corporation to have a reasonable number of employés in its employ, and to exercise reasonable and due care to that end, to secure the proper running of its trains, including the dispatching, of course, but not to meet and cover cases of casualty, unavoidable accidents, or the act of God. If, then, a casualty, or an unavoidable accident, or an act of God, occur and intervene, making it necessary to work an employé overtime, assuming the railroad company has done its duty in having in its employ a reasonable number of employés to take care of ordinary conditions, including mishaps and occurrences reasonably to be apprehended and liable to occur, and the employé is worked overtime, the act does not apply.

Is it necessary that the casualty should have been of a physical nature operating directly on the employé? Or that the unavoidable accident should have been to the employé directly, so as to physically disable him, or that the act of God should have struck or operated directly on such employé? If a father, with a wife and child, as he is about to leave his house to take his trick as dispatcher, sees them or either of them stricken with sudden and severe illness, or death, is not that a case of casualty, or of an act of God, such as would make the act regulating hours of labor inapplicable *in case* the employer found it necessary to do as was done here? The father could go to the office of the company and take his trick, and neglect those at home; but the employer, if he knew the facts, would not permit, and the father's thoughts would be at home, and not on his work. The same is true, to an extent, when death strikes the father or mother, a member of the household. It is hard to draw the line, and somewhat dangerous to the strict enforcement of the law, perhaps, to hold that a casualty, or an unavoidable accident, or an act of God not operating *directly* on the employé or the employer, brings a case within the proviso of the act; but I think it the more just and reasonable to hold that it does, provided the employé by its operation is incapacitated from the proper performance of his duty, and the employer has done its duty in providing a reasonable number of employés for the duty. If the casualty, or accident, or act of God is such that it operates directly or indirectly on the employé performing a certain duty, and relied on by the employer to perform such duty, and thereby in fact incapacitates such employé from discharging that duty, and makes it necessary for the railroad company to tie up its trains or work a train dispatcher overtime, there being no negligence, it seems to me the Hours of Labor Act does not apply.

In this case there was no negligence on the part of the defendant railroad company. It had three regular dispatchers, and three assistants or copy dispatchers ready and competent to take their places, and at least two extra copy dispatchers able and competent to take the place

of two of the others, if they were called upon to act as dispatchers. It seems to me that it would be too onerous and unreasonable to require a railroad company, under the circumstances shown here, to keep in its employ and ready for duty a greater force of dispatchers and copy dispatchers and reserve copy dispatchers than this defendant had. No happenings or experience had shown defendant's force to be inadequate, and reasonable foresight could not have foreseen such a condition, which was unusual, not liable to happen, and which had not existed before.

[3] The defendant urges, in view of the language of the act (section 2), "that no operator, train dispatcher, or other employé, who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements, shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers * * * continuously operated night and day * * * except in case of emergency, when the employés named in this proviso may be permitted to be and remain on duty for four additional hours * * * on not exceeding three days in any week," that this action cannot be maintained in any event, as Towner's duties, except in emergencies such as this, did not call on him or require him to use the telegraph or telephone to dispatch, report, transmit, or receive, or deliver orders pertaining to or affecting train movements, and that he had not performed such duties prior to midnight that day, and that when called to act as dispatcher he remained on duty 8 hours only. The claim is that, until put on this work of dispatcher at 12 o'clock midnight, he did not come within the act at all, and that what he had been doing before is immaterial, inasmuch as he had not been engaged "by the use of the telegraph or telephone dispatches" in reporting, transmitting, receiving, or delivering orders pertaining to or affecting train movements, and that it had not been a part of his duty to do so.

It is contended that he was not within the description of section 2 until he assumed the duty of operator at midnight. I do not think this contention can be sustained. Towner was an employé of the defendant in this line of work, but he acted as copy operator only, and was to do so continuously unless called upon to take the place of the regular operator, whose duties he was qualified to perform in an emergency. He had been at work as copy operator for the 8 or 9 hours preceding 4 o'clock p. m., and he was then off 8 hours, and then he went on duty as regular operator or train dispatcher, and worked 8 hours, or until 7 a. m. I think Towner was within the reason and the spirit of the act. He could not within a given 24-hour period work 8 or 9 hours as copy operator, and later and within the same 24-hour period work 8 or 9 hours more as train dispatcher. The very object or purpose of the law would forbid this.

I think that on the other grounds stated the plaintiff has failed, and that defendant has established:

"1. That the requirement of Operator Towner to remain on duty for a longer period than 9 hours in the 24-hour period on November 14, 1912, was because of a casualty, or act of God, and the provisions of the federal Hours of Service Act prohibiting such employment did not apply.

"2. That the requirement of Operator Towner to remain on duty for a longer period than 9 hours in the 24-hour period on July 22, 1913, was because of a casualty, unavoidable accident, or act of God, and the provisions of the federal Hours of Service Act prohibiting such employment did not apply.

"3. That the defendant is entitled to judgment dismissing the complaint."

There will be a judgment accordingly.

THE BEE.

(District Court, D. Oregon. August 31, 1914.)

No. 6473.

1. ADMIRALTY (§ 20*)—JURISDICTION—INJURY TO STEVEDORE.

Where plaintiff was employed on a dock as a stevedore to assist in loading a vessel and while so doing was struck and injured by a sling load of lumber which was being transferred from the dock to the boat by its hoisting apparatus located on and operated from the boat, the injury having taken place on land and not on navigable water, was not a maritime tort within the jurisdiction of admiralty, and did not therefore create a maritime lien against the boat.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 216, 225, 231; Dec. Dig. § 20.*]

2. MARITIME LIENS (§ 60*)—JURISDICTION—INJURIES TO STEVEDORES—LIENS—STATE LAW.

A lien against a boat rising out of such injury, if it existed at all, was nonmaritime and created by the statutes of the state in which the injury occurred, and enforceable according to the procedure prescribed by such law.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 98; Dec. Dig. § 60.*]

3. SHIPPING (§ 87*)—INJURY TO STEVEDORE—BOAT LIEN LAW.

Where a stevedore, while working on a wharf assisting to load lumber onto a vessel, was injured by being struck by a sling load of lumber, due to the alleged careless and negligent use and operation of the ship's appliances by her officers, the injury was caused by the ship, and was therefore within Oregon Boat Lien Law (L. O. L. § 7506), providing that under such circumstances an action may be maintained against the vessel.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 340; Dec. Dig. § 87.*]

4. MASTER AND SERVANT (§ 250*)—INJURIES TO STEVEDORE—EMPLOYER'S LIABILITY ACT—APPLICATION.

L. O. L. Or. § 7506, provides that in cases of negligent injury by a boat or vessel, an action may be brought against the boat or vessel by name rather than in personam against the owner. Section 7509 declares that on return of the warrant, the proceedings shall be in the same manner as if the action had been commenced against the person on whose account the damages accrued, and section 7511 provides that if an issue of fact is joined, the same proceeding shall be had as in other actions. *Held*, that the Oregon Employers' Liability Act (L. O. L. §§ 5014-5072), was applicable to proceedings against a vessel for injuries to a stevedore by the alleged negligent operation of the vessel's hoisting appliances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 805; Dec. Dig. § 250.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. SHIPPING (§ 73*) — INJURIES TO STEVEDORE — NONMARITIME TORT — WHAT LAW GOVERNS.

Though the territorial sovereignty of a state extends to a vessel while she is on the high seas and the law of her home port is usually applied by comity to regulate the mutual relations of the ship, her owner, master, and crew as among themselves and with relation to their lien for wages, methods of discipline, contracts, and the status of those aboard her, yet as regards an actionable personal injury, not maritime in character, the ship's liability will be governed by the law of the place where the injury occurred, rather than that of the vessel's home port.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 73.*]

Action by W. A. Schroeder against the Steamship Bee. On demurrer to the complaint. Overruled.

Giltner & Sewall, and Edward J. Brazell, all of Portland, Or., for plaintiff.

Snow & McCamant, of Portland, Or., for defendant.

BEAN, District Judge. This action was instituted under the Oregon Boat Lien Law in the state court against the steamship Bee to recover damages for a personal injury. The law in question declares that "every boat or vessel used in navigating the waters of the state or constructed in the state shall be * * * subject to a lien * * * for damages or injuries done to persons or property by such boat or vessel" (L. O. L. § 7504), and provides a method of procedure for the enforcement of such lien. The action was removed to this court because of diversity of citizenship. The defendant demurs to the complaint on the ground that it does not state facts sufficient to constitute a cause of action.

It is alleged, in substance, that the defendant boat is engaged in the coastwise trade between Columbia river and California points, and at the time of the injury to plaintiff was berthed at the Southern Pacific dock in the port of Portland, taking on a cargo of lumber from a train of cars standing on the dock. The plaintiff was employed as a stevedore to assist in loading the vessel, and while at work on the cars was struck and injured by a sling load of lumber which was being transferred from the cars to the boat by a hoisting apparatus located on and operated from the boat, which injury it is alleged was due to the carelessness and negligence of the mate who had charge of the work and to whose orders plaintiff was obliged to conform, in ordering the sling load to be hoisted without warning to the plaintiff.

[1] The cause of action as made by the complaint is not a maritime tort of which courts of admiralty have jurisdiction. The consummation of the wrong having taken place on land and not on navigable water, and the cause of action not having been consummated on such water, there is therefore no lien on the boat under the maritime law. Therefore the fellow-servant doctrine as applied in proceedings in admiralty and the ruling of this court in the *Nokomis* (no opinion) that the Oregon Employers' Liability Law (L. O. L. §§ 5014-5072) does not control proceedings in admiralty have no bearings upon the questions now presented.

[2] The lien sought to be enforced, if it exists at all, is nonmaritime and created by the state statute, and is enforceable according to the statutory method prescribed by the state law and the rules of evidence and procedure applicable thereto. *Johnson v. Chicago, etc., Elevator Co.*, 119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 447. The case is here by reason of diversity of citizenship, and not as a proceeding in admiralty.

The facts stated in the complaint would bring the case within the provisions of the Employers' Liability Law if the action was in personam against the owner of the vessel, but it is contended by the defendant: (1) That the Boat Lien Law has no application to the case made by the complaint because the injury complained of was not done by the "boat or vessel" within the meaning of the law; (2) that the Oregon Employers' Liability Act does not apply to actions brought against a boat to enforce a lien given by the state statute; and (3) that the defendant vessel is owned in California, and the law of that state governs the relations between the vessel and her owners on the one hand, and the employes of the ship on the other, and that under such law the mate, whose negligence it is alleged caused the injury, was a fellow servant with the plaintiff, for whose act neither the vessel nor her owner is liable.

[3] (1) The first point is, in my judgment, not well taken. The complaint shows that the injury to the plaintiff was due to the careless and negligent use and operation of the ship's appliances by her officers, and as said by the Court of Appeals in *Aurora Shipping Co. v. Boyce*, 191 Fed. 967, 112 C. C. A. 379:

"A ship in commission and capable of doing mischief includes her hull and whatever else pertains to her as a complete entity, including masts, rigging, sails, steering gear, propelling machinery, furniture, anchors, master, officers, and crew."

If, therefore, the plaintiff's injury was, as alleged, due to the negligent operation of the ship's appliances by its officers, it was caused by the ship within the law, and in this respect differs from the *Mayfair*, recently decided (no opinion), in which the injury was alleged to be due to the negligent manner in which lumber was piled on the wharf, and not to any act of the ship.

[4] (2) The remedy provided by the state law for enforcing the lien given by the statute is an action against the boat or vessel by name, rather than in personam against the owner (section 7506, Lord's Ore. Laws), but after the seizure of the vessel and the return of the warrant the proceedings are to be had against the vessel in the same manner as if the action had been commenced against the person on whose account the damages accrued (section 7509). And if an issue of fact be joined the same proceedings shall be had as in other actions. Section 7511. This being so it would seem to follow that the trial should be governed and the liability of the parties determined by the same rule as if the action were in personam against the owner; and, if it were an action against the owner, it is settled, as I understand the Oregon decisions, that the liability law would apply. *Gynther v. Brown & McCabe*, 67 Or. 311, 134 Pac. 1186; *Dunn v. Orchard Land & Timber Co.*, 136 Pac. 872.

[5] (3) The complaint contains no allegation as to the home port of the defendant vessel, but it appears elsewhere in the record that it is California, and the defendant contends that the laws of that state and not of Oregon must determine her liability for the injury complained of. The territorial sovereignty of a state extends to a vessel while she is on the high seas (*International Nav. Co. v. Lindstrom*, 123 Fed. 475, 60 C. C. A. 649), and the law of her home port is usually applied by comity to regulate the mutual relations of the ship, her owner, master, and the crew as among themselves and their lien for wages, and methods of discipline, and may, under some circumstances, govern her contracts and the status of those aboard her. *The Velox* (D. C.) 21 Fed. 479; *The J. L. Pendergast* (D. C.) 29 Fed. 127; *The Olga* (D. C.) 32 Fed. 329; *The Felice B* (D. C.) 40 Fed. 653; *The Angela Maria* (D. C.) 35 Fed. 430; *The Egyptian Monarch* (D. C.) 36 Fed. 773. But where the act of a ship occasions an actionable personal injury, not maritime, the law, I take it, is that the rights of the parties are to be determined by the law of the place where the injury occurred, and not that of the home port of the vessel. *N. P. R. R. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958; *Stewart v. B. & O. R. R. Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537. For, as stated by Mr. Justice Bradley in *The Scotland*, 105 U. S. 29, 26 L. Ed. 1001:

"In administering justice between parties it is essential to know by what law, or code, or system of laws, their mutual rights are to be determined. When they arise in a particular country or state, they are generally to be determined by the laws of that state. Those laws pervade all transactions which take place where they prevail, and give them their color and legal effect."

Demurrer will be overruled.

CAUBLE v. CENTRAL VERMONT RY. CO.

(District Court, S. D. New York. September 14, 1914.)

DAMAGES (§ 173*)—MEASURE OF DAMAGES FOR INJURY TO PERSON—EVIDENCE—LOSS OF EARNINGS.

Plaintiff, who was a teacher, was injured in a collision on defendant's railroad, and brought an action for damages. *Held*, that testimony that she intended to take a further educational course and secure an additional degree which would have enabled her to earn a higher salary, but was prevented by her injury was incompetent and its admission was prejudicial to defendant as affording a basis which was more or less conjectural and uncertain for the estimation of damages by the jury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 490-492, 501; Dec. Dig. § 173.*]

At Law. Action by Laura A. Cauble against the Central Vermont Railway Company. On motion to set aside the verdict of the jury for \$10,000 damages, and for a new trial. Motion granted.

Bassett, Thompson & Gilpatrick, of New York City, for plaintiff.
Martin S. Lynch, of New York City, for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

RAY, District Judge. I am convinced that the motion for a new trial must be granted and the verdict set aside.

The collision of engines was not denied; that plaintiff was at least shaken up could not be questioned, but the nature and extent of her injuries were sharply contested. The plaintiff was a teacher and on her way to a new field to secure or with a view to employment of the same kind in that field. After the collision she was transferred to another train very near the place of the accident and proceeded on her journey to her destination where she was entertained for some days, took rides and walks, etc. She had been a hard student, was a little upwards of 40 years of age, and a lady of studious habits and more than ordinary intelligence. She had in mind the taking of instruction in other lines so as to engage in broader intellectual fields, including a course of study, graduation, and the taking of a degree. All this was unknown to the defendant railroad company on whose train she was a passenger and could not have been within the contemplation of the parties, and, if by the accident and injury, she was prevented from pursuing this contemplated course of study, securing graduation, a degree, and larger wages because thereof, all of which was more or less conjectural and uncertain, it was not a proper matter to be considered by the jury in estimating and fixing damages. *North American, etc., Co. v. Morrison*, 178 U. S. 262, 267, 20 Sup. Ct. 869, 44 L. Ed. 1061.

The evidence on the part of the plaintiff tended to show that by reason of the injury plaintiff was disabled to pursue any studies, etc., and hence allowing her to testify what she purposed or intended to do in the lines of study, taking a regular course, etc., was prejudicial and allowed the jury to conjecture and surmise that the plaintiff, by reason of defendant's negligence, has lost and will lose higher wages in a broader field to which she would have attained but for the alleged negligence and consequent injury.

This is what transpired at the trial:

"Q. What were your arrangements with Columbia University for that extra course? A. I was given a fellowship of \$50 a month and my tuition for a year. I was to make some special investigations on some sociological lines and prepare myself to direct just such work in training schools. Q. If you had completed your year of study in Columbia University, beginning in September, 1912, would that have led to another degree?

"Mr. Lynch: That is objected to as immaterial.

"The Court: That gets into the realms of speculation, where it is not permissible.

"Mr. Thompson: I want to prove an agreement with the Carnegie Institute that if she took that degree she had an offer of that department with an increase of salary. This accident prevented her taking that degree, and, not having the degree she could not accept the position. Her loss of employment at an increased salary is directly due to this accident.

"The Court: I think you had better leave this until Monday. If you can give me any case where it is decided that the testimony is competent—

"Mr. Thompson: I will take an exception to that, your honor.

"Q. What courses did you intend to pursue at Columbia University during the year beginning the fall of 1912?

"Mr. Lynch: That is objected to as incompetent and immaterial.

"The Court: She may answer, but it is not necessary to go into details. (Exception by defendant.)

"By the Court: Q. Did you or did you not intend to take advance courses in your studies? A. I did. (Exception by defendant.)

"By Mr. Thompson: Q. What were those courses in? (Same objection, ruling, and exception.) A. Courses in sociology, which made a study of the social customs of the different races who are immigrating to America—their social customs. By that I mean their family relations, their educational, institutional, and their practical relations; the things which we need in trying to educate the children of foreigners, while they are still living in the homes of parents who do not understand what we do in our American schools. That was one phase of the work. Another phase of the work was a study of the types of institutions in America which cared for different defective, dependent, helpless, or unsupported children. I was working in Pittsburgh, where we had all those problems constantly thrown at us. Q. How many hours a day of required work was there in the course that you were to pursue that year? A. One of the three courses—one course at the university required two hours a week. One course at the university required four hours a week. Two courses, I think, required four hours a week. Q. Four hours each, a week? A. Four hours each a week. That was six hours, all told, at the university. The rest of the work I had was in the same class at the School of Philanthropy in the Charities Building, 105 East Twenty-Second street. There they are dealing with all these social problems first hand. And I would go to those men and see how they approached it. I might differ with them in opinion as to whether their method of approach was good or otherwise, but I wanted to know what they did. Q. In order to prepare yourself for this work, was it necessary for you to read and study in the library? A. Yes. Q. Consult books there? A. Yes. Q. Were you able to go to the library as much as your work required you to? A. I could not consult— (Objected to as incompetent.)

"The Court: After the accident, you mean she was not able to go there to the library as much as she did formerly, is that it?

"Mr. Thompson: No. She had not gone there formerly, except when she was a student there before. But in connection with this work she was obliged to go to the library and prepare herself. And I asked her if she was able to go there as often, as frequently, for a long time, as her studies required her to.

"The Court: It may be she would not be able to do so anyhow, so you are going into speculation. She may describe any of the facts. But when you put it in, 'as much as her studies required,' that is surmise and guess. I will sustain the objection and give you an exception. (Exception by plaintiff.)"

I do not think this error was cured or overcome by the charge. The court was requested to charge:

"In fixing the amount of damages the jury may consider the earning capacity of plaintiff at the time of the accident and also any increased earning capacity that plaintiff might reasonably be expected to have acquired but for the accident and consequent injury."

The statement by plaintiff's counsel as to what he wanted to prove, followed as it was by the evidence quoted, admitted under objection and exception, and other evidence that she could not do what she intended to do, must, or probably did, leave the jury under the impression that the plaintiff could recover damages based on what her earning power would have been had she not received the injury and had pursued the studies contemplated, etc. The jury was not told to disregard the testimony. I do not see how it was competent, and it seems to me that it was harmful and prejudicial. I would not set aside the verdict because the damages awarded are excessive, inasmuch as, if the plaintiff's nervous troubles and nervous condition were wholly the result of injuries received in that accident and the defendant was negligent (which was not questioned), the damages were not

excessive. However, the defendant claimed that there are several causes for such nervous troubles and conditions as affected the plaintiff, and that hard study, worry, etc., are producing causes, and that plaintiff's condition was the result, not of the accident and injury, if any, but of fright, worry, and mainly her previous life of hard and tiresome mental work. All reference to what the plaintiff intended to do, the studies she intended to pursue, and her prospects of greater compensation if they were followed to a successful end should have been ruled out.

In response to the above quoted request the court in assenting thereto also said:

"That is not only earnings for the past, but earnings in the future, whatever you say under the evidence that would have been. But you cannot give speculative damages, gentlemen, nor surmise, nor guess that she might have got the degree, and if she had, she might have earned more; you cannot surmise or guess damages."

However, this did not cure the error, as the evidence remained in the case.

It is urged that it was error to permit a physician called by the defendant to answer the question, in substance, "If a person had to work or starve, what would you recommend as a proper course of treatment?" referring to the nervous complaint or condition in question. Treatment, etc., had been gone into by defendant, and the suggestion had been made that rest would cure the plaintiff. The court had expressly ruled out evidence as to the financial condition of the plaintiff, but the question was somewhat objectionable as raising an inference, or permitting an inference, that the plaintiff was poor and financially unable to rest, and that therefore she could not take proper treatment and was entitled to more damages than if she had taken proper treatment. The objection should have been sustained.

There will be an order setting aside the verdict and granting a new trial.

BEEBE v. B. F. STURTEVANT CO.

(District Court, E. D. Pennsylvania. August 31, 1914.)

No. 3184.

TRESPASS (§ 40*)—PLEADING—STATEMENT OF CLAIM.

A statement of claim in trespass under Act Pa. May 25, 1887 (P. L. 271), may properly state the duties to which defendant was subject, and its failure to perform them, but should in addition contain averments showing in what respect it failed.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 80-88; Dec. Dig. § 40.*]

At Law. Action by Lawrence F. Beebe against the B. F. Sturtevant Company. Sur rule for more specific statement. Rule made absolute.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

John Thiel, of Philadelphia, Pa., for plaintiff.
Henry Spalding, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This rule must be made absolute. The plaintiff's statement contains nothing more than six abstract propositions of duty and the averment that each had been disregarded. The statement does not disclose in what the dereliction of duty consisted. This it should do. The science of pleading has its practical as well as its academic side, with which those interested in procedure forms have been most concerned. At the bottom of all pleadings lies the distinction between the different kinds of facts. We have the facts which are established by testimony and evidence, or what may be termed the evidential facts. We have the ultimate facts, which are found from these evidential facts by inference. Upon these ultimate facts the judgment of the law proceeds. The first must not be confounded with the evidence by which they are established, nor the latter confused with the conclusions of law which follow the findings of fact. The temptation to the pleader on the one side is to aver only the general or ultimate facts, so as to open as wide as possible the door of evidence. The effort of the other is to confine the averments to the particular or evidential facts, so that the evidence may be correspondingly restricted.

It is a not incurious feature of the development of pleadings that the drift of the changes proposed in the practice in courts of equity and of law is in opposite directions. The new rules of courts of equity in all jurisdictions require the plaintiff to confine himself to a statement of the ultimate facts upon which his right of action is based. Acts of assembly are being passed in every state to compel plaintiffs to give a narrative history of the particular facts of the transaction out of which the case arises. These opposite changes alike spring from the desire to get rid of an evil. The Legislature of Pennsylvania has expressed its will by the act of May 25, 1887 (P. L. 271), which, among other things, has prescribed what a statement in actions of trespass shall contain. The terms of the act are general. Whether it was intended to do away with the common-law form of pleading, and to compel statements of claim to give the particular facts in narrative form, is not clear. The construction which has been given to it by the Pennsylvania courts is that it is permissive, and the general practice throughout the state justifies the observation that some lawyers follow the one form and some the other.

The question of the sufficiency of statements is raised in a variety of ways. We have cases in which it has been determined on demurrer, on rules for bills of particulars, on rules for more specific statements, on objections to evidence at the trial, and on motions for judgment after verdict. The test varies somewhat according to the mode in which the question is raised. When raised as in this case, it is to be determined as a practical question of whether the defendant is sufficiently apprised of the case which he is to meet. The form of this statement is commendable in its general plan of stating the duties to which the defendant was subject and its failure to comply with them. There should, however, be added an averment of the respect in which the defendant failed.

In passing upon a particular case, much depends upon what the case is, and each must be determined upon its own circumstances, and be left in the first instance to the spirit of professional fairness and candor in the pleader to state his real case. He is not, however, called upon to state his evidence. In this case the statement is too general.

Let the rule be made absolute.

BIRDSALL et al. v. DELAWARE & H. CO.

(District Court, M. D. Pennsylvania. June Term, 1914.)

No. 622.

1. EXECUTORS AND ADMINISTRATORS (§ 438*) — ACTIONS — JOINT OBLIGEEES — CAUSE OF ACTION—RIGHTS OF SURVIVORS.

Where plaintiffs, with certain others since deceased, executed an instrument called a "mining lease," by which the lessee obligated itself to mine not less than 20,000 tons of coal per annum or pay \$6,000 a year, plaintiffs' interest under the contract was personalty, and, they being joint obligees and not tenants in common, the surviving obligees were entitled to sue without joining the personal or legal representatives of those who had died.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1765–1785, 1790; Dec. Dig. § 438.*]

2. PARTIES (§ 4*)—INTEREST—ASSIGNMENT.

Where a suit was instituted to enforce collection of payments due from an obligee under a mining lease, defendant could not object that one of the legal plaintiffs had made an assignment of his interest in the cause of action.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 4; Dec. Dig. § 4.*]

Action by William S. Birdsall and another* against the Delaware & Hudson Company. On demurrer to defendant's plea in abatement. Overruled.

S. B., C. B. & J. H. Price, of Scranton, Pa., for plaintiffs.
Welles & Torrey, of Scranton, Pa., for defendant.

WITMER, District Judge. The plaintiffs with James Scott, George H. Birdsall, and Maria L. Bailey, since deceased, on October 24, 1890, made and executed an instrument, known as a "lease," whereby the lessee obligated itself to mine and pay for not less than 20,000 tons of prepared coal per annum or pay \$6,000 a year. The defendant took possession of the land and began mining coal, and paid the minimum \$6,000 annually until April, 1902, since when they have not made any payment. This suit is brought to enforce collection of the payments due.

The defendants plead in abatement: First, that the parties are only entitled to recover jointly and the interests of James Scott, George H. Birdsall, and Maria L. Bailey are vested in their personal representatives and heirs and they should be made parties; second, Charles E. Hackley, one of the plaintiffs named in the action, has no interest in the cause of action alleged in the declaration.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] The plaintiffs sue, not as tenants in common with others, owners of a certain interest in real estate, but as the surviving joint obligees of an instrument given therefor in satisfaction of the purchase money. Their interest is in personalty, and does not savor of the real estate. *Lazarus' Estate*, 145 Pa. 1, 23 Atl. 372. The parties can here not be regarded as tenants in common. They are practically in the same position as if suing on a bond or note given to secure the purchase money. The case is not within the exception to the general rule of joint obligees invoked by the defendant relating to covenants with tenants in common. The personal or legal representatives of the deceased obligees or promisees are therefore not necessary parties to the suit. The right of action vests in the surviving plaintiffs. 15 Enc. of Pl. & Pr. 531, 532; 1 Chitty on Pleading, 19 (14th Am. Ed.); *Penn. v. Butler*, 4 Dall. 354, 1 L. Ed. 864, Fed. Cas. No. 10930; *Dana v. Parker* (C. C.) 27 Fed. 263; *Robinson v. Hintrager* (C. C.) 36 Fed. 752.

[2] As to the second objection, it is sufficient to note that the suit is by the legal plaintiff. Though there has been an assignment by him, there may be a recovery, and the defendant is not permitted to dispute the form of the suit.

The demurrer is sustained, and the defendant is directed to plead in bar.

BRACE et al. v. CENTRAL R. CO. OF NEW JERSEY.

(District Court, M. D. Pennsylvania. September 19, 1914.)

No. 508.

DAMAGES (§ 206*)—PHYSICAL EXAMINATION OF PERSON INJURED—POWER OF COURT TO ORDER.

In a common-law action for a tort resulting in a personal injury to plaintiff, a federal court has no power to make an order requiring plaintiff to submit to an examination by disinterested physicians, in the absence of a state statute giving it.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 531; Dec. Dig. § 206.*]

At Law. Action by Mary Jane Brace and others against the Central Railroad Company of New Jersey. On rule for order for compulsory examination. Denied.

Paul J. Sherwood, of Wilkes-Barre, Pa., for plaintiff.

Warren, Knapp, O'Malley & Hill, of Scranton, Pa., for defendant.

WITMER, District Judge. In this action the plaintiffs are endeavoring to recover damages for alleged injuries sustained by Bert W. Brace while a passenger on one of defendant's railway trains. The plaintiffs' statement sets forth that the said Brace suffered a fracture of the skull, resulting in permanent injuries to his brain and mind. Upon refusal to have the injured plaintiff examined by disinterested physicians to determine the state of his mind and the extent of the injury, the defendant obtained a rule to show cause why such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

examination should not be ordered under the direction of the court. The plaintiffs resist the order, and in support of their contention that the court is without authority in the matter call attention to *Camden Sub. Ry. Co. v. Stetson*, 177 U. S. 172, 20 Sup. Ct. 617, 44 L. Ed. 721; *Union Pacific Ry. Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734; *Chicago v. Kendall*, 167 Fed. 62, 93 C. C. A. 422, 16 Ann. Cas. 560; *Wilson v. N. Eng. Nov. Co. (D. C.)* 197 Fed. 88; *Denver City Tram. Co. v. Norton*, 141 Fed. 599, 73 C. C. A. 1; *In re Ward (D. C.)* 161 Fed. 755.

This is a common-law action for the recovery of damages for a tort, and subject to the local law concerning matters of evidence. Section 721, Rev. St. (U. S. Comp. St. 1901, p. 581); *Camden, etc., Railway Co. v. Stetson*, *supra*. No power to make an order for the examination of the person of the plaintiff in a case like this is to be found at common law (*Union Pacific Railway v. Botsford*, *supra*); hence in the absence of a state law the power does not exist.

The question has been variously decided in the lower courts of Pennsylvania, but it nowhere appears that it has been considered by the State Supreme Court. Though the sound reasoning employed in the able opinion of Judge Gunnison in *Hess v. Railroad Co.*, 7 Pa. Co. Ct. R. 565, and by Judge Biddle in *Dimenstein v. Riechelson*, 34 Wkly. Notes Cas. (Pa.) 295, appeals to me, yet it remains that their conclusion reached, in granting the order, was based on the proper exercise of the equitable powers inherent in courts, incident to their power to regulate practice necessary to the proper administration of justice, being satisfied that where a party voluntarily comes into court, alleging personal injuries and demanding damages therefor, disinterested witnesses should not be prevented from examining the nature and extent of the injury under proper regulation, in order that the court and jury may be informed thereof by others than the plaintiff and his friends. All of these considerations were disregarded, it seems, for other and more important reasons by the United States Supreme Court in the *Botsford* Case, and while the decision has been slightly modified by the court in the later case cited of *Camden Railway v. Stetson* in holding that a statute enacted by the state of New Jersey regulating the practice should be enforced, it still remains that short of statutory authority the courts are powerless.

The prayer of the petition is at present denied.

WAY v. J. H. WAY & SONS CO.

(District Court, E. D. Pennsylvania. August 27, 1914.)

No. 1293.

RECEIVERS (§ 208*)—ANCILLARY RECEIVERSHIPS—DIRECTIONS OF COURT.

As a general rule, proceedings in which an ancillary receiver has been appointed for a corporation will be confined to conserving the property within the jurisdiction and transmitting the money into which it may be converted for distribution in the original proceedings, and the court will

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

not, especially in case of a purely private corporation, direct its receiver to enter into contracts with respect to its business which are beyond his general powers.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 416; Dec. Dig. § 208.*]

In Equity. Suit by J. Harold Way against J. H. Way & Sons Company. On petitions of receivers for authority to enter into contract, and for an order to pay. Denied.

Edgar J. Pershing, of Philadelphia, Pa., for petitioner.

Surpetition of Receivers for Authority to Enter in Contract.

DICKINSON, District Judge. There are several reasons for withholding the decree asked for, all bearing, however, upon the question of the approved practice in such cases.

1. The proceedings in this court are ancillary to like proceedings in the court of the domicile of the corporation. As a general rule, the ancillary proceedings are well confined to conserving the property of the corporation within the jurisdiction of the court and transmitting the moneys into which it may be converted for distribution in the original proceedings.

2. This corporation is a purely private one. It has no public duties to perform and no public function to serve. The interference of a court with its affairs should be confined, so far as possible, to the strictly legal purposes of receiverships, leaving its business affairs to those most concerned with them.

3. The submission to the court of particular contracts is to multiply applications and require the court to enter into the business of the corporation by assuming to do what ought to be and can be much better done by the receivers who have already been given full general authority to conduct the business and raise whatever moneys are required. There is therefore no necessity for the interference of the court. All the court should do is to authorize the receivers to act, and this authority they already have.

No decree being necessary we make none.

Surpetition of Receivers for Order to Pay.

What should be done in view of the statement of facts submitted with this petition is one which the receivers can determine for themselves.

For the reasons stated in declining to make the decree asked for by another petition, we decline to make a decree in the premises.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

NEW HAMPSHIRE SAVINGS BANK et al. v. VARNER et al.

In re BRON.

(Circuit Court of Appeals, Eighth Circuit. August 29, 1914.)

Nos. 4105, 4121-4125.

1. BANKRUPTCY (§ 440*)—APPELLATE PROCEEDINGS—MODE OF REVIEW.

An order of a court of bankruptcy allowing or denying a lien or priority of a lien asserted against property of a bankrupt estate as security for a debt of \$500, or more, whether the debt or only the right to a lien is contested, is properly reviewable by appeal under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 440.*]

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. MORTGAGES (§ 151*)—PRIORITY OF LIENS—MORTGAGES AND MECHANICS' LIENS.

The owner of real estate sold the same to bankrupt pursuant to a verbal agreement that the bankrupt should give a purchase-money mortgage to the vendor which should be subject to another mortgage given at the same time for borrowed money, and that no work should be done on the premises until the transaction was completed and the deed and mortgages filed for record. This agreement was carried out, and the deed and mortgages were delivered and filed for record on the same date and as parts of the same transaction. *Held*, that the mortgage liens attached simultaneously with the vesting of title in the bankrupt, and that no valid mechanic's lien could attach to the property through any contract with the bankrupt prior to that time.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 307, 309-311, 314-329, 332-336; Dec. Dig. § 151.*]

3. MECHANICS' LIENS (§ 168*)—TIME OF ACCRUAL—BEGINNING OF WORK.

Under Gen. St. Kan. 1909, § 6244, relating to mechanics' liens, as construed by the Supreme Court of the state, a mechanic's lien dates from the commencement of the building or improvement, but such commencement must be in good faith and not a mere pretense at commencement to defeat prior liens on the property.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 299, 300; Dec. Dig. § 168.*]

Appeals from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

In the matter of Charles Bron, bankrupt. Appeals by the New Hampshire Savings Bank and P. J. Conklin, from orders denying priority to mortgages held by them over mechanics' liens in favor of G. F. Varner and W. R. Marshall, doing business as the Wichita Lumber Company, J. C. Titus and J. H. Higley, partners as the Titus-Higley Lumber Company, A. S. Orr, doing business as the North End Hardware Company, the Haines Tile & Mantle Company, the Jackson-Walker Coal & Material Company, and the Home Builders' Association. Reversed.

The appellants the New Hampshire Savings Bank, a New Hampshire Corporation, as assignee of E. D. Kimball, and P. J. Conklin made proof before the proper referee in bankruptcy of separate debts against the bankrupt estate of Charles Bron, a bankrupt, in the sum of \$8,312.50 and \$5,218, re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 216 F.—46

spectively, and in the proofs alleged that their respective debts were secured by mortgages upon certain real estate of the bankrupt situated in the city of Wichita, Kan., known as the Waco Avenue property in that city, and each asked that his debt be allowed in the sum claimed and as secured by his mortgage, and that mortgage adjudged the first or prior lien in the order thereof upon said real estate as security for said debts. The several appellees appeared before the referee and objected to the allowance of the appellants' mortgages as prior liens upon said property to secure such debts as against them, and alleged that they severally held mechanics' liens upon said property each of which under the statute of Kansas was prior to the liens of the appellants' mortgages, and asked that their respective mechanics' liens be adjudged liens upon the property prior to the liens of the mortgages; and the trustee in bankruptcy in behalf of the general creditors objected to the allowance of any liens upon the property. The referee heard the claims of the respective parties upon testimony in which there is sharp dispute as to the date of the execution of the deed of the property to the bankrupt, and of the execution and delivery of the appellants' mortgages, and the commencement of the improvement of the property, from which the several mechanics' liens date, and adjudged the liens of the appellants' mortgages to be valid and prior to the several mechanics' liens of the appellees: directed the property to be sold and the proceeds applied to the payment, first, of the mortgage lien of the New Hampshire Savings Bank, second, to the mortgage lien of P. J. Conklin, and the remainder, if any, to the mechanics' liens of the several appellees without priority as between them. Upon separate petitions of the appellees for review of such order, the district court reversed the order of the referee and decreed the several mechanics' liens to be prior in equity to the mechanics' liens of the appellants, and directed that the proceeds arising from the sale of the property be applied, first, to the payment of those liens without priority as between them, and the remainder, if any, to the payment, first, of the mortgage lien of the New Hampshire Savings Bank, and, second, to the mortgage lien of P. J. Conklin (in accordance with the provisions of the Conklin mortgage), and that the appellants pay the costs of the proceedings. From this decree the appellants separately prosecute these appeals. The parties have stipulated in writing that the several appeals shall be submitted upon the same record and as one cause; that the amounts of the mortgages and mechanics' liens shall be as found by the referee; and that only the question of their priority shall be submitted to this court for determination.

Kos Harris and Charles G. Yankey, both of Wichita, Kan. (V. Harris, R. L. Holmes, and Winn Holmes, all of Wichita, Kan., on the briefs), for appellants.

J. A. Brubacher and Chester I. Long, both of Wichita, Kan. (A. V. Roberts, Paul Brown, and George Gardner, all of Wichita, Kan., on the briefs), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and REED, District Judge.

REED, District Judge (after stating the facts as above). [1] The appellants are confronted at the threshold of the proceeding with motions to dismiss their respective appeals upon the ground that their remedy, if any they have, is by petition to revise in matter of law under section 24b of the Bankruptcy Act and not by appeal under section 25a. The determination of this question is ruled by the decision of this court in *Coder v. Arts*, 152 Fed. 943, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372, affirmed by the Supreme Court in 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008; *Matter of Loving*, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725; *In re Hartzell*, 209 Fed. 775, 126

C. C. A. 499 (this circuit). And see *In re Streator Metal Stamping Co.*, 205 Fed. 280, 123 C. C. A. 444.

In *Coder v. Arts*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, above, it was insisted by the trustee, as it is by the appellees here, that inasmuch as no objection was made to the amount found due upon the notes by the District Court, and it was only sought by the appeal to further contest the right to the security asserted by the mortgagee Arts, that his remedy was under section 24b, by petition to revise in matter of law and not by appeal; but it was held that the character of the proceedings must be determined by the nature of the claim set up against the bankrupt estate, and that appeal was the proper remedy to question the validity of a lien asserted as security for a debt of more than \$500.

In *Re Hartzell*, 209 Fed. 775, 126 C. C. A. 499, there was asserted in effect, by way of intervention in the bankruptcy proceedings, a lien alone upon the property of the bankrupt, and it was held that an appeal in such case was also an appropriate remedy to review the decision of the court of bankruptcy denying such lien.

In the *Matter of Loving*, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725, a bank made proof of its debt against a bankrupt estate before the proper referee in bankruptcy, and in its proof asserted a lien under a statute of Kentucky upon certain property of the bankrupt estate, and asked that its debt be allowed as a claim secured by such lien. The claim was allowed by the referee as a lien against the estate of the bankrupt over the objection of Loving the trustee in bankruptcy, who petitioned the Court of Appeals to revise in matter of law the order of the referee establishing the lien only. The Supreme Court held that the fact that after the adjudication of the claim the trustee made no further objection to its allowance, and contested only the validity of the lien, did not change the appellate character of the proceedings, and that appeal was the appropriate remedy.

The establishing of liens upon real or personal property as security for a debt and determining the priority thereof are well recognized grounds of equity jurisdiction; and whether the assertion of a lien in bankruptcy proceedings be in connection with a claim for a debt which it is alleged it secures, or a lien only upon the property, an appropriate remedy for the review of the decisions of courts of bankruptcy, which proceed upon equitable principles, is appeal under sections 24a and 25a of the Bankruptcy Act.

The motion to dismiss the appeals upon the ground that they are not the proper remedy must therefore be denied.

The appellees in Nos. 4121, 4122, and 4125 separately move to dismiss the appeals upon the further ground that the mechanics' lien in each of those cases is less than \$500 (as they in fact are), and that the appeals should be dismissed for that reason. But it is the decree adjudging the appellants' liens to be inferior to those of the several appellees that is sought to be reviewed, and it is the amount of the appellants' liens respectively that determines their right to appeal, and not the amount of the several liens of the appellees. These motions to dismiss the appeals must also be denied.

[2] Section 6244 of the General Statutes of Kansas (1909) provides:

"Any person who shall under contract with the owner of any tract or piece of land, or with a trustee, agent, husband or wife of such owner, perform labor or furnish material for the erection, alteration or repair of any building, improvement or structure thereon; or who shall furnish material or perform labor in putting up of any fixtures or machinery in, or attachment to, any such building, structure, or improvement; * * * shall have a lien upon the whole of said piece or tract of land, the building and appurtenances, in the manner herein provided, for the amount due to him for such labor, material, fixtures, or machinery. Such liens shall be preferred to all other liens or incumbrances which may attach to or upon said land, buildings, or improvements, or either of them, subsequent to the commencement of such building * * * or improvements."

It is held by the Supreme Court of Kansas that this statute gives to the materialman or laborer, for material furnished or labor done in constructing buildings or improvements upon the land of another, a lien for such material and labor prior to all liens or incumbrances upon the property that may attach subsequent to the commencement of the work upon the building or improvement, or the furnishing of fixtures, machinery, or repairs where the lien is claimed for fixtures, machinery, or repairs. *Kansas Mortgage Co. v. Weyerhaeuser*, 48 Kan. 335, 29 Pac. 153; *Nixon v. Cydon Lodge*, 56 Kan. 298, 43 Pac. 236, and cases cited. Whether or not any of the several mechanics' liens in question are for fixtures or machinery furnished for this building does not definitely appear. As the building was an entirely new structure, it may be assumed that the liens are all for material used in its construction. Three questions then arise: (1) When did the bankrupt acquire title to this property; (2) when did the appellants' mortgage liens attach thereto; and (3) when was the work of constructing the building actually commenced? From the testimony taken by the referee and certified by him to the District Court upon the petitions for review, it appears without dispute: That on and prior to January 1, 1911, Mrs. Conklin, wife of the appellant Conklin, was the owner of the property and occupied it with him as a part of their homestead. That the bankrupt had some negotiation with the appellant Conklin for its purchase shortly prior to that date which was consummated by a deed from Mrs. Conklin and her husband to the bankrupt delivered January 4, 1911, but bearing date December 31, 1910. During these negotiations it was especially agreed verbally that the bankrupt was to execute a purchase-money mortgage to the appellant Conklin for \$4,500, and one to a Mr. Kimball for \$7,500 (the New Hampshire Savings Bank mortgage), which was for borrowed money presumably to enable the bankrupt in part at least to improve the property. That these mortgages should be executed and delivered concurrently with the execution and delivery of the deed to the bankrupt, and be the first or prior liens upon the property; the Kimball mortgage to be prior to that of Conklin. That the mortgages were so executed by the bankrupt and wife and delivered when the deed to the bankrupt was delivered, as one transaction, and all were filed for record in the office of the proper register of deeds, January 4, 1911, about noon of that day; the Kimball mortgage being marked filed a few minutes prior to the Conklin mortgage. There was no agreement or understanding that the bankrupt should have posses-

sion or the right of possession of the property before the deed and mortgages were executed and delivered; in fact, the agreement was that there should be no work done upon the premises until the transaction was completed and the deed and mortgages filed for record. It is the contention of the appellees that the deed to Bron was delivered on January 3d; but the great weight of the testimony convinces that the deed was not completed by the acknowledgment of Mrs. Conklin until the morning of January 4th; and that it was not delivered until that morning there is no doubt under the testimony. Under these facts, neither the title to the property nor the right of possession vested in the bankrupt until January 4, 1911, and no valid mechanics' lien could attach to the property under any contract with the bankrupt prior to that time; and the appellants' mortgage liens attached simultaneous with the vesting of the title in the bankrupt, and were therefore the prior liens upon the property. *Huff v. Jolly*, 41 Kan. 537, 21 Pac. 646; *Chicago Lumber Co. v. Schweiter*, 45 Kan. 207, 25 Pac. 592; *Getto v. Friend*, 46 Kan. 24, 26 Pac. 473; *Missouri Valley Lumber Co. v. Reid*, 4 Kan. App. 4, 45 Pac. 722. See, also, *Hayes v. Fessenden*, 106 Mass. 230; *Conrad v. Starr*, 50 Iowa, 470, 479, 482; *Wagar v. Briscoe*, 38 Mich. 587, 592, 593.

In *Chicago Lumber Co. v. Schweiter*, 45 Kan. 207, 25 Pac. 592, above, the Supreme Court of Kansas said:

"To create a valid lien for material or labor, it is necessary that the person for whom they are furnished should be an owner within the meaning of the statute, and have a right at the time the contract for the same is made to create a lien. The only claim which Jones had upon the land was derived from his contract with the owner, and any one who relies on the contract to establish ownership in Jones must be governed by the limitations and conditions therein contained. When the lumber and material was purchased and furnished, Jones did not have the legal title, and by the terms of the contract which he made he did not have the equitable title, and he could create a lien on no greater interest than he held. 'In general, it must be said that only the interest of the contracting party can be subjected to the lien; and, if he has no interest, there is nothing to which the lien can attach.' 2 Jones, Liens, § 1245; *Wagar v. Briscoe*, 38 Mich. 587; *Hayes v. Fessenden*, 106 Mass. 230. If the lumber company had examined the public records when the material was sold and delivered, it would have ascertained that the legal title was in Schweiter; and if they had pursued the inquiry, as they should have done, they would have learned of the contract between Jones and Schweiter, with all of its conditions and limitations."

[3] The appellees contend that the work of excavating for the cellar of a building to be erected upon the premises was begun early in the morning of January 3, 1911, and continued during January 4th and for some days thereafter, and that such beginning was, under the Kansas decisions, the commencement of work upon the building. If that is true, then a contract for such excavation was made before the bankrupt acquired any title to or right of possession of the property, and was not with the owner thereof; and liens arising upon work done under such contract would attach only to the interest the bankrupt then had in the property and would not take precedence over the appellants' mortgages, which vested simultaneously with the vesting of the title in the bankrupt. The appellees' contention as to the commencement of this excavation rests upon the testimony of Charles Bron, Jr., son of

the bankrupt, who testified that between Christmas, 1910, and January 1, 1911, he arranged with a Mr. Underwood and a Mr. Jones to clear the premises and do the work of excavating for the cellar of the building known as the Waco flats that his father was to erect upon the premises in question; that in the afternoon or evening of January 2d (which was Monday) he saw Mr. Underwood and told him he wanted to commence the work of excavating the next morning, and for him to be there early and he would meet him on the premises; that Mr. Underwood came shortly after 8 o'clock the morning of January 3d; that he (Bron, Jr.) then staked out lines for the cellar and Underwood took away two loads of dirt; that the weather was so cold and the ground frozen so hard that they had to quit work and did nothing more that day; that the next morning, January 4th, Mr. Jones came and they continued the excavation during that day and subsequent days until it was completed. As a reason for commencing this work on January 3d, he said that it was a practice he had adopted some two or three years before of having work commenced on the construction of buildings before mortgage liens were filed thereon; that his father was engaged in building upon unimproved property, and was unable to obtain lumber or building materials on credit unless work was commenced for a building before mortgage liens were filed thereon.

Mr. Underwood testified that he was told by Mr. Bron, Jr., the afternoon of January 2d, that he wanted him to commence the work of excavating for the cellar early the next morning; that he went there shortly after 8 o'clock and found Mr. Bron, Jr., upon the premises who staked out lines for the cellar; that the weather was so cold and the ground frozen so hard that they could do but little work; that he succeeded in getting one small load with a pick and shovel and part of another along one side of the cellar line and hauled them away and quit work; that the next day was also cold, but not as cold as the day before, and they continued the work. Mr. Jones testified that he went there on January 4th and worked with Underwood in excavating for the cellar; that he was sick the next day but sent his boy in his stead. Mr. and Mrs. Conklin, who lived upon the premises and in full view of where the excavating is alleged to have been done, testified positively that no work was done in excavating for the cellar on January 3d or 4th; that January 3d was so cold that Mrs. Conklin could not go out to complete the execution of the deed of the property to the bankrupt. Others living near the property testified that they saw no evidence of work done upon the premises on January 3d or 4th, nor was any done until some days after January 4th.

In certifying the evidence to the judge upon the petition for review, the referee says:

"At an early hour of January 3, 1911, Bron entered upon the premises with laborers and did an hour or two's work toward excavating for the foundation of a building which was to be erected on the premises. Soon after this various parties furnished labor and material in and about the erection of improvements, for which they filed mechanics' liens, presented herein as secured claims; that in the course of the proceedings in said case the following questions arose: Which of the respective claimants was entitled to the first, second, and third lien on the funds? And it was determined that the lien created by the mortgage from Bron to Kimball and assigned to the New Hampshire

Savings Bank vested immediately upon its execution, delivery, and record, and was a first lien on the premises; and the mortgage to Conklin, by agreement between the parties, created a lien upon its execution, delivery, and record and was a second lien on the premises; and the creditors having mechanics' liens, which were coequal, were entitled to a third lien without preference to any one of them, their liens not having precedence over the mortgages, the actual beginning of the building not having commenced until after the 3d day of January, 1911, the work done by the bankrupt on that day being fraudulently done by the bankrupt for the purpose of giving preference over the mortgages to mechanics' liens to be thereafter created and established. * * *

It is true that under the Kansas statute, as construed by the Supreme Court of that state, mechanics' liens date from the commencement of the building or improvement. *Thomas v. Mowers*, 27 Kan. 265; *Chicago Lumber Co. v. Schweiter*; *Getto v. Friend*, above, and *Kansas Mortgage Co. v. Weyerhaeuser*, 48 Kan. 335, 29 Pac. 153. This, of course, means a commencement of the building in good faith and not a mere pretense at commencement to defeat prior liens upon the property.

In *Kansas Mortgage Co. v. Weyerhaeuser*, above, the question of what constitutes "the commencement of a building" is considered, and after quoting from a number of cases the court says:

"The commencement of a building in law takes place with the digging and walling of the cellar. * * * It is some work or labor on the ground, such as beginning to dig the foundation, which every one can readily see and recognize as the commencement of a building. In the cases of *Kelly v. Rosenstock*, and *Kugler v. Rosenstock*, 45 Md. 389, it was held that where a lessee, before he had acquired an interest in the property, and before a survey had been made, went with his foreman and a laborer, and drove stakes to indicate the line of the foundations, and at one corner dug or scraped away the dirt down to a level, the whole work occupying but a part of a day, that this could not be considered as the commencement of the building. In the case of *Savings Bank v. Fellowes*, 42 Conn. 36, it is held that bringing a considerable amount of lumber upon the premises and beginning to build a fence around the lot does not create a lien prior to a mortgage executed after the delivery of the lumber or the commencement of the fence; the work on the house not commencing until after the execution of the mortgage. * * * These citations (including *Conrad v. Starr*, 50 Iowa, 479, and others) are enough to show the drift of judicial opinion upon this question. As the avowed object and main purpose is to create an impression on the mind of any person who seeks to purchase or acquire an interest or lien in the land, the acts indicating that a building thereon is being commenced ought to consist of work of such character that a person of ordinary observation could determine that a building was in process of construction."

From this decision and the cases therein cited it seems clear that the work done by the bankrupt's son and Underwood on the premises on the morning of January 3d, conceding for the moment that such work was done that morning or the morning of January 4th, was not such work as amounted to the commencement of the building within the meaning of the Kansas statute; and when it is considered that it was done, as stated by the bankrupt's son, to defeat the liens of the prior mortgages, it is entirely clear that what was done was but a mere pretense at the commencement of a building, done to defeat bona fide prior liens upon the property.

The work of Underwood and Jones in excavating for the cellar, whatever was done, was paid for by the bankrupt when done, and no lien was filed therefor. When the material of the several appellees was contracted for or furnished for the building is not shown by the record other than the referee states in his certificate that it was some time after January 4, 1911. There can be no doubt under the testimony that if they had then examined the record title to this property, as it was their duty to do, if they relied upon a lien thereon as security for the material (*Chicago Lumber Co. v. Schweiter*, 45 Kan. 207, 25 Pac. 592, above), they would have discovered that appellants' mortgages were executed and filed for record at the same time the deed to the bankrupt was executed and as a part of one transaction and were prior liens upon the property.

It is also claimed that Underwood cleaned the premises of some shrubbery and a few trees during the holidays; but such work if done is no indication of the beginning of a building. *Kansas Mortgage Co. v. Weyerhaeuser*, above.

The appellees cite and rely upon *Smith Lumber Co. v. Arnold*, 88 Kan. 465, 129 Pac. 178, and cases cited. In these cases the builder was either in actual possession of the property under an agreement for such possession, or the owner knew of such possession and that a building was being erected and made no objection thereto. In *Chicago Lumber Co. v. Fretz*, 51 Kan. 134, 32 Pac. 908, one of the cases cited in behalf of the appellees, the mortgagee and mechanic's lienholder both claimed under Fretz, who was in actual possession of the property when the mortgage and mechanic's lien attached. In this case there was no such agreement, nor was Bron in actual possession of the property, and neither appellant knew that any work was done upon the premises preparatory to a building prior to the delivery of the deed and mortgage and the filing of the same for record, and no facts are shown which estop either of the appellants from enforcing his mortgage lien upon the property as against the several appellees.

The District Court erred in adjudging the mechanics' liens to be prior to the appellants' mortgages, and its decree is reversed and the cause remanded to that court, with directions to allow each of the appellants' mortgages as prior liens upon the property in the order thereof, and superior to the mechanics' liens of the several appellees. It is ordered accordingly.

CONNER v. CRAIG et al.

(Circuit Court of Appeals, Fourth Circuit. July 27, 1914. On Petition for Rehearing, September 8, 1914.)

No. 1229.

1. TENANCY IN COMMON (§ 35*)—MUTUAL DUTIES AND OBLIGATIONS OF COTENANTS—SALE OF PROPERTY—SUPPRESSION OF FACTS BY COTENANT.

Complainant and defendant C. were owners in common of a tract of timber land in West Virginia where C. resided, complainant being a non-resident. For many years C. had looked after the land for himself and as confidential agent of complainant. A firm of which C.'s son was a member wrote complainant, making an offer of about \$20 an acre for the timber on his half of the land. This offer complainant communicated to C., asking his advice, and C. in answer stated that he thought the price too low; that he would not sell his interest at that price, but was offering all the timber at \$40 an acre, and had hopes of making a sale; also that he would give complainant all the information he might obtain. Pending the correspondence, C., on behalf of himself and as complainant's agent, gave an option on all of the timber at \$40 an acre, but although he wrote complainant the next day, he did not mention such fact, but permitted complainant, while such option was still outstanding, to give an option on his share to the son's firm at the price offered. The first option having expired, the one given by complainant was closed, and the firm and C. at once joined in a sale of all the timber at \$40 an acre. *Held*, that C. as cotenant and agent of complainant was under the duty to inform him of all matters bearing upon the proposed sale, and that his concealment of the material fact that he was negotiating a sale at double the price offered was a fraud on complainant which entitled him, as against C., to share in the benefit of the latter's sale.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 27; Dec. Dig. § 35.*]

2. TENANCY IN COMMON (§ 53*)—SALE BY COTENANT—VALIDITY OF CONTRACT—FRAUD PARTICIPATED IN BY PURCHASER.

The firm which purchased complainant's interest, having had knowledge of C.'s concealment from complainant of his own negotiations for the sale of the timber at a higher price, was affected by the fraud and precluded from keeping the benefit of their bargain, and complainant was entitled to recover the amount of the profit realized from the resale.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 128; Dec. Dig. § 53.*]

3. PRINCIPAL AND AGENT (§ 158*)—SALE BY AGENT—VALIDITY OF CONTRACT—SUPPRESSION OF FACTS BY PURCHASER.

While it is a general rule that a purchaser is not bound to disclose his knowledge of the property to the vendor, the moment silence passes into suppression, the region of bad faith is entered and the rule does not apply, and where the purchaser knows that the vendor is misled by a breach of trust of his agent, by availing himself of such breach of trust he becomes a participant in it and cannot hold his bargain.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 589-598; Dec. Dig. § 158.*]

4. TRUSTS (§ 361*)—SUIT BY VENDOR TO ENFORCE TRUST—FRAUD OF PURCHASER.

In a suit in equity to establish a trust in the proceeds of a resale of property obtained from him by defendant for less than its true value,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

through fraud in which defendant participated, complainant is not required to return the money received by him for the property.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 556-559; Dec. Dig. § 361.*]

Appeal from the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Suit in equity by Levietta B. Conner, administratrix of John S. Conner, deceased, against James S. Craig and another, trading as Craig & Wolverton, a partnership, and the Weston Lumber Company. Decree for defendants, and complainant appeals. Reversed.

Malcolm Jackson, of Charleston, W. Va. (W. W. Brannon, of Weston, W. Va., Brown, Jackson & Knight, of Charleston, W. Va., and Brannon & Stathers, of Weston, W. Va., on the brief), for appellant.

W. G. Mathews, of Charleston, W. Va., and W. G. Bennett, of Weston, W. Va. (Mollohan, McClintic & Mathews, of Charleston, W. Va., on the brief), for appellees.

Before PRITCHARD and WOODS, Circuit Judges, and DAYTON, District Judge.

WOODS, Circuit Judge. [1] In 1875 the commissioner of school lands conveyed a tract of land in Nicholas county, W. Va., containing about 2,200 acres, to James S. Craig and John S. Conner as tenants in common. By written agreement dated July 6, 1907, Arden L. Craig and John M. Wolverton, doing business as lawyers and dealers in real estate under the firm name of Craig & Wolverton, obtained from John S. Conner an option to purchase his one-half interest in the timber on the land at the price of \$21,000, a little less than \$20 an acre. By a similar instrument dated July 8, 1907, they obtained from James S. Craig an option on his one-half interest in the timber at \$40 an acre. On July 10, 1907, Craig & Wolverton agreed to sell the timber on the entire tract to Weston Lumber Company and Ernest G. Smith at \$40 an acre. In pursuance of his option, on August 6th Conner conveyed by deed his interest in the timber to Craig & Wolverton; and on August 14th Craig & Wolverton and James S. Craig joined in a deed conveying the timber on the entire tract to Weston Lumber Company. On May 23, 1908, James S. Conner filed his bill, alleging that he had been induced to give the option on his interest and to make the conveyance to Craig & Wolverton at much less than its real value, by fraudulent concealment and misrepresentation of James S. Craig and Craig & Wolverton, and that consequently he was entitled to share in the proceeds of the sale to Weston Lumber Company as if he had not conveyed to Craig & Wolverton and had been named as a party in interest to the sale of the timber at \$40 an acre. The defendants by their answers denied the allegations of fraud and concealment, and set out in full their version of the relations of the parties and the negotiations which ended in the sale to Weston Lumber Company. Conner died during the pendency of the suit, and the cause was continued in the name of Levietta B. Conner, his administratrix. Aft-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

er consideration of a great mass of evidence, including voluminous correspondence between the parties, the District Judge in a formal decree held that the plaintiff was not entitled to relief and dismissed the bill.

It is but just to say before entering upon a review of this finding that the evidence leads to the conclusion that James S. Craig, and A. L. Craig, who acted for Craig & Wolverton, believed themselves to be acting within their legal rights in their transactions with Conner. But their belief cannot protect them if Conner suffered loss, by reason of their dealings with him, which courts of equity hold to be fraudulent in the sense that they were unfair. The books are full of cases in which bargains have been annulled because the parties acted on their own standards of right below the standards which courts of equity enforce. The conclusions of the district judge who tried the cause must always have great weight, but in this instance facts which seem decisive are not in dispute, and this court must draw from them its own conclusions.

The perspective will appear from a statement of the relations of the parties. John S. Conner was a jurist and afterwards a practising lawyer living in Cincinnati, Ohio, having little personal knowledge of the quantity and value of the timber. James S. Craig lived in West Virginia near the land, and, though he had not had it surveyed or the timber estimated, he had bought and sold similar property and was familiar with market values. For about 30 years he had the entire management of the land, paid taxes and other expenses, conducted suits involving the title, and in all respects acted for himself and for Conner. From time to time he made statements of his accounts to Conner, and occasional adjustments were made. Although he and Conner seldom met, their relations were those of warm friendship, and Craig had voluntarily assumed toward Conner the position of a trusted agent and manager of the land. A. L. Craig was the son of James S. Craig, but he sustained no trust relation to Conner, and was of course free to deal with him at arm's length and to buy his timber at the lowest price. In 1907 Conner was in failing health, and though not in financial distress needed money and was anxious to sell his interest in the timber if a fair price could be obtained.

The negotiations were opened by a letter from Craig & Wolverton to Conner dated March 23, 1907. Conner was in great perplexity as to the price and the wisdom of making a sale and sought advice and information from his friend and agent, James S. Craig. In responding to this call, Craig, except in two particulars, fully recognized and discharged his trust as the confidential adviser and agent of Conner. He told him in interviews and letters that he thought timber would advance in price, that he would not sell his own interest at the price offered, and that he expected at some time in the future to get \$40 an acre for the timber on his share of the land. He reminded Conner of his embarrassment in advising him in reference to a trade with his own son, but promised to give him all the information he himself might have. He wrote on June 18th, after mentioning a number of sales of similar timber at smaller prices,

"still, in my own right and as your agent I am making written offers to close out our timber at forty dollars per acre and am having good hopes that I shall stagger on a man who can see that much in it for him and have the money to close at that price."

Conner's letters show that he regarded James S. Craig's advice to be strong against the sale at the price proposed by Craig & Wolverton. Yet with all this James S. Craig failed in the trust he had undertaken in the concealment of two important facts from Conner: First, on June 17, 1907, James S. Craig, for himself and as agent of Conner, had given to Q. R. Squires an option running till July 2, 1907, to buy the entire timber at \$40 an acre; and, second, on the same day he had promised to give Craig & Wolverton an option on his one-half of the timber in case Squires should not comply. Failure to communicate the latter fact would be of little consequence but for its close connection with the concealment of the first. James S. Craig knew that Conner was in great perplexity as to his course, and as an intelligent business man he could not fail to see what an important factor in Conner's consideration would be the knowledge that Squires, with faith in his ability to comply, had taken an option on the timber at twice the price he then had under consideration. Not only was the importance of this information manifest on its face, but the course of the transaction shows that both the Craigs regarded it of great moment. James S. Craig refused to bind himself to sell to his son while the Squires' option was in force. His correspondence with Squires, his renewal of the option, although his son was complaining of his course towards him, and his testimony in this case indicate that he was hopeful of consummating a sale to Squires. A. L. Craig regarded the Squires' option so important that he wrote his father a letter, bitterly reproaching him for having given it, and in his testimony he says that after hearing of it, though he thought the price so excessive, a sale could not be made under it, and though he continued to write Judge Conner about allowing his firm to make a sale, yet he practically gave the matter up. It is true Squires did not comply, but he testified he was confident of his ability to comply, but for lack of time.

Not only did James S. Craig and A. L. Craig allow Conner to place himself in the most embarrassing position of unwittingly giving an option to Craig & Wolverton while the Squires' option was outstanding, but A. L. Craig considered whether under his option he would not be entitled to the advantage of a sale at the higher price named in the Squires' option if it should be accepted. Under these facts it is not possible to accept the explanation made by James S. Craig that he did not mention the Squires' option because he attached no importance to it, and because he wanted to surprise Conner with good news if Squires complied. Nor is it possible to agree that the statement above quoted from James S. Craig's letter to Conner of June 18, 1907, to the effect that he was making written offers to close out the timber at \$40 and that he had good hopes of staggering on a man who would take it at that price, was notice to Conner of the Squires' option. On the contrary this statement could not but lead Conner to the inference that there was no definite negotiation pending at the higher price mentioned, and no definite prospect of sale to a particular individual. It

is most significant that this letter was written the day after the option was given to Squires and had been made known to A. L. Craig. It was carefully prepared by James S. Craig and typewritten by A. L. Craig. The letter is an elaborate and carefully guarded statement of the facts as seen by the writer and of his opinions. Careful perusal of it in view of the surrounding facts, particularly the failure of James S. Craig to mention the Squires' option in his interview with Conner on July 4, 1907, forces the conclusion that information as to the Squires' option was intentionally withheld by James S. Craig, and that A. L. Craig availed himself of the concealment and obtained the second option from Conner overlapping the first in point of time at half the price.

Focusing all the circumstances on this letter and the interview of July 4, 1907, the attitude and motive of James S. Craig is brought into view. He saw his obligation to Conner and was unwilling to sacrifice Conner's interest for the benefit of his son; but he knew that if the Squires' option failed and Conner sold his half interest for \$20 an acre, there would be a strong inducement to the purchaser to acquire his own half interest at a greater price. But motive is not of paramount importance. Whatever be the motive, equity will not allow an agent and cotenant to take a greater price for himself to the exclusion of his principal and cotenant, when the principal and cotenant sells at the less price because of the agent's failure to disclose an important fact which it was his duty to disclose. In the leading case of *Van Horne v. Fonda*, 5 Johns. Ch. 388, Chancellor Kent lays down the rule, which has since been often restated and followed, that the bare relation of cotenants creates "a mutual obligation" to deal "candidly and benevolently" with each other. In addition to this obligation and far beyond it in significance, James S. Craig voluntarily assumed the duties of agent and trustee, promising to keep Conner informed as to all material facts which would affect his interest. The concealment of a material fact which induced Conner to sell at a lower price and contributed to his own sale at a higher price requires a court of equity to hold that, even if Craig & Wolverton had been innocent purchasers, James S. Craig should at least share with his principal and cotenant the benefit which he took. The rule that a trustee cannot be allowed to profit by such concealment is too familiar to require support by citation of authority. It is thus stated in *Perry on Trusts*, 206:

"All the knowledge of an agent belongs to his principal for whom he acts, and if the agent uses it for his own benefit he will become a trustee for his principal."

[2, 3] 2. The rights of Conner against Craig & Wolverton are dependent on a different principle, for they were mere vendees dealing with Conner at arm's length and assuming no trust relation to him. The general rule is that a vendee is not bound to disclose his knowledge of the property. But since the rule rests on the presumption that the vendor knows his own property, the moment silence passes into suppression the region of bad faith is entered; and a very small act, or very slight circumstances, will convert concealment into fraud. *Conlan v. Sullivan*, 110 Cal. 624, 42 Pac. 1081; *Faxon v. Baldwin*,

136 Iowa, 519, 114 N. W. 40. In *Turner v. Harvey*, Jacob, 187; Lord Eldon, speaking of the general rule that a vendee may remain silent says:

"But a very little is sufficient to affect the application of that principle; if a word, if a single word, be dropped which tends to mislead the vendor, that principle will not be allowed to operate."

Here the conduct of A. L. Craig is fatal to his claim that he merely exercised the right of a vendee to keep silence. He knew that his father, who was Conner's agent, was concealing the important fact of the negotiation with Squires, and availed himself of that concealment to make a bargain with Conner. Where a vendee knows that a vendor is misled by a breach of trust of his agent, he cannot hold his bargain, because by availing himself of the breach of trust he becomes a participant in it. In such case the aid of the court is afforded, not only against the trustee, but against all claiming any benefit from his acts. *Perry on Trusts*, 172, and cases cited; *Bush v. Bush*, 1 Strob. Eq. 377; *Wooddell v. Bruffy's Heirs*, 25 W. Va. 465.

Besides, A. L. Craig actively participated in at least one important act by which Conner was misled. The letter of June 18th from James S. Craig to Conner plainly conveyed to Conner on its face the impression, contrary to the fact, that there was no definite negotiation pending with any particular person for the purchase of the timber; and this communication, bearing that plain implication, was copied and mailed for his father by A. L. Craig. Participation of A. L. Craig in the concealment of James S. Craig precludes Craig & Wolverton from the benefit of their bargain with Conner.

[4] 3. Little need be said on the defense of estoppel. This is not an action for rescission, for rescission would be impossible after the property had passed to Weston Lumber Company, an innocent purchaser; but it is an action to declare a trust in favor of the plaintiff in one-half of the purchase money received from Weston Lumber Company. This being so, it was not inconsistent with the right asserted that the plaintiff should use the money already paid to him. Equity does not require the absurd thing of repayment of money by the plaintiff to be paid to him again with other money claimed by him. *Pierce v. Wood*, 3 Foster (23 N. H.) 519; *Montgomery v. Pickering*, 116 Mass. 227; *Wallace v. Sisson*, 4 Cal. Unrep. 34, 33 Pac. 496.

The charge that James S. Craig was to have a portion of the profit made on Conner's interest is not sustained by the preponderance of the evidence. But the confessed and successful efforts made by the Craigs after the sale to Weston Lumber Company to conceal from Conner the sale at \$40 an acre and to make him believe that James S. Craig had not sold his interest strengthen the conviction that they intentionally concealed from him the fact that Squires was negotiating for the timber at \$40 an acre.

The result is that Conner's representative must share in the proceeds of the sale to Weston Lumber Company as if he had been named as a party in interest to the sale at \$40 an acre. The evidence shows, however, that the sale was a most advantageous one, and Conner's estate will receive great benefit from the sale and the work of Craig &

Wolverton in making it, and that for their work in making the sale 10 per cent. would be reasonable compensation. We think adjustment of the equities requires that Craig & Wolverton be allowed that commission on the one-half of the purchase money received and to be received from the sale to Weston Lumber Company, going to Conner's estate. Levietta B. Conner, administratrix of the Estate of John S. Conner, is entitled to receive one-half of the entire purchase money paid and to be paid by Weston Lumber Company, less the amount received from Craig & Wolverton, and less 10 per cent. commissions allowed to Craig & Wolverton.

Reversed.

On Petition for Rehearing.

Careful consideration of the petition for rehearing does not disclose any material point which was not carefully considered by the court in reaching its conclusion. It is impossible that the opinion of the court could be construed as holding that the administratrix of John S. Conner is entitled to share in the proceeds of the sale of any property except that which was owned by John S. Conner and James S. Craig as tenants in common. It is true that at the argument mention was made of the insolvency of the Weston Lumber Company, but its agreement with Craig & Wolverton provided for a vendor's lien for the unpaid purchase money, and the court could not assume that the security was inadequate nor could it require that Conner should act upon that assumption. Should the extremely improbable contingency arise that the amount received from Weston Lumber Company for Conner's half interest be less than the amount which Craig & Wolverton agreed to pay Conner, it will be time enough for the defendants to ask for the proper relief. But the court cannot allow such a remote possibility to influence it to deny Conner's estate the right to participate in the advantage of the sale to Weston Lumber Company.

The petition for rehearing is dismissed.

CITY OF CHICAGO et al. v. NEW YORK, C. & ST. L. R. CO.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1914. Rehearing Denied May 22, 1914.)

No. 2036.

1. RAILROADS (§§ 75, 93*)—RIGHT OF WAY—LOCATION—STREET CROSSINGS.

Under Illinois law a railroad company may locate its right of way in a city, including a way on or across streets without consulting the city, subject to the limitation that construction on or across a street may not be undertaken without the assent of the city; but, when the city in fact assents, the property right becomes as completely vested as if the grant had been direct from the sovereign.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 183-191, 260-265; Dec. Dig. §§ 75, 93.*]

2. CONSTITUTIONAL LAW (§ 297*)—EMINENT DOMAIN (§ 2*)—VESTED RIGHTS—CITY ORDINANCES—RAILROADS.

Where defendant city passed an ordinance in 1909 providing for the separation of the grades of a street from that of certain railroads cross-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing the same, providing for an elevated structure on which the tracks of another company should be superimposed on the structure by which complainant's tracks were to be carried over the street, and in order to comply with such ordinance complainant, at large expense, was required to obtain a new right of way to fit the required point or crossing, complainant thereby acquired a vested property right to cross the street pursuant to the scheme of such ordinance, which right the city could not impair, without compensation or without due process of law, by the subsequent passage of another ordinance requiring complainant to cross the street at another place and the right of way of such other company either north or south of the street crossing, so that the structure over the street should be two separate single elevated structures instead of two at the same point one superimposed upon the other.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 297;* Eminent Domain, Cent. Dig. §§ 3-12; Dec. Dig. § 2.*]

3. RAILROADS (§ 98*)—RIGHT OF WAY—LONG OR CROSS STREETS—SHIFTING OR ELEVATION—POLICE POWER.

Though a railroad company may insist on holding its perfected right of way latitudinally and longitudinally, a city, in the interest of the public and in the exercise of police power, if authorized by the state so to do, may enforce a shifting or elevation of the tracks within the limits of the right of way on or across the streets.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 291, 292, 296; Dec. Dig. § 98.*]

4. RAILROADS (§ 98*)—CROSSING STREET GRADE—SEPARATION OF GRADES—ORDINANCES—AMENDMENT.

Where defendant city passed an ordinance in 1909 for the separation of the grades of a street and certain railroad crossings, contemplating a structure by which one railroad was carried over the street above another, and complainant railroad company acquired a right of way to comply with such plan, a subsequent ordinance requiring the erection of separate single structures over the street which would lessen and shorten the street grades and obviate the necessity of pumping surface water of the subway into the city's sewers was not an attempt to appropriate complainant's property within the constitutional prohibition of taking property, but was an attempt to exercise the police power as to the improvement of the street, but unenforceable in the absence of a lawful amendment of the plans under the former ordinance.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 291, 292, 296; Dec. Dig. § 98.*]

5. RAILROADS (§ 98*)—STREET CROSSINGS—SEPARATION OF GRADES—TIME.

Where an ordinance providing for the separation of grades of a street and certain railroads crossing the same provided for a structure on which the tracks of one railroad were superimposed on another and required that the elevation work be completed by December 31, 1911, the ordinance not having provided for a forfeiture or abrogation of the elevation plans in case of delay, the railroad company's failure to complete the work within the time specified did not bar its rights in its right of way that became vested under the ordinance.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 291, 292, 296; Dec. Dig. § 98.*]

6. MUNICIPAL CORPORATIONS (§ 724*)—POLICE POWER—DAMAGES—CITY'S LIABILITY.

Where a city in the exercise of its police power attempted in good faith to pass an ordinance changing the form of the structure by which a railroad company should cross a street above the grade of a street, which ordinance was invalid, such invalidity did not render the city liable for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

damages to the railroad company resulting from increased cost of operation by reason of delay, caused by the ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1545, 1561, 1568; Dec. Dig. § 724.*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

Suit by the New York, Chicago & St. Louis Railroad Company against the City of Chicago and Lawrence E. McGann, Commissioner of Public Works. Decree for complainant, and defendants appeal. Modified and affirmed.

Charles M. Haft, of Chicago, Ill., for appellants.

John H. Clark and Robert J. Cary, of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. This appeal involves principally the nature and effect of an ordinance of 1909 and an amendatory ordinance of 1912.

Prior to 1909 appellee and the Lake Shore, the Pennsylvania, the Baltimore & Ohio, and the Illinois Central Companies operated railroads that crossed each other and public highways at grade in the neighborhood of Seventy-Ninth street in Chicago. The street ran east and west; the railroads, in a general north and south direction. By the 1909 ordinance a comprehensive scheme was adopted to separate the grade of the street from that of the railroads and the grades of the railroads from each other. At the point where appellee was to cross Seventy-Ninth street, the plan required the street to be depressed 17 feet, next above the street the elevated structure of appellee, and above that the elevated structure of the Illinois Central. To carry out this plan it was necessary for appellee to abandon its old right of way, and to procure a new right of way north and south of the street, the assent of the city to cross the street at the new location, and a new easement to cross the Illinois Central right of way. In the ordinance the city assented to appellee's crossing the street at the new location. At great expense appellee secured a new right of way to fit the required point of crossing Seventy-Ninth street. Elevation work was to be completed by December 31, 1911. On that date work was progressing without objection from the city, but nothing had then been done in erecting the superstructure over Seventy-Ninth street, and the Commissioner of Public Works had not issued or been requested to issue a permit for that part of the work.

In February, 1912, the city council passed an ordinance, amendatory of that of 1909, by which appellee was required to cross Seventy-Ninth street at a new location, and to cross the Illinois Central right of way either north or south of Seventy-Ninth street, so that at Seventy-Ninth street there should be two separate, single, elevated structures, instead of two at the same point, one superimposed upon the other.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 216 F.—47

After the adoption of the 1912 ordinance, appellee demanded of the Commissioner that he issue a permit for work at Seventy-Ninth street in accordance with the 1909 ordinance, unamended. This he refused on the ground that the demand was not in accordance with the ordinance as amended.

Thereupon appellee began this suit; and, after joinder of issues and production of proofs, the court decreed that appellee had a vested property interest in the right of way across Seventy-Ninth street as located by appellee under the 1909 ordinance; that the requirement of the 1912 ordinance that appellee should relocate its right of way was illegal and void; that the commissioner should issue a permit for elevation work according to the plans of the 1909 ordinance; and that appellee recover damages from the city in the sum of \$31,290.42.

[1, 2] Two distinct elements, in our opinion, appear in the 1909 ordinance. One is a grant of a property right. Under Illinois law a railroad company has authority to locate its right of way, including a way upon or across streets, without consulting the city. That authority flows from the sovereign. The only limitation is that construction of the railroad upon or across a street shall not be undertaken without the assent of the city. When the city assents, the property right becomes as completely vested as if the grant had been directly from the sovereign. *C. & W. I. R. Co. v. Dunbar*, 100 Ill. 110; *Tudor v. Rapid Transit R. Co.*, 154 Ill. 129, 39 N. E. 136. And of course a vested property right cannot be taken away without just compensation or due process of law. *Grand Trunk W. R. Co. v. South Bend*, 227 U. S. 544, 33 Sup. Ct. 303, 57 L. Ed. 633, 44 L. R. A. (N. S.) 405. So when Chicago by its assent expressed in the 1909 ordinance completed appellee's title to a right of way across Seventy-Ninth street at the designated place, in latitude and longitude, power was lacking thereafter to destroy or impair the property right by an ordinance of the character of that of 1912.

[3] The other element in the 1909 ordinance is the exercise of police power. Though a railroad company may insist upon holding its perfected right of way latitudinally and longitudinally, a city in the interest of the public, if authorized by the state so to act, may enforce a shifting or an elevation of the tracks within the limits of the right of way upon or across a street. *C. B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; *C. I. & W. R. Co. v. Connersville*, 218 U. S. 336, 31 Sup. Ct. 93, 54 L. Ed. 1060, 20 Ann. Cas. 1206; *Grand Trunk W. R. Co. v. South Bend*, 227 U. S. 544, 33 Sup. Ct. 303, 57 L. Ed. 633, 44 L. R. A. (N. S.) 405. Undoubtedly the principal object of the 1909 ordinance was to command and control track elevation in the interest of public travel on Seventy-Ninth street. That legislation was under a power which would not be foreclosed by a contract to that effect, even if the city had not expressly reserved the power in the 1909 ordinance. But nevertheless the part of the ordinance that constitutes a grant of property rights must be upheld as fully as if the grant were in an ordinance by itself.

[4] No change in the 1909 plans and specifications of elevated structures over Seventy-Ninth street was made in terms by the 1912 ordinance. But the effect of that ordinance, if it had been accepted by ap-

pellee, or if the change of location of the right of way therein required could be enforced, would be to cancel the plans and specifications of the two-storied elevated structure, and, according to the evidence of the engineers, the erection of separate, single structures at the locations indicated would do away with a large part of the depression of Seventy-Ninth street, lessen and shorten the grades, and obviate the necessity of pumping the surface water of the subway into the city's sewers. As the scope of an ordinance may properly be judged by its effect in operation (*Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220), we deem the 1912 ordinance to be an attempt to exercise the police power with respect to the grade and drainage of Seventy-Ninth street and the elevation of railroad tracks thereover. It interfered with the use and enjoyment of the 1909 grant of the right to cross by offering as a substitute another grant and commanding that the latter alone be used, in order to improve Seventy-Ninth street; but it did not profess to be an appropriation of appellee's property within the meaning of the constitutional prohibition of the taking of property. It did not even prohibit or interfere with the use of the 1909 grant generally, but only in the way specified in the 1909 plans. But inasmuch as there was no lawful amendment of the 1909 plans, the part of the decree that commands the Commissioner to issue appellee a permit to erect a structure over Seventy-Ninth street in accordance with the 1909 ordinance was proper.

An objection to the decree is based on the alleged insufficiency of the evidence to establish appellee's acceptance of the 1909 grant. But in view of the admission in appellants' answers, "That it is true that the various railroad companies, in said ordinance of 1909 named, accepted said ordinance, as by the terms thereof was provided," it was needless for appellee to bring forward (and we will not examine) any evidence on that subject.

Appellee introduced its corporate charter and evidence to show that by foreclosures, reorganizations, consolidations, and leases, it acquired in the village of Hyde Park (now a part of the city where Seventy-Ninth street and the railroad crossings in question are located) all the rights granted to the original company that constructed the railroad now operated by appellee; and the parties have had an extended debate over the legal effect of that evidence. We refrain from setting out or discussing the details, for we conceive it sufficient to say that in 1909 appellee had legal capacity to accept the city's grant, and the city is not concerned collaterally with appellee's rights under other instruments.

[5] A contention is advanced that no rights can be held under the 1909 ordinance, because the elevation work was not finished by December 31, 1911. As heretofore pointed out, two separate matters are contained in the 1909 ordinance. The time limitation is attached to the elevation provisions. It is not a definition of the duration of the grant of a right of way. Even as to elevation, time was not made essential; no forfeiture or abrogation of the elevation plans was to be a consequence of delay in finishing the work. Moreover, the city treated the 1909 ordinance as being in force by passing the 1912 amendatory ordinance.

Appellants' assertion that the Illinois Central was an indispensable party is obviously without merit. Appellee counted solely on its own property rights.

[6] Respecting damages, however, difficulties appear. During the elevation work appellee by a contract had arranged to bring its trains into the city over the Rock Island tracks at a charge of \$4,470 a month. If the Commissioner had issued the permit when demanded, appellee could have completed its elevated structure over Seventy-Ninth street by November 1, 1912, and the detouring charge would have been borne as a part of the elevation expenses. But the Commissioner's refusal caused a delay beyond November 1, 1912, which was continuing at the time of the trial; and the court awarded damages at the rate of \$4,470 a month from November 1, 1912, to the entry of the decree. Apart from a doubt whether the contract price for the use of Rock Island tracks (during which time appellee was being saved capital, operating, and maintenance charges on part of its own right of way) was the correct measure of damages for interference with the use of appellee's right of way across Seventy-Ninth street, and another doubt whether appellee alone should be permitted to recover the detouring charge when before suit appellee and the other roads had entered into a contract to do all the elevation work jointly and to pay all expenses, including this detouring charge, from a common fund, we believe there is a radical objection. It is elementary that a state is exempt from damages consequent upon invalid legislation in an attempted exercise of the police power; the difficulty is in the application of the principle and its corollary respecting the delegated powers of municipalities. If a state should enact a passenger fare of a cent a mile and require double crews of trainmen; and if a railroad company, under duress of threats of prosecution and police interference, should comply with the statute, but at once bring suit to enjoin its further enforcement; and if a court should refuse to hold the statute invalid on expert testimony as to its probably confiscatory effect and should thereupon dismiss the bill without prejudice (*Knoxville v. Water Co.*, 212 U. S. 1, 29 Sup. Ct. 148, 53 L. Ed. 371; *Louisville v. Cumberland Tel. Co.*, 225 U. S. 430, 32 Sup. Ct. 741, 56 L. Ed. 1151); and if in a renewed suit the statute, on evidence of actual experience thereunder, should ultimately be held invalid—it seems to us clear that neither the state, nor the Legislature, nor the court, would be liable for the railroad company's damages through diminished revenue or increased expense while the validity of the statute was being tested. And so if a city, in an invalid, but a good faith, attempt to exercise its delegated legislative power over trades, should damage a tradesman by reason of the ordinance's making his business more expensive to conduct while he was having the ordinance adjudged invalid, the city would find shelter from damages under the state's immunity. If the 1912 ordinance is not attributable to Chicago's governmental power received from and on behalf of Illinois, appellee may be entitled to its actual damages. But, for reasons stated in a prior paragraph, we think the ordinance was an invalid attempt to exercise in good faith the police power, and nothing but that. If an ordinance is a valid exercise of the power, those upon whom it operates have no cause

of suit for injunction. It is only when injunction would lie on account of an ordinance's invalidity that a city needs to share in the state's exemption from damages.

The decree is modified by striking therefrom the award of damages, and as so modified is:

Affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. REED.

(Circuit Court of Appeals, Eighth Circuit. August 29, 1914.)

No. 4080.

1. RAILROADS (§ 480*)—ACTION FOR INJURIES BY FIRE—ISSUES AND PROOF.

In an action against a railroad company to recover for damage caused to plaintiff's property, principally an orchard, by a fire alleged to have been caused by one of defendant's engines, an allegation in the answer that the fire would not have reached the orchard, but for the interference of plaintiff's agent, which caused it to spread, constituted an affirmative defense, the burden of proving which rested on defendant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1709–1716, 1733; Dec. Dig. § 480.*]

2. APPEAL AND ERROR (§ 970*)—EVIDENCE (§ 546*)—EXPERT WITNESSES—DETERMINATION OF QUESTION OF COMPETENCY—REVIEW.

Whether or not a witness is shown to be qualified to express an opinion upon questions of value is a preliminary question for the trial court, and its ruling thereon will not be disturbed, unless plainly erroneous as matter of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3849–3851; Dec. Dig. § 970;* Evidence, Cent. Dig. § 2363; Dec. Dig. § 546.*]

3. APPEAL AND ERROR (§ 1004*)—REVIEW—AMOUNT OF VERDICT.

An appellate court will rarely, if ever, enter upon a consideration of conflicting evidence of value, to determine whether a verdict for damage to property is excessive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944–3947; Dec. Dig. § 1004.*]

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Action at law by Mollie E. Reed against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Thomas B. Pryor and Vincent M. Miles, both of Ft. Smith, Ark., for plaintiff in error.

Robert E. Jackson, of Muskogee, Okl., for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and REED, District Judge.

REED, District Judge. The plaintiff, defendant in error, recovered judgment in the District Court against the railway company, plaintiff in error, for \$1,133 and costs, as damages to her pasture, the destruction of certain of the fences, and the burning of an orchard upon some 17 acres of her land, alleged to have been caused by fire originating

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from a locomotive engine used by the railway company in operating its railroad in Oklahoma near to plaintiff's premises, and it prosecutes this writ of error to reverse such judgment.

The errors assigned and relied upon in behalf of the plaintiff in error are that the court erred: (1) In that part of its charge to the jury which placed the burden upon the railway company of proving that plaintiff or her agent set out the fire which burned the orchard. (2) In excluding the evidence of one of defendant's witnesses as to the value of the orchard destroyed. (3) That the verdict and judgment are excessive.

[1] The plaintiff alleged as her cause of action against the railway company that in operating one of its passenger trains near to her premises it negligently failed to provide and employ suitable means to prevent the escape of fire from the engine, which engine set fire to dry grass and other combustible materials on her land near the right of way of the railway company; that by reason of a continuous body of such grass and material, said fire spread over her premises, and without fault upon her part destroyed ten acres of pasture of the value of \$5, five tons of hay of the value of \$15, 130 fence posts of the value of \$13, and 101 live pear trees and 629 live apple trees of the alleged value of \$4,279.

In the answer as amended the defendant denied all negligence upon its part, denied that plaintiff suffered any damages from any fire caused by its locomotive, and denied the value of the property as alleged by plaintiff. It answered further:

"That if any of plaintiff's property was damaged or destroyed as alleged by her, such damage was the result of her own negligence by reason of her failure to exercise ordinary care to protect her property from injury or destruction, which failure directly contributed to such loss."

The court instructed the jury that the burden of proof was upon the plaintiff to prove the allegations of her petition by a preponderance of the evidence, and said further:

"There are two main questions for you to determine in this case; possibly three. First, do you find by a preponderance of the evidence that the railroad company set out this fire in the operation of one of its trains, as charged? If you find that it did, then do you find that that fire was the proximate cause of whatever injury, if any, was done to the plaintiff's property or any part of it, and that you will determine from the evidence in the case."

It further charged:

"Now, in a case of this kind, a plaintiff who sees a fire started, and who, by a slight effort or reasonable effort, or the use of reasonable means within his power, can prevent the injury of his property, or any part of it, and stands by and does not do anything to prevent it, or if, on the other hand, he takes an active part in continuing the fire or spreading it, then, of course, he cannot ask a jury for damages in a case of that kind. It is charged by the railroad company here in this case, and it is the theory of the defense, that if this fire was set by the railroad train as charged, that it would not have reached this orchard but for the intervention of plaintiff's agent, either in failing to do what was in his power in stopping it from reaching the orchard, and which he might reasonably have done, or, in addition to that, in actually setting out fire himself, in such a way as to carry the fire on to his orchard. Now the defense must establish by a preponderance of the evidence, if you find that the conditions were such that the fire might, but for this intervention on his

part, possibly have reached the orchard; of course, if you find that but for the intervention of plaintiff's agent the fire would not have reached the orchard at all, then as far as the orchard is concerned there should be no recovery in this case."

Counsel for the plaintiff in error excepted to the charge as follows:

"I want to save exceptions to the portion of the instructions placing the burden of proof upon the defendant to prove by a preponderance of the testimony that plaintiff's agent set out the fire; that the burden is on the plaintiff to establish that the fire originated straight from the train."

It is upon that portion of the charge to which the exception was taken that the railway company predicates the assignment of error under consideration. The charge, of course, must be considered as a whole; and, so considering it, the jury is plainly first told that the burden of proof is upon the plaintiff to prove by a preponderance of evidence (1) that the fire was set out by the defendant's engine, and (2) that such fire was the direct and proximate cause of the injury to the plaintiff's orchard (the damage to that being the greater part of plaintiff's claim); thus covering the claim of the defendant that plaintiff's husband, acting as her agent in the matter, interfered with the fire and caused it to spread to and damage the orchard, that the burden was upon the defendant to establish this by a preponderance of the testimony. This issue was presented by the defendant as an affirmative defense to plaintiff's alleged cause of action, in the event that the jury should find that the fire originated from the engine; and we think that the jury was correctly told that the burden of establishing such defense was upon the railway company. There was no error, therefore, in the charge considered as a whole.

[2] The defendant next complains of the action of the court in sustaining an objection to a question to its witness D. F. Garvin asking an opinion as to the damage to the orchard. This witness lived some 12 miles from the plaintiff's premises and owned an orchard of some 9 acres which he said was "just a small orchard for family use." After testifying in substance to an experience of some 20 years in the orchard business, but that he had never been in the plaintiff's orchard, never saw it only as he passed it on the train, and did not know the value of the land in that vicinity, but that it was about the same in quality as "that over at Henson," but was not acquainted with the value of land there, he was asked this question:

"Q. Well, if the market value of land at McKee (a station near plaintiff's land) was \$25 or \$30 an acre, either figure has been testified to in this case, what would you say would be the difference in the market value of land of 17 acres of land at \$25 or \$30, located at McKee, with 629 apple trees on it, from 11 to 14 years old, before a fire passed through this orchard destroying it, and after a fire passed through the orchard destroying it.

"Objected to by counsel for plaintiff.

"By the Court: I don't think the witness has shown himself qualified as to the value. Objection sustained. Defendant excepts."

This ruling is assigned as error. Whether or not a witness is shown to be qualified to express an opinion upon questions of value is a preliminary question for the trial court, and its ruling upon that question will not be disturbed unless plainly erroneous as matter of law. Still-

well Manufacturing Co. v. Phelps, 130 U. S. 520-527, 9 Sup. Ct. 601, 32 L. Ed. 1035; St. Louis & S. F. Ry. Co. v. Bradley, 54 Fed. 630, 4 C. C. A. 528. The witness Garvin was never in the plaintiff's orchard, and had only seen it from the train in passing, and said that he did not know land values in that vicinity. Clearly he was not shown qualified to answer the question, and there was no error in sustaining the objection thereto.

[3] It is finally urged that the verdict is excessive. To determine this would require a consideration of conflicting evidence of values which an appellate court will rarely, if at all, undertake. Chicago & Northwestern Ry. Co. v. O'Brien, 153 Fed. 511, 514, 82 C. C. A. 461; and see cases cited in Fox v. C. G. W. R. Co. (D. C.) 207 Fed. 886, 889, and Gila Valley Ry. Co. v. Hall, 232 U. S. 94, 105, 34 Sup. Ct. 229, 58 L. Ed. 521.

There is an entire absence of anything in this case that would warrant us in disturbing this verdict upon this ground, even if we were authorized to do so.

The judgment is affirmed.

RALPH v. CHICAGO & N. W. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. August 29, 1914.)

No. 4113.

1. CARRIERS (§ 320*) — ACTION FOR INJURY TO PASSENGER — QUESTIONS FOR JURY.

Plaintiff was in charge of a shipment of stock on defendant's railroad from a point in Minnesota to Chicago, including a car load of horses. On reaching Clinton, Iowa, in the night, without notice to plaintiff, the car of horses in which he was riding was taken out of the train and left in the yards. Plaintiff's testimony tended to show that he was not acquainted with the place, was unable to find any one and returned and stayed in the car. The night was very cold and stormy, and he was badly frozen. On the part of defendant, there was testimony tending to show that there was a lighted restaurant at no great distance from the car where plaintiff could have found shelter. It was intended that the car should go through, without stopping for feed and rest. *Held*, that under such testimony there were questions of fact respecting defendant's negligence and plaintiff's contributory negligence which required the submission of the case to the jury, and that it was error to direct a verdict for the defendant.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.*]

2. CARRIERS (§ 331*)—INJURY TO PASSENGER IN CHARGE OF LIVE STOCK—CONTRIBUTORY NEGLIGENCE.

A provision in the contract that plaintiff would "be required" to ride in the caboose did not necessarily make it negligence for him to ride in the car with the horses, where it was with the knowledge of the trainmen and without objection on their part.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1371, 1374-1382; Dec. Dig. § 331.*]

In Error to the District Court of the United States for the District of Minnesota; Charles A. Willard, Judge.

Action at law by Joe Ralph against the Chicago & Northwestern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

The plaintiff in error, a citizen of Minnesota, sued the railway company, an Illinois corporation, in a state court of Minnesota to recover damages for a personal injury to himself while a passenger upon one of its trains, alleged to have been caused by the negligence of its employés. The defendant removed the cause to the United States District Court for the district of Minnesota, where a trial resulted in a directed verdict, and judgment for costs in favor of the defendant, to reverse which the plaintiff prosecutes this writ of error.

Tom Davis and Ernest A. Michel, both of Marshall, Minn., for plaintiff in error.

L. L. Brown, W. D. Abbott, and S. H. Somsen, all of Winona, Minn., for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and REED, District Judge.

REED, District Judge. [1] The testimony on behalf of the plaintiff shows or tends to show, that on November 11, 1911, a Mr. Dinehart shipped from Slayton, Minn., two car loads of sheep, and one car load of trotting horses consigned to the Chicago Horse Sales Company at the Union Stockyards, Chicago, Ill.; that plaintiff was an employé of Mr. Dinehart and accompanied said stock as caretaker under the usual contract of shipment, leaving Slayton about 4 o'clock in the afternoon of that day on the line of the "Omaha" Railway Company. At Butterfield Junction, about 50 miles from Slayton, the stock was transferred to the defendant company to be carried from that place to its destination, over its own line of road. The stock arrived at the Clinton (Iowa) yards of the defendant at 10:45 p. m. Sunday, November 12, 1911, via Mason City and Belle Plaine, division points on its line of road in Iowa. The plaintiff rode in the car with the horses from Slayton to Clinton with the knowledge of the conductors of the train, and without objection from any of them, to care for the horses and keep them quiet. The weather was somewhat stormy when the train left Slayton, turned cold some time Sunday, and was very cold and stormy, with a high wind, when it arrived at Clinton. At the Clinton yards the car of horses in which the plaintiff was riding was detached from the caboose, the rest of the train, and engine, and left there overnight. The plaintiff testified that he did not know that the car was to be set out at Clinton, and expected it was to go on to Chicago that night; that there was feed for the horses in the car, and he carried his own luncheon and intended to ride in the caboose from Clinton; that when he discovered that the car was separated from the rest of the train he got out and tried to find the caboose and engine, but was unable to do so and went back into the car with the horses, expecting that it would soon start for Chicago; the car not starting

as he expected, he got out to ascertain where in the yard he was; that he saw no one nor any light, and because of the storm, the darkness, and his unacquaintance with the yard he was unable to determine where in the yard he was and returned to the car, where he remained until morning; that he looked out of the car at different times during the night, observed that it was storming, but saw no one, though he heard the movement of engines in the yard; that the weather was exceedingly cold, and during the night his feet were so frozen that he was unable to continue his journey in the morning; that he was attended by physicians of the company, who took him to a hospital in Clinton, where he remained for some six months; that he suffered much pain and severe injuries to his feet from which he will never recover. The extent and character of his injuries are shown by the testimony of physicians.

The principal ground of negligence alleged against the defendant is that its employes in charge of the train and the yard at Clinton failed to inform the plaintiff that the car of horses was to be set out at the Clinton yards and left there overnight; that in consequence of its being so set out he was exposed to the severity of the weather, whereby his feet were frozen producing the injuries of which he complains.

The answer of the defendant admits the receipt of the stock, including the car of horses and the plaintiff therein at Butterfield Junction on November 11, 1911, to be carried by it to Chicago; the stopping of the car in which plaintiff was riding overnight in the yard at Clinton, and that while so in said car he suffered some injuries by exposure to cold; denies that plaintiff was injured because of any negligence upon its part, and alleges that any injury sustained by him while in the car was caused solely by reason of his own neglect, and the risks and hazards necessarily incident to being and riding upon said train and car, which plaintiff well knew, appreciated, and assumed; and denies all other allegations of the petition.

The defendant's conductor in charge of the train from Belle Plaine to the Clinton yards testified that he did not see the plaintiff on his train; that he heard stockmen on the train about 50 miles out of Clinton wondering where the man in the car with horses was; that he did not try to find him or collect his transportation, but told one of his brakemen to ascertain at De Witt, a station 19 miles from Clinton, if there was such a person in the car of horses; that he also informed the yardmaster at the Clinton yards on arrival there that a man was supposed to be in the car of horses, and that he would better look him up. The brakeman testified that before arriving at De Witt he overheard a conversation among some stockmen that they had seen nothing of the man in the car of horses for some time, and that they seemed worried about him; that when they got to De Witt he went to the car of horses, partly opened the door, saw a man in there, and asked him if he was all right, and the man answered that he was, and wanted to know how far it was from Chicago, that he told him about 155 miles; that they would get to the Clinton yards in about 35 or 40 minutes; that there was a restaurant there, where he could get a good hot meal, and could go to the caboose and sleep from there to

Chicago, or could go into the eating house; that he did not know whether his stock was going on or not, but presumed that it was.

Defendant's yardmaster at the Clinton yards testified that the conductor of the train upon its arrival there said that there was supposed to be a man in charge of the car of horses, that he had not seen him, and that "I had better look after him; I did not go to the car to see about him, and didn't see the car itself that I know of."

The switch foreman at the Clinton yard testified that the train in question arrived there at 10:45 p. m., November 12, 1911; that he inspected the cars in that train; that the conductor told him there was a man in a car with horses, and asked me if I wouldn't open that car when I came to it and see if the man in charge was there. I told him I would, and when I came to that car I stood on one of the truss rods and held my lamp up and halloed, "Old man, are you alive in there?" He said yes; he was lying alongside by the door in a blanket, and when he said he was all right I got down and closed the door. This was 10 or 15 minutes after the train arrived.

The car inspector testified that he went with the switch foreman to the car in question and testified, in substance, the same as the switch foreman, but none of them informed him that the car was to remain there overnight. There is other testimony that there was a restaurant at or near the switchyards, the distance of which from the car in which plaintiff was varied in the estimates of witnesses from 100 to 500 feet; that there were lights in this restaurant and other buildings in or near the yards, and that those lights were burning that night; that the yards consisted of a dozen or more tracks diverging from a lead track; that switch engines were moving in the yards all night; that trains were coming and going, and many men worked in the yards and buildings during the night. The foregoing is the substance of defendant's testimony.

The plaintiff denied making the statements testified to by the brakeman, switch foreman, and car inspector, and denied seeing or knowing of their coming to the car; denied knowing of the buildings or seeing the lights in the yard or of the men working therein, but said that he did hear the movements of engines, but could not tell where they were.

At the conclusion of the testimony the defendant moved for a directed verdict in its favor upon the grounds: (1) That the evidence is insufficient to justify a finding that the defendant was in any way negligent or liable to the plaintiff; (2) that the injuries resulted from plaintiff's own fault and neglect without any fault upon the part of the defendant or its employes; (3) that under the contract of carriage in question plaintiff was bound to ride and remain in the caboose with which the train was provided; (4) that the plaintiff assumed all risk of the injury which he sustained; (5) that the failure to notify plaintiff of the delay of the car at Clinton was not the proximate cause of his injury; and (6) that the plaintiff had ample opportunity to leave the car and go to a place of comfort and safety after its arrival in Clinton. The motion was overruled by the court. The case was then argued to the jury in behalf of both parties, the jury charged, and it

retired the afternoon of April 23, 1913. In the morning of April 24th it was brought into court and asked by the court if it had agreed upon a verdict. The foreman answered that it had not, and was not likely to agree. The court addressing counsel for the defendant then said, "You may renew the motion for a directed verdict," which was accordingly done, and the court said, "The court grants the motion," and a verdict and judgment were entered accordingly, to which the plaintiff duly excepted. Upon what ground the motion was sustained does not appear.

The testimony, a brief statement of which is set out above, shows without dispute that the plaintiff, a stockman 53 years old, in care of a car of horses, rode in the car with them from Slayton to the Clinton yards, where it was detached from the caboose and the rest of the train and engine and left overnight; that the destination of the car was Chicago, where it would have arrived early the next morning but for its delay at Clinton; that the plaintiff did not know, and was not informed by any of the trainmen or yard employes, that it was to be left at Clinton. The defendant's testimony tends to show that the Clinton yard was lighted and a number of men working there during the night; that there was a restaurant or eating house near the yards, and other places where the plaintiff could have obtained comfortable accommodations and avoided exposure to the cold, and that it was solely because of his own want of ordinary care to protect himself and his assumption of the risk of riding upon the train and in the car of horses that he suffered the injuries of which he complains. At the close of the testimony the defendant moved for a directed verdict in its favor upon these grounds, which motion was denied by the court, and correctly so, we think, because the testimony was such as to require its submission to the jury for determination. After the jury had been out overnight and reported in the morning that it was unable to agree, the court upon its own motion requested counsel for the defendant to renew its motion for a directed verdict, which being done, the court then directed the jury to return a verdict in favor of the defendant, which was done and a judgment entered thereon for the defendant for costs. In this we think the court erred, for disputed questions of fact must be submitted to a jury for determination, unless waived by the parties. It is only when testimony is undisputed, or is so convincing or conclusive that reasonable impartial minds should reach but one conclusion, that the court may withdraw it from the jury and determine, as matter of law, that the verdict must be in favor of one of the parties. The trial court recognized this rule in first denying defendant's motion for a directed verdict, and submitted the disputed questions of fact to the jury upon instructions quite as favorable to the defendant as it could rightly expect. Counsel for defendant do not question the rule, but insist that from the testimony of its employes it conclusively appears that plaintiff, by the exercise of ordinary care, could have avoided exposing himself to the severity of the weather by obtaining shelter in the restaurant or some of the other buildings in or near the Clinton yards. But this ignores entirely the plaintiff's evidence as to the condition in

which he was placed by setting out the car without being informed that this was to be done, his entire ignorance of his surroundings and the condition in which he found himself by being left alone with the horses in a railroad yard of many tracks on a dark and stormy night.

The shipping contract upon which plaintiff was riding contains a request, signed by him, that the time for confining the stock in the car without unloading for food, water, and rest be extended from 28 to 36 hours, and it may be said that he must have known it was to be unloaded before reaching Chicago, and might be in the Clinton yards. But the shipment left Slayton at 4:10 p. m. Saturday, November 11th, and the 36-hour period would not expire until 4:10 a. m. of November 13th, and the train arrived at Clinton at 10:45 p. m. on the 12th, or 6 hours before the expiration of the 36-hour period. It might very properly be said that if the car was to be set out before the expiration of this period, the plaintiff should be informed thereof. The 36-hour period from Slayton was obviously intended to enable the carriage of the stock to Chicago without unloading for food and rest.

[2] Again, it is said the plaintiff was bound under the shipping contract to ride in the caboose, and that it was his own fault in not doing so. The contract contains this provision, among others:

"Men actually in charge of live stock will be required to ride in the caboose attached to the train, and are prohibited from getting on or off cars or walking over them, while they are moving."

This only provides that the plaintiff *will be required* to ride in the caboose. But the trainmen knew that he was riding in the car with the horses, and instead of requiring or even requesting him to ride in the caboose, he was permitted to ride in the car without objection, and a brakeman at Belle Plaine, the plaintiff says, requested that he ride in the car with the horses.

The waybill accompanying the car of horses contains upon its face, among other things the following:

"George Ralph in charge Clinton yards unloaded 6:00 A. M., 11/13/11. Reloaded 4:30 P. M., 11/13/11. Fed—watered—rested. Car O No. 23816. Shipper, C. E. Dinehart; destination, Chicago Horse Sales Company, U. S. Yards."

Defendant's testimony shows without dispute that the car arrived at the Clinton yards at 10:45 p. m., November 12th. An indorsement thereon shows that the car of horses was not unloaded until 6 a. m. the next morning. This indorsement was obviously made after the horses were unloaded, and presumably at the time they were reloaded. It appears, therefore, that they remained in the yards for something over eight hours, and that the plaintiff was with them during that time.

The defendant cites and relies upon the decision of this court in *McCullen v. C. & N. W. Ry. Co.*, 101 Fed. 66, 41 C. C. A. 365, 49 L. R. A. 642, as authorizing the direction of this verdict in its favor because of the failure of the jury to agree. The cited case does not support such contention. That case, it appears, had been three times tried upon substantially the same testimony, and each time the jury failed to agree. It was again tried the fourth time upon the same

testimony and submitted to a jury which, after deliberating for 30 hours without reaching a verdict, was recalled and directed to return a verdict for the defendant. Of this proceeding, Judge Thayer, speaking for this court, said:

"It has been repeatedly held since the decision in *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, that when the facts proven are such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of that issue is for the jury; and inasmuch as 48 men, who have at various times listened to the evidence in this case, have differed in opinion as to whether the defendant was or was not negligent, we would perhaps be justified in regarding that test as conclusive, and in remitting the case to the lower court to be retried. In view of the numerous trials that have taken place, we have thought it best, however, to consider the testimony attentively, and decide as to its sufficiency to sustain a verdict for the plaintiff, as it would have been our duty to do if the trial court, at the conclusion of the first trial, had of its own motion directed a verdict for the defendant."

The court then refers to the testimony, reverses the judgment, and remands the cause for another trial. The fact that 12 men have listened to the evidence and failed to agree upon the question of defendant's negligence and the plaintiff's contributory negligence is but little, if any, less cogent than the question of such negligence should be again tried.

Of the testimony in this case we express no opinion as to the ultimate facts that should be found therefrom, and only say that it should have been submitted to the jury to determine therefrom the alleged negligence of the defendant, the contributory negligence of the plaintiff, and any other disputed questions of fact. The court erred, therefore, in withdrawing it from the jury and itself determining these disputed questions. The judgment is reversed, and the cause remanded for new trial.

Reversed.

SCHWEIG v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. July 29, 1914.)

No. 4101.

1. MASTER AND SERVANT (§ 228*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMPTION OF RISK—EMPLOYERS' LIABILITY ACT.

An employé of an interstate railroad company, who worked for more than 54 hours out of 57 hours, assumed the risk of injury by reason of his exhausted condition, and there can be no recovery for his death, due to such cause, under Employers' Liability Act April 22, 1908, c. 149, § 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), unless the violation by the railroad company of some statute enacted for the safety of employes contributed to his death and exempted him from such assumption under section 4 of the act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. § 228.*]

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MASTER AND SERVANT (§ 94*)—HOURS OF SERVICE ACT—RAILROAD "EMPLOYE."

An employé, working about feedyards of an interstate railroad in helping to unload, care for, and reload stock which in course of shipment was unloaded there for food, water, and rest, who while riding on a switch engine, from one part of the yards to another, fell off and was killed, was not within Hours of Service Act March 4, 1907, c. 2939, 34 Stat. 1415 (U. S. Comp. St. Supp. 1911, p. 1321), which defines "employés," as used therein, to mean "persons actually engaged in or connected with the movement of any train," and the fact that he had been required or permitted to remain on duty continuously for more hours than prescribed therein did not constitute a violation of the act by the railroad company.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 159; Dec. Dig. § 94.*

Hours of service of employés, see note to United States v. Houston Belt & T. Ry. Co., 125 C. C. A. 485.

For other definitions, see Words and Phrases, First and Second Series, Employé.]

In Error to the District Court of the United States for the District of Minnesota; Chas. A. Willard, Judge.

Action at law by Peter Schweig, administrator of the estate of Walter Schweig, deceased, against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

For opinion below, see 205 Fed. 96.

Ernest A. Michel, of Marshall, Minn. (Tom Davis, of Marshall, Minn., on the brief), for plaintiff in error.

F. W. Root and Nelson J. Wilcox, both of Minneapolis, Minn., for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and REED, District Judge.

CARLAND, Circuit Judge. This was an action brought by Peter Schweig, the father and administrator of the estate of Walter Schweig, deceased, to recover damages for the death of the latter, alleged to have been caused by the negligence of the railway company.

A verdict was directed for the company by the trial court, and this ruling is alleged as error. It was alleged in the complaint and admitted at the trial that the train of 30 cars of stock, in connection with which Schweig was working when he was killed, was an interstate train; that the cattle that were unloaded from it and then reloaded had come from outside the state, and were destined for points outside; that at the time of the accident the cars attached to the engine from which the deceased fell were cars that had come into Minnesota from another state, and with the exception of one thereof were destined to points outside the state. The facts as they appear in the record are substantially as follows:

The railway company has and maintains at Montevideo, Minn., extensive railway yards, and as a part thereof maintains stockyards where cattle are fed and watered, and loaded into and off its cars. To facili-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tate the loading and unloading of cattle in the yards, certain platforms have been constructed alongside the tracks; the floor of the platforms being level with the floor of the box cars.

Walter Schweig, 16 years of age, was employed by the railway company in working in and about said yards, and in and about one of said loading platforms forming a part of said stockyards. He assisted in loading and unloading cattle; assisted in taking up and putting down toeboards, being small platforms leading from the railroad car doors to the loading platform and used to prevent cattle from falling down between the platform and the car. He pulled down water troughs on said interstate cars, said troughs being made of iron and built into the side of the cars, so as to become a part of the same, and helped to place sand in the cars preparatory to shipment of live stock. He also loaded hay into said cars for the purpose of feeding the cattle therein.

Deceased and other employés were accustomed to ride on the engines of the company in going from place to place about the yards where their services were required. On the morning of October 1, 1911, the day of the accident, a train consisting of 30 cars of live stock arrived at Montevideo. The cattle were unloaded and driven into the pens for food, water, and rest, and the empty cars were taken to the storage yards by the switch engine.

At some time in the afternoon, it being then time, in usual course, to reload these cattle, the switch engine went into the storage yard, attached itself to 21 of those 30 empty cars, and hauled them to and spotted them at the chutes for loading. The reason why the whole 30 were not handled in the one movement was that there were only chutes enough to accommodate 21 cars at one time. When the 21 cars were loaded, the switch engine was attached to them for the purpose of taking them back to the storage yards, there to await the loading of the remaining 9 cars, which would make up the full original train of 30 cars for their further eastward journey. At this time three of the employés of the company, namely, Walter Schweig, the deceased, Charles Garrettsee, and Charles Yung, got onto the train to ride down into the storage yards. Later, while in the act of stepping over the coupling apparatus on the locomotive, Schweig fell off, and was run over and killed. There was testimony on the part of the plaintiff that Schweig was ordered to go down to the storage yards, but in the view we take of the case this becomes immaterial, as we think under the evidence that Schweig was not a trespasser in riding upon the engine. In approximately 57 hours next preceding the time of the accident, deceased had been on duty and working for the company 54 hours and 40 minutes. There was evidence that deceased had fallen asleep the previous night at 10:30, while standing up eating a sandwich. The only negligence alleged against the company was the act of permitting Schweig to so continuously work without rest.

[1] Plaintiff in error claims that Schweig fell from the engine by reason of being in a tired and exhausted condition, although there is no direct evidence that this was so, and it is very doubtful whether there was sufficient evidence to go to the jury upon this subject (S.

L., I. M. & S. Ry. Co. v. McWhirter, 229 U. S. 265, 33 Sup. Ct. 858, 57 L. Ed. 1179); but we do not determine this question. Looking at the case as presented by the record, regardless of the Hours of Service Act, and treating the case simply as one under the Employers' Liability Law (35 Stat. 65), it is clear that Schweig assumed the risk of injury by reason of the continuous hours of service, as he knew better than anybody else his own condition, and as to whether he was taking any risks in continuing to work in his then present condition, whatever it was. Therefore the verdict was rightly directed on this view of the case. It remains to consider whether the Hours of Service Act relieved Schweig of the assumption of risk. Section 4 of the Employers' Liability Act provides:

"Sec. 4. That in any action brought against any common carrier under or by their virtue of any of the provisions of this act to recover damages for * * * the death of any of its employes, such employé shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the * * * death of such employé."

[2] It thus appears that if Schweig was within the Hours of Service Act, and the violation of the terms of that act was the cause of his death, he did not assume the risk. Section 1 of the Hours of Service Act provides:

"That the term employes as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train."

We are not now to consider whether Schweig was engaged in interstate commerce, for that is admitted; but the question is, Was he actually engaged in or connected with the movement of any train? In riding upon the engine, Schweig and the other employes had nothing to do with its operation or movement. Their work was entirely independent of this, and it seems clear that in performing the work, which the record shows that Schweig performed, he was neither within the spirit or the letter of the Hours of Service Act. He was neither engaged in nor connected with the movement of the train. Whether Schweig was tired and exhausted by reason of continuous service did not affect, and could not affect, the movement of the interstate train. This condition of the case left the rule in regard to the assumption of risk operative, and defeats a recovery by the personal representative of Schweig. *Southern Railway Co. v. Crockett*, 234 U. S. 725, 34 Sup. Ct. 897, 58 L. Ed. 1564.

Judgment below affirmed.

OUTLOOK ENVELOPE CO. v. SHERMAN ENVELOPE CO.

(Circuit Court of Appeals, First Circuit. September 8, 1914.)

No. 1066.

PATENTS (§ 328*)—INVENTION—ENVELOPE.

The Callahan patent, No. 701,839, for an envelope, *held* void for lack of patentable invention.

Appeal from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Suit in equity by the Outlook Envelope Company against the Sherman Envelope Company. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 210 Fed. 630.

Frederick P. Fish, of Boston, Mass., and Louis W. Southgate, of Worcester, Mass., for appellant.

George O. G. Coale, of Boston, Mass. (Coale & Hayes, of Boston, Mass., on the brief), for appellee.

Before PUTNAM and BINGHAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. Our conclusion is that the Callahan patent, No. 701,839, June 10, 1902, for an improvement in envelopes, as explained by the record in this case, does not disclose patentable invention, and we agree with the reasoning and conclusion of Judge Dodge in the District Court. The opinion of that court presents a lucid review of the state of the art in respect to open-slot envelopes with openings protected by transparent coverings, and a cogent analysis of the elements of the complainant's improved commercial article.

The idea of an open slot, though previously differently located on the face of the envelope, was old in the art, though perhaps of different shape. The same is true of transparent coverings, though in the mechanical sense differently attached to the edges of the opening. Callahan did very little, if anything, beyond taking the idea of an opening, and the idea of a transparent covering, both of which were old, and adjusting them so as to show the name and address of a communication sheet, which was to have a fold conforming to the inside dimensions of the envelope, which should arbitrarily hold the sheet in its place, so that the name and address only should be disclosed. We do not think the measure of ingenuity involved in the complainant's mechanical or commercial improvement brings it within the spirit of the Constitution as to intended patent monopoly and protection, or that his organization, or combination, amounts to invention, within the legal principles applicable to such a situation.

The question of invention is satisfactorily dealt with in the following paragraph from Judge Dodge's opinion:

"But notwithstanding the presumption from the grant of the patent, and notwithstanding the fact that the plaintiff's envelopes have the commercial

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

merit referred to, I am unable to believe that the patentee's addition of the transparent cover to the open slot formerly used amounted to invention, in view of the state of the art at the time. Everything else in his combination was old, and the transparent cover which he added was old, except in its relation to the communication sheet folded so as to show the address through the slot without a cover, which was one of the old elements of the combination. To arrange an envelope of the kind described in the Brown patent in such a way that the position of its transparently covered slot should correspond with the position of the name and address on a communication sheet within, so addressed and folded as to show them where the slot would display them if uncovered, was not to make the old elements combined produce any new mode of operation. The patentee could claim no invention so far as his communication sheet is concerned, nor any with regard to the function of at once protecting it and displaying the desired part of it which his envelope performs."

We think the reasoning of Judge Dodge in this respect perfectly sound, and we accept it as decisive of the question of invention.

The decree of the District Court is affirmed, with costs of this court.

FIRTH-STERLING STEEL CO. v. BETHLEHEM STEEL CO.

(District Court, E. D. Pennsylvania. September 10, 1914.)

No. 431.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PROJECTILE.

The Davis patent, No. 945,492, for an armor piercing projectile having in combination (1) a cavity for the required quantity of explosive, (2) the shape to most readily pierce, (3) the support of a nose of soft metal covering and surrounding the penetrating point so as to make its power effective, (4) a shell or cap over the forward end of the projectile to give the contour for prolonged flight, and (5) a cavity or air space in this shell in front of the soft nose of the projectile, so that the operation of the latter may not be hindered, *held* to disclose patentable novelty and invention, and also infringed.

2. PATENTS (§§ 283, 317*)—SUIT FOR INFRINGEMENT—INJUNCTION—MANUFACTURES FOR UNITED STATES.

While the fact that an infringer of a patent for a projectile has contracted to manufacture the infringing projectile for the United States is no defense to a suit for the infringement, an injunction restraining the same may properly except from its operation the performance of such contract and the entering into and performance of like contracts with the government, leaving to complainant, as to such infringements, its remedy on an accounting.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 448-450, 452, 559-565; Dec. Dig. §§ 283, 317.*]

3. PATENTS (§ 1*)—CONSTRUCTION AND OPERATION—INVENTIONS USED BY UNITED STATES.

The patent laws cannot be so limited by the courts as to exclude from their protection inventions which the United States may desire to use.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 1; Dec. Dig. § 1.*]

In Equity. Suit by the Firth-Sterling Steel Company against the Bethlehem Steel Company. On final hearing. Decree for complainant. See, also, 199 Fed. 353.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Melville Church, of Washington, D. C., for plaintiff.

James A. Watson, of Washington, D. C., for defendant.

Francis Fisher Kane, U. S. Atty., of Philadelphia, Pa., for the United States.

DICKINSON, District Judge. [1] The decision of this suit involves mainly the validity of the patent issued January 4, 1910, following application filed April 21, 1908. The letters patent were granted to Cleland Davis, and are now owned by the plaintiff by assignment. The number of the letters patent is 945,492. There is no serious question of infringement. The real defense is lack of novelty; all the features of the claimed invention having been anticipated in the prior art. The general claim of invention is for an improvement in projectiles. The type of projectile involved in the present discussion is the armor piercing projectile. If the doctrine that preparedness for war is a preservative of peace holds good, the inventive genius of the nation should be given every stimulus to apply itself in the direction here indicated. At the present time added emphasis is given to the concern which all feel in the success which may attend such efforts. The history of the development of the art is in itself not uninteresting, and throws light upon the points in controversy.

The contest between armor piercing projectile producers and armor plate manufacturers is an approach to the old one between resistless force and immobility. The advances made by the armor plate makers made the task of the projectile designer include the achieving of two necessary results. The projectile must both reach the plate and pierce it. It must reach it to pierce it, and must therefore have the property of long flight. It must pierce it when reached, and must therefore be given the greatest possible power of penetration. Failure in one rendered futile success in the other. The property of prolonged flight was early found in contour of form. Whether this was due to inducing the projectile to take the trajectory of longest flight, or to the reduction of air resistance, or to both, the practical result was empirically discovered and universally accepted. The proper contour was found and could be reproduced at will. The problem of securing the greatest power of penetration presented a dual aspect in finding a practical method of solution. The obvious and necessary resort to a fine sharp point encountered an obstacle to its success in that the hardened surface given to the armor turned aside, upset, or broke the point of the projectile.

Passing by for the present the advantages of the use of ductile or frangible metal in the substituted means attempted to be used to protect the point of the projectile, this was accomplished by means of the Johnson device. The sought for result was accomplished by what may be described, in a general way, as jacketing the point of the projectile in other metal. The inquiry whether the success is due to the lateral support given to the point or to what would seem to be in effect the same thing, the "radial inertia" of the enveloping metal being greater than its tensile strength, to the depressing of the plate an instant before the point is in contact or to the enveloping metal

making smooth the entrance of the projectile, may also be passed in this preliminary statement. We have the fact of a successful result. To recapitulate these results, we had the contour of shape for length of flight known. We had also the property of fullest penetration secured. We had, however, no practical combined result, because the use of one of these known things was either to prevent or render futile the use of the other. No effective shot could as yet be fired, because, if the flight contour was given the projectile, it would reach the mark, but would not do its work when there, and, if the penetrating device was employed, it could not do its appointed task because it would not reach its mark. To get over this dilemma, resort was had to the thought which would seem to lie on the surface of the problem. The flight contour and the penetrating form, although alike essential and required to be both potentially existing in the projectile when inserted in the gun, did not function simultaneously but successively. The one began where the other ended. The contour of flight had accomplished its appointed work when the mark was reached. It was not until then that the penetrating construction began its work. If, therefore, a temporary flight form could be given the surface contour of the projectile, which would inhere until the mark was reached, and would then be automatically discarded to make way for the penetrating form, the problem would be solved. This would seem not difficult to accomplish. There were two seemingly obvious means of its accomplishment. The one was to give to the enveloping metal, which made the penetration effective, the form contour, which lengthened the flight. The other was to supply the contour of flight form by means of a hollow enveloping cap or casing, which would be destroyed on impact. The seemingly obvious, however, is seldom true. Devices to accomplish the required result were tried, and the problem remained still unsolved. The causes of the failures we need not now discuss. They are referred to in connection with the special findings submitted herewith. The solution was finally found in the device which embodies the claims of the patent in suit. That it was at once attended with commercial success is undoubted. The failure of the solid form of point encasing metal was avoided by abandoning its use. The cap which failed was one which inclosed the naked point of the projectile proper. Its failure was escaped by the simple expedient of retaining the soft metal nose feature within an enveloping shell or cap having the required flight contour. Success was achieved by making a complete projectile, which consisted of the projectile proper having a cavity space for sufficient explosives to propel it, a sharp point from which a soft metal nose or protuberance protruded, so as to assure penetration, and all this fitted into a shell or cap having the required contour to give prolonged flight, and a cavity or air chamber in front of the soft metal nose, so that the cap would perform its proper function without interfering with the penetrating function of the sharp point of the projectile and the enveloping metal. This design had inventive merit, and was, as has been said, a commercial success. Its merit is in a happy combination, which produced the required result. It is easier to be sure of this than to state in

just what the novelty of the combination consists, because the device is of such supreme simplicity. It stood the supreme test of merit and of novelty, however, in that it did what had not before been accomplished.

This brings it well within the established principle that the patentable novelty of a combination is not denied by proof that all its elements, taken separately, are old. *Hailes v. Van Wormer*, 87 U. S. 353, 22 L. Ed. 241. In what this combination results, the useful purposes accomplished by it, and of what the combination consists may be thus summarized:

- (1) It produces an improved effective armor piercing projectile.
- (2) This projectile is given the characteristics of both the greatest length of flight and power of penetration by a method not before known of combining in one projectile the presence of (a) the contour of form productive of length of flight; (b) the sharpness of point to facilitate penetration; (c) the support of the point to give it strength as well as sharpness; (d) an arrangement and construction of the several parts, so that the use of one does not forbid the use of the others nor the functioning of one lessen the efficiency of the others.
- (3) The embodied design consists of an armored piercing projectile (a) having a cavity for the required quantity of explosives; (b) having the shape to most readily penetrate; (c) having the support of a nose of soft metal covering and surrounding the penetrating point so as to make its power effective; (d) having a shell or cap over the forward end of the projectile, so as to give it contour of prolonged flight; (e) having a cavity or air space in this shell in front of the soft nose of the projectile, so that the operation of the latter may not be hindered.

It would give undue length to this opinion to do more than state the general conclusions reached. We have accompanied the special findings of fact and conclusions of law filed herewith with some discussion of the grounds of defense raised in this case. The general conclusions reached are that the patent in suit is valid; that the proprietary right of the plaintiff therein has been infringed by the defendant; and that the plaintiff is entitled to the usual decrees for an injunction and accounting and for costs.

[2] There is one modification, however, which should be made in the award of an injunction. The defendant is manufacturing projectiles under a contract with the United States, who have been admitted to intervene in this proceeding. The government is properly concerned only with the fulfillment of that contract.

[3] We do not concede the right of the United States to maintain the further positions taken. They go in effect to the length of denying the extension of the patent laws to inventions for which the government may have use. Congress alone, and not the courts, can so limit them. The United States, considered as an individual as well as its citizenship as a whole, is concerned with the policy of stimulating the inventive genius of its people to the limit of their abilities. No real benefit is ever gained by withholding from any one his just rights. The remedies he is given are both legal and equitable. The

former is of right; the latter of grace. The legal remedy is to accord him proper compensation for any use made of his property. This does not deprive the government of the use of any invention which may be demanded by the public needs. It merely accords to the individual just compensation, and this should not be withheld.

The writ of injunction is to except from its operation any interference with the performance by the defendant of its contract with the United States and its entering into like further contracts. The decree for an accounting by the defendant may be made to secure the plaintiff in all its rights. The form of a decree, in accordance herewith, may be submitted.

We have accompanied this opinion with special findings of fact and of law. These meet the defensive propositions advanced by counsel. The industry displayed and energy exhibited in their presentation, however, justify adding perhaps unnecessary length to this opinion in discussing them. The defense is presented as summarized in six propositions. These we have condensed into three, and discuss in a different order from that in which presented. They are: (1) The patent has not been infringed. (2) The patent is invalid. (3) The patent can be infringed with impunity because defendant has contracted with the War Department to infringe it.

1. Denial of Infringement.

The defendant itself supplies the swift refutation of its own argument in support of this position. It asserts most earnestly that the defendant is using the device, not of Davis, but of former Captain (now Major) Phillips. It avers just as earnestly that the Davis device is identical with that of Phillips, and therefore anticipated by it. This is suicide. The only fact of difference between the projectile which it is manufacturing and that described in the patent is in the difference between the metal of one possible form of cap which could be made according to the Davis design and that made use of by the defendant. To give even the color of a difference, the assertion is made that the Davis invention consists of a special form of sheet metal cap, and that the defendant is using a metal cap, but not of sheet metal. It is sufficient to observe that the first assertion is unwarranted. The fact of infringement is found. Its denial can scarcely be serious. The only suggestion of a basis for it is in the unsuccessful effort to avoid infringement by the method of cap adjustment.

2. Invalidity of Patent.

This objection is multiform. The denial of novelty is one. The argument takes for its text the title given the invention in the specifications "a contour cap for projectiles." If it were true, as asserted, that all Davis did was to design a cap to be fitted over or fastened to the front end of any projectile, there would certainly, in view of the prior state of the art, be no novelty in this, except whatever novelty the special make of cap might possess. Mere assertion, however, does not always prove a fact, and is never an argument. Davis did more

than this. To deny to his design the merit of a combination, as defendant's argument essays to do, is to refuse to follow the very definition of a patentable combination which is approvingly quoted. Most of the elements, indeed it may be said all the elements, except the idea of the combination itself, may be said to be old. Herein, however, lies the novelty, as well as the utility, and the consequent merit of what was accomplished. Hence also its patentability. The aggregated elements were contour of flight, penetrating shape, supporting nose, hollow cap, and projectile proper. Merely putting together these old elements produces at most only the aggregated functions of them all. Bringing them into the contact of a mere aggregation may indeed destroy the operation of some of the elements considered separately, but the aggregated result can be no more than the sum of all. Its fullest product is a mathematical addition. A true combination produces a new and different, at least in the sense of an additional, result. A product springs from the manner in which the elements are brought together, which is not present in all of them, considered as the mere sum of separate units. The result is one of multiplication or of the addition, plus something else. Every true combination, however, has its key. Every arrangement of separate blocks which form an arch possesses always a keystone and sometimes cement. The Davis device uses these old elements in a novel combination. Not only were these elements, taken separately, old, but the idea of a combination was itself old. To these attempted combinations reference has already been made. The failure of each consisted in the loss of function which the elements separately had. The flight function was retained. The ballistic quality was lost. The device which expanded the soft metal nose of the projectile into a huge proboscis, having the flight contour, doubtless failed because the massing of the metal in front of the point destroyed its supporting function by crowding the metal which surrounded the point, thus destroying its "radial inertia." The hollow cap device failed because there was no nose to the projectile point; this feature having been dropped out of the combination, and the metal of the cap itself not serving, as it was expected to do, as a substitute for the nose. The change from ductile to frangible metal in the solid and hollowed tip was also barren of results. The thought which saved the day was the simple one of combining with the other elements, not the hollowed cap with the naked point of the projectile proper, but with the nose as well as point. It is the simplicity of the combination which makes it look like a mere aggregation.

Right here is the high-water mark of the argument for the defense. A standard projectile, at the time of the Davis device, might well be considered as one with a soft nose incasing a sharp point. A hollow contour cap was part of the then art. To merely cover the one with the other is an idea so simple as to seem a mere aggregation. In the simplicity of a device may, however, consist its chief merit. It may well be a case of "the simplest is the best." Right here must be kept in mind another feature of the condition of the then art. No successful completed projectile was known. The army and navy

experts had applied themselves to the task of doing just what Davis has done—to find the proper combination. We cannot therefore deny it to have the merit of novelty as well as value, although it doubtless deserves the criticism directed against it by defendant of not making any great call upon the inventive faculties. The patent laws extend the promise of reward, however, to the exercise of the humblest talents, as well as to inventive genius. The only toll it exacts is that the product shall possess inventive merit. The criticism of the findings and reasoning of the examiner is not, however, well based. In the claims which he allowed, and in those which he held to be too broad, he showed discriminating judgment. The prior art disclosed a cavity cap, into which the naked point of the projectile penetrated. It was able to show a projectile proper, in which the point was behind and surrounded with soft metal. It possessed no projectile as a whole in which there was interposed soft metal between the point and the cavity. In consequence, the examiner allowed claims for the last and disallowed those for the first. He disallowed also the claims for devices in which the soft metal was around but not in front of the point. This was because here, as in the devices then already patented, the point projected into, or at least met, the cavity.

This brings us to the defense of anticipation, so far as involved in the state of the art before the Phillips design. This is best presented in the Hadfield patent. The strength of the argument lies in this: In the Hadfield device, as in the Davis design, the essential idea was to surmount the projectile designed for penetration with a hollow cap, which would transform the projectile as a whole into one having the qualities of prolonged flight. The then prior state of the art as to the ballistic form of projectiles must be remembered. The sharp point form of projectile had not as yet been adopted. Hadfield dealt with the projectile proper as it was. It is within the limits of fair surmise that, had the pointed form with the soft metal nose been then in use, his design would have incorporated it. In this lurks the only doubt in the way of a finding that the Davis idea had not been anticipated. Although, however, Hadfield might have incorporated the sharp point feature, had it then been known, he in fact did not. He might also have overlooked the combination of nose and point, as did those who first followed him. He might also have extended his design by first discovering the merits of the sharp point feature and then incorporating it with the others. Here again, however, he did not. The possibility of what he might have done does not detract from what Davis did.

This brings us chronologically to the Phillips, Wheeler and McKenna, and the Davis idea. The fact that they all were in quest of this idea, and that they independently, though successively, found it, shows two things: First, the prior art was short in accomplishment. Second, the idea, although perhaps easy to find, had the value which they at once and all now recognize it to have. The Wheeler and McKenna discovery is disposed of by the statement of the admitted fact that it was after that of Davis. Phillips was ahead of Davis in

point of time, but of this there are these things to be said. In the first place, it is by no means certain that Phillips had conceived the Davis thought. How far the peculiar feature of having lubricating openings through the soft nose absorbed his whole thought, we cannot be sure. The Davis idea was, however, there whether Phillips was consciously alert to its presence or not, and this would doubtless constitute anticipation. In the second place, no one, so far as this record discloses, knows whether the Phillips design would have justified itself in practice. It has never been tried. The chief of ordnance doubted it, and the fact that it was not tried indicates that its promise of success was not inviting. The presence of the large number of lubricating perforations justifies the criticism of counsel for plaintiff of the possible, although lurking, danger of an undue weakening of the point support. In the third place, and this most concerns us, the Phillips design was never reduced to practice. The argument of defendant in the line of the facts showing it to have been in the course of practical application, although stretched to undue length, falls short of reaching conviction. The Phillips idea never progressed beyond the incubating stage. As it likewise was never the subject of printed publication, it does not detract from the legal deserts of the Davis invention, unless the latter was pirated. Suspicion, prompted and pointed by self-interest, might suggest the charge, but there is absolutely nothing to justify such a finding. We pass the charge of lack of utility with the observation that defects in mechanical construction or in the material of construction do not show absence of merit in an invention.

3. Governmental Use.

A brief reference to the final stand of the defense will conclude its consideration. Whether governmental use should be excepted from the exclusive proprietary rights given to the patentees is a policy for the consideration of Congress, not of the courts. The argument based upon the ruling in *Crozier v. Krupp*, 224 U. S. 290, 32 Sup. Ct. 488, 56 L. Ed. 771, ignores the distinction that the right of action given by the act of 1910 against the government does not grant immunity to any private trespasser upon the rights of patentees. The Bethlehem Steel Company, and not the United States, is the defendant here, and to say that, because of the government use of these projectiles, the plaintiff is deprived of a remedy for wrongs done it is to confuse the power to issue writs of injunction with the exercise of the discretion of the courts in their issue. The distinction also between legal rights and particular forms of remedy, legal or equitable, should not be lost sight of. We cannot too clearly keep before us the thought that equitable relief is always of grace and never of right, unless given by act of Congress, as well as the thought that all legal rights are to be kept inviolate. The plaintiff can be accorded its full legal rights without in any way interfering with the work of the army or the navy. To attempt the latter would be an act of manifest folly. The decree allowed meets this view of the case.

Findings of Fact.

The court finds the following facts:

(1) The plaintiff is the owner by assignment of the rights of the patentee in letters patent No. 945,492, issued January 4, 1910, on an application filed April 21, 1908.

(2) The patent was allowed by the Patent Office after hearing and argument, in which all the points of defense now raised were heard. Neither the United States nor the defendant were parties to this hearing or proceeding, and the existence of a description by Captain (now Major) Phillips of a similar form of projectiles was not known to the Patent Office.

(3) Captain (now Major) William A. Phillips, of the Ordnance Bureau of the War Department, devised and designed a projectile, and on May 4, 1907, put his ideas in the form of and incorporated them in a drawing. They were never put in practice, however, nor embodied in the concrete form of a projectile, nor were they ever made public. The drawing remained on file with the bureau, but the ideas were never tested by a trial. The patentee received no benefit from and had no knowledge of the Phillips design.

(4) On April 21, 1908, there was, in the state of the prior art, knowledge that a certain contour given to a projectile would prolong its flight by reducing the air resistance and by flattening the trajectory of the projectile. It had been experimentally determined and become known what contour would produce the best results in this respect. The patentee of the patent in suit availed himself of this knowledge and incorporated this contour in his design.

(5) It was likewise known that the ballistic effects of shots were increased by drawing the penetrating end of the projectile to a fine point and incasing this with a relatively soft metal, so as to form a nose for the projectile. The known result was that by this means the integrity of the piercing point was preserved and supported during penetration or the operation was facilitated. This soft metal nose was in use before the marked sharpness of point had become the accepted form of projectile. The observation may be added to this finding that the principle to which this device owed its success was a matter of opinion. The various theories advanced are those enumerated in the opinion filed herewith. The result is doubtless a combined result; all the causes suggested operating to a common end. One essential thing is the lateral support given to the point by the "radial inertia" of the incasing metal around the point being greater than the force of the deflecting tendency and the tensile strength of metal forming the nose of the point, and the latter being so adjusted to the "radial inertia" as that the penetration was well begun before the deflecting force operated.

(6) It was obvious that, to make an effective shot, the projectile must possess the power both of prolonged flight and fullest penetration, and it was known that these properties could be conferred by giving the projectile proper the penetrating shape and inclosing it in the proper contour of flight; these different forms to have such

duration as that the latter would be destroyed when the effectiveness of the former came into operation. What was not known, however, was the means of securing the full benefits of the one without interfering with the effective functioning of the other. The known devices were two. One was to so shape the nose of enveloping soft metal as to give it the contour of greatest flight. This was to make a solid head or projection incasing the point of the projectile. The other was to incase the projectile proper in a metal cap having the desired contour. The general idea expressed by each method was the same. The hood was to answer the double purpose of affording the flight property and give the required ballistic qualities by having both the flight form and being so disposed about the point of the projectile as to function as the metal nose was known to do. Neither device was a success. To make clear this finding and that which follows, some observations upon the causes of these failures are called for. To have the fullest ballistic properties of the projectile evidence themselves, the mark must not only be reached, but the projectile must be moving with the highest possible velocity, and its point must be protected from fracture or deflection when the impact comes. If the solid metal cap was not given the proper form, length and velocity of flight were lost. If this form were preserved, it could be done only at the cost of interposing a mass of metal in front of the point of the projectile. This mass of metal would not function as did a mere nose of soft metal disposed about the point. The support of the point is required to be a lateral support. This support must come from the radial inertia of the metal immediately around the point. The effect of massing metal in front was to destroy the radial inertia of the metal around the point by crowding. Disposing the metal of this solid cap differently changed the radius of the head, and this was found to lessen the penetrating effectiveness of the projectile. The difficulties of the problem were increased by the fact that the cavity provided for explosives weakened the head at the section of maximum strain, unless the orthodox radius of the head was preserved. The simple cap device was also a failure. This was due to the fact that it was either destroyed before impact, because the inertia of the cap caused it to be pierced by the point of the projectile, or, if preserved, the metal of which it was composed would not function as would the soft metal nose. The substitution of frangible for ductile metal was found not to be a help but a detriment.

(7) After and because of the discovery made by this patentee, it became known that, by incorporating in the previously made devices, and combining with the elements already present, the feature of an air space or cavity in the cap, the greatest flight and ballistic properties of the projectile were both preserved, and the former design was changed from a failure into an assured and accepted success. The salient feature of these successful caps is this cavity or air space in front of the soft metal nose given the projectile. The space in front of the nose of the projectile may be wholly empty or filled or partially filled for weight or otherwise without impairing the efficiency of the cap, if the filling is easily penetrable.

(8) The novelty and utility of the design of the patentee consists in the features that there can thereby be manufactured an armor piercing projectile which is an improvement over any which could before be made, giving to the projectile proper increased efficiency; that the projectile thus made possesses the properties of both length of flight and ballistics in greater degree than projectiles before existing, and that these results are accomplished by combining in one projectile, in a manner not before known, the tapering shape or contour which is productive of the greatest length of carry, the sharpness of point required for the greatest power of penetration, coupled with the support of the point, so as to make its sharpness effective by preventing the point from being upset, and such an arrangement and construction of the several parts as that the functioning of the one does not interfere with the efficiency of the others.

(9) The design of the patentee consists of an armor piercing projectile of standard, or any desired type, having any desired cavity for explosives, any desired degree of sharpness to enable it to most readily penetrate, with the point protected and supported in any desired manner to make its power of penetration effective, with the point inclosed in a shell or cap so formed as to give the whole projectile any desired contour to promote length of flight; the shell having a cavity or space in front of the nose of the projectile proper, so that the functioning of the nose construction may not be hampered.

(10) The patentee has invented or discovered a new and useful improvement in armor piercing projectiles not before known or used by others in this country, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, and not in public use or on sale prior to April 21, 1908.

(11) The invention and discovery of the patentee consists of those things set forth in claims 1, 2, 7, 8, 9, 10, and 11 of his application for letters patent, as follows:

"1. The combination of a pointed armor piercing projectile; a soft metal cap surrounding and supporting the point of said projectile; and a contour cap secured to said projectile having a shape adapted to give to the projectile, as a whole, that contour best adapted for piercing the air with the minimum resistance, and said contour cap, when in position on the projectile, leaving a hollow space between its extreme forward point and the forward point of said soft metal cap, substantially as described.

"2. The combination of a pointed armor piercing projectile; a soft metal cap surrounding and supporting the point of said projectile; a conoidal contour cap struck with a radius of substantially six diameters of the projectile; and means for so securing said contour cap to said projectile as to leave a chamber between the front of said soft metal cap and the extreme point of said contour cap, substantially as described."

"7. An armor piercing capped projectile having a sharp nose and a cap surrounding and supporting the nose of the projectile and provided with a chambered fore portion; the lateral faces of said chambered portion being gently convergent forward to approximately a point.

"8. A cap for sharp-pointed armor piercing projectiles having a base portion recessed to receive the tip of a projectile and to support it laterally and adapted to be secured on the tip of the projectile and a chambered front portion extending approximately to a sharp point.

"9. A capped armor piercing projectile, the cap of which has a chamber in

front of the projectile point; the solid portion of the cap being distributed mainly around but not in front of the nose of the projectile.

"10. A cap for a pointed armor piercing shell having a chambered front portion adapted to lie in front of the projectile point and recessed at the rear so as to fit around and laterally support the nose of the projectile; said recess extending nearly through the unchambered portion of the cap.

"11. A cap for pointed armor piercing projectiles having a radius of curvature of substantially six times the diameter of the projectile, and comprising a hollow pointed contour portion and a portion adapted to laterally surround and inclose the projectile point."

(12) The defendant has, since the grant of letters patent owned by plaintiff, made and sold improved armor piercing projectiles substantially identical with the projectile covered by said patent, and has infringed the same.

Conclusions of Law.

The court finds the following conclusions of law:

(1) Letters patent, No. 945,492, are valid, and the plaintiff has, and since March 9, 1910, has had, the sole and exclusive right to make use and vend the improved armor piercing projectiles described in claims 1, 2, 7, 8, 9, 10, and 11 of the application for said letters patent.

(2) The defendant has infringed upon said right of the plaintiff by making and vending projectiles, and is guilty of an infringement of said patent.

(3) The plaintiff is entitled to a decree for an accounting for profits.

(4) The plaintiff is entitled to a decree allowing a writ of injunction, excepting from the operation thereof all dealings between the United States of America and said defendant.

(5) The plaintiff is entitled to a decree for its damages.

(6) The plaintiff is entitled to a decree for costs.

HITCHCOCK v. AMERICAN PLATE GLASS CO. et al.

(District Court, W. D. Pennsylvania. September 10, 1914.)

No. 12.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—APPARATUS FOR GRINDING PLATE GLASS.

The Hitchcock patents, No. 934,442 and No. 934,612, each for a grinding apparatus, No. 1,056,415 for apparatus for applying abrasives to grinding apparatus, and No. 1,056,416 for method of applying abrasives to grinding apparatus, all having special reference to the art of grinding the surfaces of plate glass and to the grading of the sand used for such purpose, conceding their validity, are very narrow in scope and limited to the precise apparatus described. As so construed, *held* not infringed.

In Equity. Suit by Halbert K. Hitchcock against the American Plate Glass Company and James W. Cruikshank. On final hearing. Decree for defendants.

Christy & Christy, of Pittsburgh, Pa., for plaintiff.

Charles M. Clarke, of Pittsburgh, Pa., for defendants.

ORR, District Judge. The bill charges the defendants with infringement of certain claims of four separate patents of the United States issued to and owned by the plaintiff. These patents and the numbers of the claims alleged to be infringed are as follows: Patent No. 934,442, dated September 21, 1909, for grinding apparatus, claims 11, 12, and 13. Patent No. 934,612, dated September 21, 1909, for grinding apparatus, claims 2 and 3. Patent No. 1,056,415, dated March 18, 1913, for apparatus for applying abrasives to grinding apparatus, claims 3, 6, 9, 15, 20, and 23. Patent No. 1,056,416, dated March 18, 1913, for method of applying abrasives to grinding apparatus, claims 1, 2 and 6. The defenses relied upon as shown in the answer, are invalidity of the patents and noninfringement.

The patents and the present case have special reference to the art of grinding the surfaces of plate glass. The necessity of grinding plate glass arises from the fact that no known rolls which can be used to roll the molten glass into sheet form will render the glass smooth enough to take the final polish which renders it lustrous and transparent. Grinding machinery, therefore, is employed in connection with an abrasive substance, by means of which the glass is brought to an even surface. The abrasive substance in common use is sand, and the operation is successfully carried on by the use of a coarser sand at the beginning and progressively finer sands as the operation progresses, until the sheet of glass or the plate glass is ready for polishing, which is done with different substances. The glass to be ground is placed and fastened upon the surface of a round table. Above the table, and therefore above the glass, is apparatus to which is attached polishing bars, called runners, which rest loosely upon the surface of the glass. The table is whirled around at high speed, and the sand and water which are deposited on the surface of the glass are carried beneath the runners, which are rotated frictionally by the rotation of the table, and in this manner cause the sand to wear away the surface of the glass to the desired smoothness.

What has thus been briefly said is a statement, so far as it goes, of the process in use prior to the time of the application for any of the patents in suit and as it is in use to-day. The patents have to do only with the method of applying the abrasive and conserving the same for use in repeated operations.

Long prior to the application for the patents, the abrasive was used over and over again, and methods were employed for the separation of the abrasive, so that the coarser and the finer sands might be, to some extent at least, classified or graded. The method then ordinarily in use was as follows: Coarse ungraded sand was shoveled into a long V-shaped trough elevated above the table and somewhat inclined thereto, from which it was washed by means of a stream of water from a hose through a smaller trough and upon the surface of the glass upon the table. Around the table was a gutter into which the sand and water was caused to flow by the rotation of the table after it had performed its function as part of the grinding operation. From this gutter the mixture flowed into a ditch, in which were placed several barriers, over which the water and the sand suspended therein was required to flow,

but which served to trap some of the heavier and larger grains of used sand which were precipitated on the hither side of the barrier or baffle, over which the water and the smaller grains of sand flowed into the next compartment, and so on. The ditch ended in what was called the fine sand house in a long rectangular basin or pair of basins having an overflow at the end opposite that at which the sand and water entered. These precipitated sands were taken from the different compartments of the ditch and re-used in the grinding operation as required; the coarser sands being taken immediately from the ditch to the table through the V-shaped trough, while the finer sands were kept in bins to be thrown upon the table when required in the grinding operation. Hitchcock, the plaintiff, with a view to improving the methods then in use, conceived the idea of storing the successive grades of sand in suspension in a grading tank until the time for each grade to be used, and of permitting each grade to be discharged from the tank directly upon the table as required.

In his patent No. 934,442, he states, after describing the prior methods and his general purposes:

"The apparatus comprises the usual grinding mechanism in conjunction with a grading tank adapted to separate the abrading material into its various grades, and so located as to permit of its discharge to the grinding mechanism. My grading tank is so constructed that a stream of fluid passes upwardly from the tank at a constantly decreasing velocity, thereby counterbalancing the normal downward velocity of the particles of material in the tank and holding them in suspension in predetermined positions, which positions depend upon the upward velocity of the water, the frictional surface of the particles and the weight of the particles. The particles in which the ratio of the weight to the frictional surface is largest take the lowest positions, as the normal downward velocity of a particle through the water depends upon this ratio, which ratio, in particles of the same shape and density, increases with the size of the particles. The larger and more compact particles thus come to a position of equilibrium in a stratum in the bottom of the tank, where the upward velocity is greatest, while the other particles arrange themselves in a series of strata, the ratios of weight to resistance in liquid of the particles composing which strata decrease as the distance from the bottom of the tank increases. After the material has been graded, the contents of the tank is drawn off from the bottom, thus supplying the coarsest material to the table to do the rough grinding, and, as the surface of the glass is reduced, a finer and finer quality of material is supplied, until all the material has been withdrawn from the tank, and the plate under treatment has been reduced to the required degree of smoothness."

His drawings and his expressed preference in the specification contemplate a tank having the shape of an inverted cone. The sand mixed with water flows from the gutter around the table into a sump pit, from which it is forced up into the cone through its apex, and is maintained in suspension in the cone by a jet of water forced upward through the mixture. The claims of this patent relied on are as follows:

"(11) Apparatus for supplying abrasive to grinding or smoothing mechanism, comprising, in combination with a mechanism using an abrasive with water, a grading tank in position to discharge to the said mechanism, means whereby the abrasive in the tank is separated into a plurality of grades lying at different levels and ranging from coarse to fine, and connections from the tank to the grinding mechanism arranged to automatically discharge the coarsest material to the grinding mechanism first, and subsequently the other grades in the order of the size of the particles comprising the grades.

"(12) Apparatus for supplying abrasive to grinding or smoothing mecha-

nism, comprising, in combination with a mechanism using an abrasive with water, a grading tank in position to discharge thereto, means for carrying abrasive in suspension to the tank, and means whereby the abrasive is maintained in suspension in the tank until discharged to the grinding mechanism.

"(13) Apparatus for supplying abrasive to grinding or smoothing mechanism, comprising, in combination with a mechanism using an abrasive with water, a grading tank in position to discharge thereto, means for carrying abrasive in suspension to the tank, means whereby the abrasive is maintained in suspension in the tank until discharged to the said mechanism, and means whereby the proportion of abrading material to water may be varied."

The elements of these combination claims are as follows:

Claim 11: (a) A mechanism using an abrasive with water; (b) a grading tank in position to discharge to the mechanism; (c) means whereby the abrasive is separated into grades at different levels; and (d) connections from the tank to discharge the material to the grinding mechanism in the order of the size of the particles beginning with the coarsest.

Claim 12 comprises the elements (a) and (b) of claim 11, and the additional (c) means for carrying the abrasive in suspension in the tank and maintaining the same until discharged to the grinding table.

Claim 13 contains the same combination as claim 12, with an additional element (d) means whereby the proportion of grading material to water may be varied.

Patent No. 934,612 shows an elaboration of the idea embodied in the patent just considered, and describes an organized plan for grading the abrasive and feeding it to a plurality of grinding tables. It shows pairs of grading tanks similar to the grading tanks of the other patent. It shows means of discharging the abrasive material, not only upon the grinding tables, but means for discharging the finer sand into smaller tanks or into storage boxes, as may be desired. The grading tank in the patent now under consideration is not different from the grading tank in the patent just considered. The claims of the patent No. 934,612 in dispute are as follows:

"(2) Apparatus for supplying abrasive to grinding and smoothing mechanism, comprising in combination with a mechanism using an abrasive with water, and having a drainage pit, a preliminary grading tank having an admission passage leading from the pit to the bottom of the tank, means for securing a flow of liquid up through such passage and the tank, a second grading tank in position to discharge to the said mechanism, and a passage for conducting a portion of the liquid from the first tank to the second tank.

"(3) Apparatus for supplying abrasive to grinding and smoothing mechanism, comprising in combination with a mechanism using an abrasive with water, and having a drainage pit, a preliminary grading tank having an admission passage, leading from the pit to the bottom of the tank, means for securing a flow of liquid up through such passage and the tank, a second grading tank in position to discharge to the said mechanism, means for securing an upward flow of liquid therethrough, and a passage for conducting a portion of the liquid from the first tank to the second tank."

The combination of elements in claim 2 is: (a) A mechanism using an abrasive with water and having a drainage pit; (b) a preliminary grading tank having a passage from the pit to the bottom of the tank; (c) means for securing a flow of liquid up through such passage and the tank; (d) a second grading tank in position to discharge to the mechanism; and (e) a passage from the first to the second tank.

The combination of elements in claim 3 is the same as that in claim 2, with the additional element (f) means for securing an upward flow of liquid through the secondary grading tank.

The said patents Nos. 934,442 and 934,612 may well be considered together in the light of the prior art, because the applications therefor, as well as the patents, bear even date respectively. That sand mixed with water will remain in suspension to a greater or less degree, according to the movement or agitation of the mixture, is a fact of which mankind generally have knowledge. That sand is more or less graded by settling in moving water in such manner that the heaviest particles are the first to fall, while the finest are the last to settle, must have been known to all who have been familiar with running brooks or with the sandy beaches of the ocean. Hitchcock does not, as indeed he could not, claim the discovery of such phenomenon of nature. He claims the invention of apparatus by which such processes of nature may be controlled for a new and useful purpose in a new manner.

Taking up the elements of the several claims, in view of what has been already said, it is to be observed that: (a), the mechanism using the abrasive with water and having a drainage pit, is old. As to element (b), a grading tank, being the equivalent of the old partitioned ditch, cannot be broadly claimed, but must be limited to the form described in the patents, unless the claims further limit or enlarge its character or functions. In the first patent, we find the tank "in position to discharge to said mechanism." This language suggests an elevated position by which gravity becomes an operating force.

United States Patent to Murnane, No. 719,978, of February 3, 1903, shows grading tanks or boxes elevated above the level of the grinding mechanism by which the graded sand mixed with water may be discharged thereto. It is clear, therefore, that the grading tank of the several claims must be limited to the grading tank having the function and operation of the patent as therein specifically described. This is emphasized by consideration of element (c) of claim 11 of No. 934,442; i. e., means whereby the abrasive is separated into grades at different levels. Means for separating into different grades is old, and therefore the means described in the specification of the patent must be intended, except as limited by the words "grades of different levels." There is no way indicated in either of the patents whereby the abrasive may be kept at different levels, except by the use of the particular form of grading tank. The element (d) of claim 11, being the connection to discharge the material from the tank to the grinding mechanism, must be limited to the connections described in the specification, as other means of applying the graded material are in use. Element (c) of claim 12 must be limited to the means described in the specification, because some means of carrying and maintaining sand in suspension have always been known. Element (d) of claim 13, means whereby the proportion of sand to water may be varied, must also be limited to the means described in the specification, because other means were known and used. Patent No. 934,442 must therefore be limited to the construction therein described, except as to the form of the grading tank, whose function and use must be limited to that described in the patent.

Of patent No. 934,612, element (a), the mechanism using the abrasive

with water has a drainage pit which is old. Element (b), the grading tank, has a passage from the pit to the bottom of the tank, as in patent No. 934,442. Element (c), means for securing a flow of liquid up through said passage and the tank as securing the upward flow of liquid, is old. Element (d), a second grading tank, is but a duplication of the tank of patent No. 934,442; and element (e), a passage from one tank to another, must be deemed old, unless limited to that described in the patent. The element (f) of claim 3, being means for securing an upward flow of liquid through the second tank, must be limited to such as are shown in the patent. Patent No. 934,612 must also be limited to the construction therein described, except as to the form of the grading tanks, whose function and uses must be limited to those described in that patent.

Taking up next the patents No. 1,056,415 and No. 1,056,416, it is to be observed that the former covers an *apparatus* for applying abrasives to grinding apparatus and the latter a *method* of applying the same, which method is the one which the apparatus of the former patent is adapted to practice. The apparatus shown in the drawings of both patents is the same, and the descriptive portions of the specifications are identical. It is unnecessary to dwell upon the specifications at any great length, or to analyze severally the claims of each patent which are the subject of this litigation. It is with doubt that the court has been able to find that there has been any substantial advance over other patents of Hitchcock, two of which have been already mentioned and one of which will be hereafter referred to.

The claims of patent No. 1,056,415, which are in dispute, are as follows:

"(5) Apparatus for applying abrading material to grinding and smoothing mechanism, comprising, in combination, grinding mechanism, a preliminary grading tank arranged to receive the material from the grinding mechanism, a secondary grading tank in position to discharge to the grinding mechanism, means for producing a downward travel of the material relative to the liquid in both of said tanks, a conduit for conducting liquid and material from the preliminary grading tank and discharging the same into the secondary grading tank, and means for independently withdrawing the liquid and material from the different strata of said secondary grading tank.

"(6) In apparatus for applying abrading material to grinding and smoothing mechanism, the combination of grinding mechanism, a preliminary grading tank, a secondary grading tank, each provided with means for independently discharging material therefrom at different levels, a conduit for conducting the liquid and material from the grinding mechanism to the preliminary grading tank, a conduit for conducting the liquid and material from the preliminary grading tank and depositing the same directly in the secondary grading tank, and means for delivering material separately from different levels from the second grading tank to the grinding mechanism."

"(9) Apparatus for applying abrading material to grinding and smoothing mechanism, comprising, in combination, grinding mechanism, a preliminary grading tank arranged to receive the material from the grinding mechanism, a secondary grading tank in position to discharge to the grinding mechanism, means for maintaining the material in suspension in liquid in both of said tanks, a conduit for conducting liquid and material from the preliminary grading tank and discharging the same into the secondary grading tank, and means for independently withdrawing the liquid and material from the different strata of said secondary grading tank."

"(15) Apparatus for applying abrading material to grinding and smoothing mechanism, comprising, in combination, grinding mechanism, a grading tank

means for maintaining the material in suspension in a liquid in said tank, and means for independently and separately withdrawing material from different levels in said tank and conducting the same to said grinding mechanism."

"(20) Apparatus for applying abrading material to grinding and smoothing mechanism, comprising, in combination, grinding mechanism, a grading tank, means for maintaining the material in suspension in a liquid in said grading tank, a conduit and means for returning the material from the grinding mechanism and discharging the same into said grading tank, and means acting simultaneously with the introduction of the material into said tank for separately and independently withdrawing material from different levels therein and conducting the same to the grinding mechanism."

"(23) Apparatus for applying abrading material to grinding and smoothing mechanism, comprising, in combination, a grading tank in position to discharge to said mechanism means for introducing a liquid containing divided material in suspension into said tank, and a liquid supply pipe extending downwardly into said tank and discharging at the bottom thereof, and an overflow pipe from the upper portion of said tank."

The claims of patent No. 1,056,416, which are in dispute, are as follows:

"(1) The method of applying abrasives to grinding and smoothing mechanism, which consist in separating the material mixed with a liquid in a suitable vessel or tank into different grades, withdrawing said grades separately and in any desired sequence from said vessel, conducting the same directly to the grinding mechanism, and returning the same to the grading vessel while still mixed with the liquid and introducing the same into the top of said vessel or tank and regrading the same.

"(2) The method of applying abrasives to grinding and smoothing mechanism, which consists in separating the material mixed with a liquid in a suitable vessel or tank into different grades, withdrawing said grades separately and in any desired sequence from said vessel, conducting the same directly to the grinding mechanism, and returning the same to the grading vessel while still mixed with the liquid and introducing the same into the top of said vessel or tank and regrading the same; said grading, regrading, and circulation being carried on in an uninterrupted cycle with the material constantly mixed with the liquid."

"(6) The method of applying abrasives to grinding and smoothing mechanism, which consists in separating the same in a suitable vessel or tank into different grades, conducting the same in a state of suspension to the grinding mechanism, regrading the used material in a separate vessel, withdrawing the finer grades in said vessel from circulation, and conducting the several coarser grades from said vessel to the first-named vessel and regrading the same; said grading, preliminary grading, regrading, and circulation being carried on in an uninterrupted cycle with the material constantly mixed with the liquid."

In the specifications of these patents the patentee states:

"In my patent No. 934,441, issued September 21, 1909, is described and claimed a certain process for grading fine material in suspension, and in my patent No. 934,612, September 21, 1909, I have illustrated and described certain apparatus for grading material, conducting the same to a grinding apparatus, and then returning it for regrading. The operation of the apparatus for grading or separating the material into grades of the present application has certain general resemblances and follows the same broad principle as that described in my patent No. 934,441, above identified."

The patent No. 934,441 was offered in evidence and throws light upon the constructions of the patents in suit. That patent is for a process of which patents No. 934,442 and No. 934,612 are for apparatus by which said process may be used. That process contemplates the

use of a single grading tank, the operation of, which is described in the patent therefor in language similar to that hereinabove quoted from the specification of patent No. 934,442. The patent No. 934,441, by its drawings and as well its specification, contemplates the withdrawal of the different grades of suspended abrasive from the grading tank at the respective levels as the same may be required. There are variations in the method of the last patent for the withdrawal of the abrasive in the manner aforesaid, which are so slight as seem to be improperly regarded as protected by the later method patent or that apparatus patent. The specifications in the later patents clearly show that the grading tank of the Hitchcock patents is the grading tank of patent No. 934,441, and no other. The duplication of grading tanks and the duplication of connections thereto and therefrom cannot give much support to the position urged by the plaintiff that the said patents are of great novelty. Expressing grave doubts of the validity of the two later patents, the court, however, is disposed to sustain them as being but very narrow in their scope and as limited to the precise apparatus, as indicated in the drawings and specifications. Having thus limited the scope of the several patents relied upon by the plaintiff, the question of infringement must be disposed of.

From all the evidence in the case, the court must find that there has been no infringement. The method and the apparatus used by the defendant is more nearly like those in use before the Hitchcock invention. According to the defendant's method, the mixture of sand and water, as it flows from the grinding table, flows into a number of settling or grading boxes; the settling of the sand according to grade being caused by the failure of the sand in suspension to flow with the water and lighter grains over partitions of various heights, so that, by reason of the partitions which disturb the direct flow of the water and sand in suspension, the heavier sands are first precipitated and the lightest sand is the last precipitated. There is no suspension or maintenance of the sand in different strata or different levels, as contemplated by Hitchcock. The sand and water from each compartment of the defendant's apparatus is pumped by an air lift pump, which is of well-known type to the place where they are required. In the defendant's apparatus, the lifting power of air forces the liquid upward through the pump from the bottom of the compartment. Because of the necessity of such a pump, the grading tanks or boxes of the defendant cannot be said to be in a position to discharge to the grinding mechanism, within the meaning of the terms of the patent. That pumps may force sand and water a long distance and to various heights has long been well known. Without undue elaboration, it is sufficient to outline the method in the apparatus of the defendant as follows:

Unused coarse sand is applied by being floated to the grinding table by means of water from a hose. That sand and water flow from the gutter around the table into the sump pit, which is one of two parts of a box some 20 feet deep, divided from the other part by a partition reaching from the bottom almost to the top of the box. The coarse sand with water can be pumped directly to the grinding table from the sump pit by means of an air-lift pump extending almost to the bottom of the pit. The sand and water flow over the top of the partition into the ad-

joining subdivision of the box, and in so flowing some of the heavier sand is left in the sump pit, while the rest is carried with the flow of water. That box with its two parts has been called, for convenience, the primary grader. After passing over the partition in the primary grader, the sand and water is pumped by a similar pump extending nearly to the bottom of the subdivision into another box containing three subdivisions, which together are called, for convenience, the secondary grader. The sand and water as it empties into the sump pit, before it mingles with the sand and water flowing over the partition dividing the primary grader, must pass directly down to within eight feet of the bottom of the sump pit before it can take the upward turn; there being a partition extending from the top of the primary grader down to within that distance from the bottom. The sand and water which is pumped from the second division of the primary grader into the secondary grader must pass toward the bottom of the secondary grader to within eight feet of said bottom before the water can take the upward turn to pass over the partition between the first and second divisions of the secondary grader. The partition between the second and third divisions of the secondary grader is much higher than the partition between the first and second divisions of said secondary grader. The surplus water containing the mud and other substances too light and unfit for use in the grinding operation passes through an outlet at the top of the third division of the secondary grader into the sewer. In each of the three divisions of the secondary grader, as well as in each of the two divisions of the primary grader, is an air lift pump. The sand in suspension in the fluid pumped from the second division of the primary grader into the secondary grader, by reason of the three divisions and the two partitions, is precipitated, in so far as it fails to pass or does pass over the partitions in the secondary grader, into three grades of sand which can be used as needed in the grinding operation. That sand settles in the several subdivisions of the graders is clear from the evidence in this case, and that it has a tendency to choke the pumps is clear; the evidence being uncontradicted that it is sometimes difficult to remove a pump because the bottom of the pump is so deeply imbedded in the sand which has been precipitated in the division with which the pump is connected. To prevent the pumps from becoming inoperative by reason of the choking of the sand, each pump is provided with a spray pipe, whereby water can be admitted into the sand at the end of the pump, thereby giving the sand such consistency that it will flow upward through the pump in the manner required. It is urged by the plaintiff that the addition of the spray pipe, as it is called, is a fact strongly indicating infringement of the process of the plaintiff, which depends upon the upward flow of water to maintain the sands in suspension at the proper levels. The court, however, cannot so find. The water introduced by the spray pipes is not sufficient to force the sand upward in the division or tank and maintain it in suspension therein, but it is sufficient to enable the starting of the pumps and of the continued action of the pumps by reason of the water which comes into the compartments with the sand from the sump pit. The application of water to disturb a body of sand is not by any means a new idea. It is a matter of common knowledge that piles are some-

times sunk in sand by the running of a stream of water beneath the piles.

The defendant's apparatus is based upon the old idea of settlement and segregation of the abrasive material. The defendants are utilizing the old sluice-box construction in a rearranged form, without any production of such upward flow of water which would prevent the desired settlement of the sands to the bottom of the several boxes where the fixed pumps are located.

The bill must be dismissed at plaintiff's costs. Let a decree be presented.

VOSE v. UNITED STATES METAL PRODUCTS CO.

(District Court, E. D. New York. July 18, 1914.)

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—WINDOW STRIPS.

The Vose patent, No. 717,641, for metallic weather strips for windows was not anticipated, but discloses patentable novelty and invention; also *held* infringed.

2. EVIDENCE (§ 460*)—PAROL EVIDENCE—ASSIGNMENT OF PATENT—TITLE OF COMPLAINANT.

Where a patent assignment, although ambiguous as originally written, by reason of an amendment or addition, was recorded as an assignment of a particular patent, as against an infringer, parol evidence may be received to show that such patent was the one intended.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115-2128; Dec. Dig. § 460.*]

In Equity. Suit by Maria E. Vose against the United States Metal Products Company. On final hearing. Decree for complainant.

H. B. Philbrook, of New York City, for plaintiff.

Gerald Hull Gray, of New York City (Hartwell P. Heath, of New York City, of counsel), for defendant.

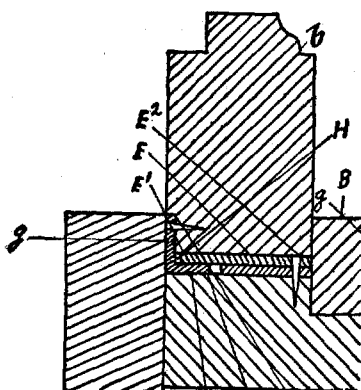
CHATFIELD, District Judge. Some of the facts in this case have been stated in the opinion just filed in the case of *Vose v. Roebuck Co.*, 216 Fed. 523. The testimony as to the members of the Vose family, their relations, and the assignments in question have been stated in that opinion; and the findings in the present case must be the same.

[1] Assuming, therefore, that title is in the plaintiff to a sufficient extent to enable her to maintain this action, we come down to the defenses of invalidity, anticipation, and noninfringement.

Although expert testimony has been given upon the question of invalidity, but little discussion would seem to be necessary. The various patents stated, such as: J. E. Jones, No. 435,841, September 2, 1890; W. Nicol, No. 601,081, March 22, 1898; G. W. Golden, No. 623,365, April 18, 1899; P. L. Hedberg, No. 626,492, June 6, 1899; J. Horsfield, No. 632,922, September 12, 1899; J. M. Lane, No. 637,623, November 21, 1899; G. W. Golden, No. 690,417, January 7, 1902;—show different arrangements of flat and returned or spring-shaped strips of metal, so arranged as to fill the space between the casing

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

jamb and the sash in a window frame, with close contact from the springiness of the material itself, or from an additional part inserted to produce that result. Each one shows a different arrangement of the parts; and inasmuch as there is some novelty in each arrangement, each device was deemed to show invention, and the patent allowed. The art seems to be very narrow, for none of the patents show broad claims which would prevent the use of the same idea in a slightly different form. But two of the Vose patents have any bearing upon this case, viz., No. 717,641 and No. 752,729. A number of buildings in New York and vicinity have been shown to have been furnished by the United Metals Products Company with metallic window cases, having metallic weather-strips of a kind shown by the model furnished by the defendant. This form of weather-strip has an angle-iron shaped strip attached upon the side of the window (instead of upon the edge or end), and a corresponding flat strip upon the casing, both extending within the space formed between the jamb and the sash. In the Vose patent, a cross-section, shown by the following diagram, will best explain what is meant:



In the Vose patent, the two strips of metal are intended to be used in a sliding contact, in which the spring of the metal is depended upon to obviate friction, or in which a small lath or strip is inserted under the outer edge of the strip attached to the jamb. The angle-iron strip is attached directly to the side of the sash. No substantial difference in function or in novelty is shown by this method of attachment; but it makes the defendant's structure resemble in that respect the Golden patent.

The defendant contends that no patentable novelty and no infringement is shown. The defendant's expert has called attention to the mechanical differences and similarities in the patents above referred to. The defendant's device shows slight changes from that shown by Vose, and might of itself be patentable if the Patent Office could find novelty in such slight changes, and should limit the Vose patent to the exact form shown in the drawings; but the claims of the Vose patent would seem to cover the defendant's structure.

Claim 2, of No. 717,641, is as follows:

"In a window, the combination of a casing provided with grooves or tracks, a sash adapted to move within said grooves or tracks, angle-shaped strips secured to said sash, and unbent flat strips located in said grooves or tracks and forming bearing surfaces for said sash, one portion only of said strips in the grooves being affixed to the casing, the free portion being adapted to cooperate with the angle-shaped strips to form a substantially dust-proof joint between the sash and casing, substantially as and for the purposes set forth."

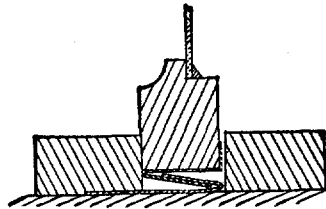
Evidence has also been offered by defendant to show that the models produced on behalf of the plaintiff were not manufactured until long

subsequent to the time at which Vose was said to be experimenting upon this particular device. It is sufficient to say that the testimony does not conclusively show that the Vose model was not constructed at about the time indicated by the plaintiff's witnesses.

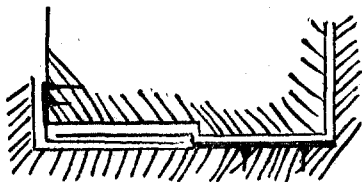
As to the question of patentable novelty, the patent to Golden, supra, is given as the closest reference by the defendant's expert, although this patent was not referred to in the file wrapper. It appears that the Golden patent secured a closed and tight joint by the use of two strips, one of which was to be attached to the sash and was in the form of an angle-iron, while the other was attached to the casing and had the part extending into the space between the sash and the case bent over in a V shape, within which V the extending part of the strip attached to the sash, slides. The following drawing will show what is meant:

The tongue and groove feature is the novel idea of this patent; but the specifications and drawings show plainly that the V-shaped piece is intended to, in a sense, furnish the element of a spring, such as is an essential feature in the Horsfield and Nicol patents. Vose makes no use of this spring or pressure idea, except in so far as the resilient qualities of the strips make it possible to avoid friction and binding, and yet have the parts remain close together. It would seem that the idea of forming a strip with two flat and unbent pieces (except as one of them should be shaped in the form of an angle-iron for attachment to the rabbeted sash), which would be a patentable invention over the Golden and earlier patents; but in the form presented by certain physical models on the trial (in which the strip attached to the jamb was not lifted by a lath or thin strip and in which, therefore, no space was provided for the passage of the two strips except as they were distorted out of shape by pressure upon each other), the weather-strip is unworkable. It would be impracticable, in either a metallic or a wooden window frame, to attempt to place a flat strip at such a delicately adjusted angle as would prevent friction. The testimony of the defendant's expert that the difference between the defendant's structure and the plaintiff's patent is sufficient to show noninfringement loses its force when we consider his testimony that the Vose device does not show patentable novelty by much greater changes from the prior art.

The plaintiff presented two other models, one of brass and one of zinc; and considerable testimony was taken with respect to the brass model, to determine the date at which such strips of brass could be obtained in the market. The witnesses for the plaintiff testified that this model was made before the date of application for the patent in suit. The defendant claims that no brass of this nature could have then been obtained, as the ordinary mercantile brass, with the proportion of ingredients shown by the metal in this model, was according to a formula not in use until several years later. They also present what is hardly more than a suggestion in the testimony, to the effect that Clifton Vose and John W. Rapp, formerly the president of the de-



fendant company, who had business relations with respect to metallic weather strips, were experimenting with a form of strip like this model, and that there was some suggestion of applying for a patent therefor, but that it was abandoned. The fact seems to be that the defendant used and continues to use, and has placed upon many buildings, weather-strips actually like these two models, and in which a cross-section is shown by the following diagram:



If this was a patentable invention over the patent in suit, and if, after Mr. Vose's disappearance, Mr. Rapp allowed the defendant to use this form of device without attempting to get a patent, then, of course, the plaintiff could not recover under charge of infringement of a different patent,

even though Clifton Vose might have been entitled to the rights of that invention, if a patent had been taken out, and even though the defendant may be using Vose's idea in the improvement of his own patent.

It appears from the testimony that the structure used by the defendant solves practically the difficulties which the Vose patent in suit was intended to meet, and furnishes a weather-strip which is usable and marketable in large quantities. The principle of this device is in all respects like that of the Vose patent in suit, except that the flat strip attached to the jamb or casing has an off-set which lifts the outer edge of the strip to the same extent that the entire strip would be raised by the lath or strip of wood, mentioned in the Vose patent. A corresponding rabbeting of the window sash is provided, so that the angle-iron can be set closer to the sash, and so that the entire space taken up by the strips will be less than would otherwise happen. It is evident that the defendant is thus using a device which, if not an infringement of the Vose patent, was an improvement thereon, and apparently was conceived, wholly or in part, by Vose. If this were patentable and Vose were the inventor, no one representing the defendant could claim it as his invention; and they have been and are using Vose's idea without legal right to do so; but that question cannot be determined in this suit. It merely furnishes an explanation of the source of this design and a probability of the time when the models were made. The testimony of the witnesses for the plaintiff would seem to be correct, so far as their identification of the models made by Mr. Vose is concerned; but there is room for error on their part in testifying that these models were made before the issuance of the patent. If, therefore, the models were made and experiments were carried on after the issuance of the patent, and if the device placed upon buildings by the defendants is an application by Vose of his own idea, then the use of these ideas would constitute infringement, if the claims of the patent are readable upon this structure, and if it is merely an equivalent for the patented device instead of a further invention.

It would seem that the change made by adding the angle-iron without rabbeting the side of the sash was covered by Claim 2. Rabbeting

the sash upon its face would be a mere mechanical improvement, even in this limited art, where novelty seems to lie in any new arrangement of parts. The change from a flat, unbent strip, lifted, if necessary, by a small piece of wood, in order to furnish freedom of movement for the strip passing underneath, to a shaped strip with the small shoulder or off-set, is a more serious proposition. Inspection of the patents in the prior art, however, would indicate that the word "flat," as used by Vose in his patent, meant that the strip should not be bent back so as to form an angle or strip of two thicknesses, or to form a spring. Vose's purpose was to simplify the construction; and his insertion of a small off-set to prevent binding and to allow at the same time close contact of the parts would seem, with respect to the other changes, to be a mechanical improvement that would be suggested upon use; and therefore the defendant's structure should be held to infringe the patent in suit.

As between Vose and his mother, some question over the additions and amendments to the assignments might have furnished greater difficulty in determining whether Exhibit 1 was an assignment of the patent actually issued upon January 6, 1903, but it has been recorded as such assignment. The evidence shows satisfactorily that Mr. Vose did transfer his property rights in this patent to his mother, and no evidence to the contrary has been offered.

The objection to the use of parol testimony to vary the terms of the written instrument would not seem to prevent parol testimony as to the identity of patent rights, referred to in a paper actually on file and questioned by a third party, who is bound by the notice of the record if that record is good. The mere suggestion of testimony or argument, based upon the reference in the assignment to the application for a patent about to be made, is not sufficient to defeat the plaintiff's rights.

The other two patents in suit (Nos. 752,729 and 814,893) have not been urged by the plaintiff, although one of these (patent No. 752,729) seems to present very closely the exact modification or mechanical change which was necessary to make the device of the Vose patent like the defendant's structure. The date of the application for this patent was the 11th day of February, 1903, and is so close to the times under consideration in the evidence that the models (Exhibits Nos. 8 and 9) may have had something to do with the taking out of the second patent, or the second patent may have suggested the modification of the first patent (No. 717,641), and have inspired the construction of these models; but as no infringement of these patents is urged, the decree must stand upon the first patent alone and for the the infringement of that patent.

The plaintiff may have a decree.

E. N. ROWELL CO. v. WILLIAM KOEHL CO.

(District Court, W. D. New York. August 31, 1914.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—MACHINE FOR MAKING PAPER BOXES.

The Rowell & Little patent, No. 844,190, for a paper box making machine, was not anticipated and is valid, but in view of the prior art is of narrow scope and limited to the construction shown in the specification. As so construed, *held* not infringed.

In Equity. Suit by the E. N. Rowell Company against the William Koehl Company. On final hearing. Decree for defendant. See, also, 194 Fed. 446.

Briesen & Knauth, of New York City, for complainant.

A. C. Wade, of Jamestown, N. Y. (Melville Church, of Washington, D. C., and Frank Keiper, of Rochester, N. Y., of counsel), for defendant.

HAZEL, District Judge. The Rowell & Little patent, No. 844,190, issued February 12, 1907, on application filed May 15, 1894, infringement of which is charged in the bill, relates to paper box making machines. Composing the top and bottom portions of the boxes are three separate and distinct parts, which are united by the co-operation of different instrumentalities embodied in the patented machine, such parts being (1) a ring or cylinder; (2) a disk, which is automatically pressed against the top of the ring; and (3) a wrapper or strip of paper for pasting the ring and disk together in such a way that the wrapper encircles the outside of the ring and projects at the edges. The top and bottom parts of the box are similar, save that an additional projecting ring is inserted in the bottom portion, over which the top portion is fitted. In finishing the boxes the operator removes them from the mandrel, and the edge of the wrapping paper at the disk end of the ring is pressed against the flat side of the disk, while the edge at the open end is pasted down on the inner side of the ring. The additional ring is then inserted in the bottom portion of the box, and a decorative strip of paper is sometimes added; but with these features we are not here concerned, as the patent in suit is simply for automatically uniting the disk and ring by a strip of gummed paper. Although the paper ring is manually placed on the upper mandrel while it is at rest, and the box afterwards removed therefrom by hand, the ring and disk are nevertheless joined together by automatic action of the machine—that is, by the intermittent rotation of a frame to which the mandrels are attached. The specification says:

"This invention relates to a machine for making paper boxes composed of a cylindrical body and a circular head, which are united by a band of gummed paper wound around the body and the head. One object of our invention is to produce a machine in which the feeding of the heads and the winding of the bands are effected automatically."

The claims relied upon are broadly for a combination of elements, and they read as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"1. The combination, with the movable table or support, of a mandrel movable toward and from said table or support, substantially as set forth."

"3. The combination, with the reciprocating table, of mandrels adapted to bear successively against said table, and a rotary frame provided with bearings supporting said mandrels, substantially as set forth."

"5. The combination, with the movable table, of a rotary frame, shafts journaled in said frame, and provided with mandrels adapted to bear against said table, substantially as set forth."

Claim 1 emphasizes the use of a mandrel in combination with a movable table or support, and claim 3 of a reciprocating table in combination with the mandrels to bear successively against the said table, while the fifth claim refers to the movable table with mandrels bearing against it. According to the specification, the paper disks, which are contained in a cylindrical magazine attached to the rear side of the main frame, are automatically brought, by means of a follower device, against the ring, which has been manually placed upon the upper mandrel while the wrapper is carried along on a raised portion of the reciprocating table.

The important defenses are invalidity, limitation of the claims, and noninfringement. It is sharply disputed that the claims in controversy are of narrow scope and limited to the reciprocating or movable table; the complainant contending that the claims are sufficiently broad to include the pressing wheel used by the defendant in co-operation with the rotatable mandrels.

If the patent is not a basic one, the charge of infringement is not sustained. The principal patents cited to limit the scope of the claims are the patent to Terry, No. 25,373, dated September 6, 1859, to Maxfield, No. 52,432, dated February 6, 1866, to Hatfield, No. 67,050, dated July 23, 1867, and No. 100,621, dated March 8, 1870, and to Johnston, No. 514,149, dated February 6, 1894. There is no doubt in my mind that the combination in suit of a reciprocating or movable table with two mandrels, or a rotating frame movable towards and from said table, with the various instrumentalities for pasting the disk to the ring body, was an improvement over the prior art, which prior art, however, precludes construing the claims in suit broadly enough to include defendant's machine, even though it achieves the same result. *Cimiotti Unhairing Co. v. American Fur Refining Co.*, 198 U. S. 399, 25 Sup. Ct. 697, 49 L. Ed. 1100.

It is insisted that there is a radical difference between complainant's machine and those of the prior art, which, as shown by the evidence, were for making hat boxes, collar boxes, and powder and cascarilla boxes. No reference whatever is found in the specification and claims in suit limiting the patent to the automatic manufacture of pill boxes, or small-sized boxes, as distinguished from large ones; and complainant's machine is, I think, readily adaptable to the manufacture of different sizes and types of paper boxes, and therefore the prior art figures as an important factor in the determination of the scope of the disputed claims.

Referring to the prior art, it appears that Maxfield, many years before the patent in suit, manually operated a machine for making collar boxes; the specification describing mechanism for securing a cylindrical body to a circular head by means of a strip of paper wound around

the box body, the instrumentalities for winding which consisted of a rotary mandrel co-operating in its forward and backward movements with a rotary pressing wheel. It is true that complainant's combination for making paper boxes is not disclosed, but with a reciprocating table in place of the pressing wheel, automatically operated, there would no doubt be a disclosure of claim 1 in suit.

The Hatfield patent, No. 100,621, is an important reference, and describes a machine for making so-called French edge boxes; that is, boxes with projecting disk edges, around which a paper strip or band is symmetrically pasted. In this machine a mandrel is used, on which is formed the box body in co-operative relation with a rotary pressing wheel or flanged roller; the latter being used to bind the gummed strip of paper to the ring and disk for the purpose of uniting them. The ring is placed on the mandrel as the pressing wheel is moved therefrom, and the circular heads are continuously fed to the rings from a magazine on the machine. The difficulties claimed by complainant to have existed in devising machines for making French edge boxes were apparently overcome by Hatfield in his adaptation of a suitable grooving in the pressing wheel, which received the edge and at the same time conducted the wrapping paper over it to the lower side of the box pressing it firmly thereto. See, also, Hatfield patent, No. 67,050, dated July 23, 1867, which had a fixed flange suitably marked or grooved for making French edge boxes.

There are, of course, obvious dissimilarities between the claims in suit and the Hatfield patent; for example, Hatfield, as already indicated, relied on the pressing wheel to perform the function of complainant's movable or reciprocating table, and he employed a single mandrel, quartered to separate and expand at the head, to secure the strip of gummed paper to the box frame, and also to assist in wrapping it around the projecting edge. The box parts were united by the joint action of a head rotated by power and a rotating pressing wheel. A magazine was provided for storing the disks and feeding them automatically and successively to the mandrel upon which the box was formed at the point where the pressing wheel contacts with the wrapping paper. In my judgment this patent negatives the asserted pioneer character of complainant's invention.

In the Partureau patent, No. 507,035, dated October 17, 1893, for pasting strips of paper on boxes, there is shown mechanism for winding wrapping paper around a box and into the opening edge by automatic means. The patent is not for making boxes, and is only important as showing that the patentees herein were not the first to devise automatic instrumentalities for pasting wrapping paper on a box frame, so as to overlap at the bottom of the box and to extend into the box opening. Complainant's expert witness is in doubt as to the practicability of the Partureau wrapper pasting device, but the specification, in its carefully detailed disclosure of the method for feeding the wrapping paper forward to the mandrel, seems to me to establish its operativeness.

In the Weil British patent, No. 12,180, there is shown a rotary frame having two mandrels attached thereto, one being idle while the other bears the box blank. True, there is no assembling of a disk

and box ring as in complainant's and defendant's machines; but the materiality of the Weil patent resides in the disclosure of a rotary frame gearing two mandrels which operate intermittently. The feature of the rotating frame with two mandrels of complainant's machine was therefore old, and it obviously did not involve invention to adapt such feature to a different type of box making machine or one that embodied additional instrumentalities. See, also, the Fairfield and Witherall patent, No. 409,674.

The complainant, however, urges the inoperativeness of the prior art, especially with reference to French edge boxes, and contends that the Hatfield structures were merely mechanical aids to hand labor and did not supersede the earlier methods of making paper boxes, while complainant's patent made a distinct advance in the art, with the result that paper boxes are no longer made by hand. But there is considerable evidence in the record to show that the Hatfield patents were fairly practicable and operative. Several machines made in accordance therewith were operated by Kerr & Co. in 1870 for making pill, paste, and powder boxes, and subsequently another machine was built under this patent for making collar boxes. Hatfield, who was sworn, firmly testified that he distinctly remembered that his machines were adapted to turn the edges of the paper into the inside of the box, and explained that the wrapping paper was not automatically fed continuously to the machines, because at that time strips of paper on reels were not considered suitable for such work. There was also testimony by the witness Wilcox, corroboratory of Hatfield, to the effect that not only collar boxes, but pill boxes as well, were made on Hatfield machines, which he recalls had mandrels and pressing rollers suitably grooved for making French edge boxes. The witness Conderman, who also operated the Hatfield invention, testified that boxes of various sizes and kinds were made thereon, and that the machines were rapidly operated, doing away with considerable hand labor. All of which testimony reasonably satisfies me that the patentees herein were not the first to automatically make French edge paper boxes, and that the machines of Hatfield operated with considerable success for an extensive period.

Defendant's machine is covered by patent No. 1,098,314, issued since the hearing to Clark & Illy, patentees. It has a frame and pressing wheel not unlike those of Maxfield and Hatfield; it has box forms on two mandrels which operate intermittently to perform their functions. While complainant's reciprocating head or table carries or supports a strip of wrapping paper, which at the proper time is wrapped around the box body or ring and disk on the mandrel, and the wrapping paper is cut in lengths sufficient for binding or wrapping one box as the reciprocating table goes to the left, the defendant's machine does not operate in this manner. The latter's strip of paper is not supported in its rotation, but is extended from the reel above the pressing wheel to the box at the head of the mandrel. The wrapping paper is not cut in lengths before it is wrapped around the box as in complainant's patent, but is severed while the wrapping is in process. The restricted scope that, in view of the disclosures of the

prior art, must be accorded the claims in suit, will not permit the defendant's pressing wheel to be considered the equivalent of complainant's movable or reciprocating table, and defendant's adaptation is deemed a material differentiation from complainant's combination.

The defendant claims that the prior Johnston & Marshall patent, No. 514,149, granted February 6, 1894, owned by the complainant company, was a complete anticipation of the patent in suit, and there was considerable testimony in relation thereto. The record shows that in 1890 the witness Johnston was employed by Rowell & Little at Batavia, N. Y., and remained with them for about six months. While so employed he saw there at the factory a box making machine having a circular table, which after leaving the employment he improved, and together with Marshall received therefor the patent under discussion. Claims covering the broad invention were included in said patent, and when Rowell & Little learned of this they began negotiations with Johnston & Marshall to obtain a disclaimer through their solicitors, who had previously prepared the drawing and specification for Johnston. Rowell & Little asserted that the solicitors had erroneously credited Johnston with the broad invention of their box making machine invented by them. The negotiations resulted in a separation of the broad and specific claims, the former being voluntarily disclaimed by Johnston in February, 1894, and on March 3, 1894, the patent was duly assigned to Rowell & Little. A concession of priority was also signed, stating in effect that Rowell & Little, and not Johnston, were the inventors of the machine embodied in the patent in suit.

Defendant contends that the disclaimer and concession of priority were fraudulently obtained, in that both Johnston and Marshall were under age at the time of their execution, and that the purpose, according to defendant's brief, was to suppress the disclaimer for over seven years, and to withhold from the public any knowledge of the invalidity of the Johnston patent, and of the proposed Rowell & Little patent, or the application therefor. Inasmuch as the evidence shows that guardians were duly appointed for both Johnston and Marshall before either the disclaimer, concession of priority, or assignment of the patent were executed and delivered, it is difficult to perceive the commission of any fraudulent act in relation thereto.

It further appears that, after the delivery of the assignment and concession of priority, Rowell & Little filed an application for the patent in suit, which was several times rejected on the Johnston & Marshall patent, and that finally interference was declared, and, the concession of priority having been filed, it was acted upon and the patent issued. Invalidity of the patent in suit is also urged by defendant on the ground that the concession of priority was without the written consent of the assignees of the patent, and that the disclaimer was void for failure to promptly file the same. But in my judgment the validity of the patent in suit was not affected by such failure, or by any of the proceedings relating to the Johnston patent, and it is therefore unnecessary to treat of them more fully.

My conclusion is that claims 1, 3, and 5 of the patent in suit are

valid, but were not for a pioneer invention, and that they are in fact of narrow scope, and must be limited to the construction shown in the specification. Defendant's machine, as hereinbefore stated, is materially different from complainant's, and is not an infringement thereof.

A decree dismissing the bill, with costs, may be entered.

AMERICAN HOIST & DERRICK CO. v. NANCY HANKS HAY PRESS & FOUNDRY CO. et al.

(District Court, N. D. Georgia, W. D. July 28, 1914.)

No. 12.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SLING FOR SUGAR CANE.

The Crosby patent, No. 758,959, for a sling for holding sugar cane, while all of the elements of the device are old, is for a new and useful combination, and discloses patentable invention; also *held* infringed.

2. PATENTS (§ 82*)—COMBINATIONS—RIGHT TO EQUIVALENTS.

The owner of a patent in its commercial article may substitute well-known equivalents for any of the parts, without depriving its product of the protection of the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 105-107; Dec. Dig. § 82.*]

3. PATENTS (§ 102*)—SUITS FOR INFRINGEMENT—DEFENSES.

A verbal error or other insufficiency in the oath attached to the application on which a patent was granted constitutes no defense to a suit for infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 142; Dec. Dig. § 102.*]

4. PATENTS (§ 112*)—SUITS FOR INFRINGEMENT—DEFENSES—PROCEEDINGS IN PATENT OFFICE.

Courts will not look with great favor on objections to the history of a patent in the Patent Office, which has been finally granted after thorough examination when such points are collaterally made, and particularly when made by an infringer.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 162-165; Dec. Dig. § 112.*]

In Equity. Suit by the American Hoist & Derrick Company against the Nancy Hanks Hay Press & Foundry Company, a copartnership, and Charles H. Field, James P. Field, and John Field. On final hearing. Decree for complainant.

Timothy Dwight Merwin, of New York City, for complainant.

James P. Field, of Atlanta, Ga., a member of defendant firm, for defendants.

NEWMAN, District Judge. [1] This is a suit brought by the complainant against the defendants to enjoin the infringement of claim 1 of certain letters patent No. 758,959, issued by the United States Patent Office to Oliver Crosby, American Hoist & Derrick Company, assignee, May 3, 1904. Claim 1 of said patent is as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
216 F.—50

"In a device of the class described, combination with a rope, a clamp slidable thereon, a dog carried by said clamp and adapted to engage said rope to prevent its being drawn in one direction, but allowing it to be drawn there-through in the opposite direction, means carried by said clamp for holding the end of the rope to form a loop, and a dog for securing said means in position holding the rope."

The patent is for a sling for holding sugar cane. Two questions are involved in the case. The first is whether the patent named is invalid for want of novelty and invention, and the second, whether the defendant is infringing it.

The patent is a combination of admittedly old elements. The claim for it is that the combination of these old elements produces a new and useful result. The purpose and use of the device is the binding of sugar cane into tight bundles for storage in the vicinity of the sugar mill until required for use in the operation of the mill. The method of use is to take the sling, and the rope or chain attached thereto, to the field and place it in the proper position on the cart before the cane is loaded. When the loading is completed the chain or rope is brought around the load and the ring in the end of it is placed in the device provided for its reception in the sling. On reaching the mill a derrick picks up the bundle thus made, by the end of the rope or chain designed for that purpose, and the act of thus lifting the load from the cart compresses it into a tight bundle, and it is held in this compressed condition, by means provided, and stored near the mill. When required for use at the mill, the derrick picks up the bundle in the same way, carries it to the conveyor table, and then, being tripped, drops the loose cane on the conveyor table to be placed on the conveyor and carried to the mill. This is a brief, but fairly accurate, statement of the use of the device in controversy here.

It will be perceived from claim 1 that the patent embraces a rope, a clamp sliding thereon, a dog carried by the clamp, and so arranged as to engage the rope and prevent its being drawn in one direction, while it may be drawn in the opposite direction, and a means carried by the clamp for holding the end of the rope so as to form a loop, and a dog securing the means in position, holding the rope. Each of these separate elements was well known before Crosby applied for his patent in 1898, but it is the combining of them in a device for accomplishing the purpose above set out as to the practical handling of sugar cane for use in the mills, and the practicability and efficiency with which the device accomplishes the desired result, that the complainant claims renders it patentable.

Several prior patents have been offered in evidence, only four of which relate to cane slings, the others all belonging to other arts. Of these four the so-called second Mallon patent, No. 610,816, application for which was filed on May 31, 1898, some six weeks after the date set by Crosby for the invention of his patent, April 15, 1898, cannot be considered, since the testimony establishing the date of the invention is not questioned or contradicted in any way here. Another of these four, patent No. 922,929, called here the third Mallon patent, was not applied for until January 18, 1909, 4½ years after the Crosby patent issued, and of course cannot be considered. The earliest of these four cane

sling patents is what is known here as the Ancoin patent, No. 543,666, issued July 30, 1895, about three years before the date of the Crosby application. This patent, while it contained some of the elements of the Crosby patent, did not contain them all, nor in fact the most important and most vital ones. The first Mallon patent, No. 571,675, issued November 17, 1896, is chronologically the second of these cane sling patents, and the last to be mentioned here. This, like the Ancoin patent just mentioned, contained some of the means found in the Crosby patent, but only partially accomplished the end desired. It is, like the Crosby patent, a tripping sling, but has no arrangement or means by which the bundle of cane can be held as a bundle until required for use, which is a vital point in the Crosby device.

It is therefore evident that none of these prior patents anticipates or renders void the Crosby patent, as none of them has the same elements or combination of elements, or accomplishes, in whole, the desired purpose. But it is conceded that all the elements embodied in the Crosby patent in question here were known in the prior arts, although not in combination or put in operation together as they are in the Crosby patent. It is perfectly clear from the evidence that Crosby, by uniting these elements in his patent, accomplished, in a feasible and economical manner, the result sought for, which had never before been done. I do not think that the putting together of these different elements into the device for which the patent was granted involved mere mechanical skill, as claimed by defendants, but I am satisfied that it was accomplished by the exercise of the inventive faculty in conceiving a method of so putting these elements together as to accomplish a new and useful result, or the same result in a better way than it had ever been accomplished before. Besides this, we have a presumption in favor of the patentability of a device where a patent has been allowed by the Patent Office, which is certainly not sufficiently overcome by the evidence here, either by the proof or the illustration made of the use of the apparatus in the presence of the court.

The rule laid down by the Circuit Court of Appeals for the Eighth Circuit, in *St. Louis Street Flushing Mach. Co. et al. v. American Street Flushing Mach. Co.*, 156 Fed. 574-576, 84 C. C. A. 340, in reference to combination patents, is as follows:

"There is no claim that any of the elements of the patent are new. The tank, the water under pressure, the nozzle, the delivery apertures, and the means of adjustment are all old, but the contention is that the particular combination of these elements in the patent produces a new and useful result, and is patentable. The new and useful result claimed is the effective loosening up of dirt and material on the street and washing them off into the gutter by one action without injury to the street. To accomplish a new and useful result within the meaning of the patent law (section 4886, Rev. St. [U. S. Comp. St. 1901, p. 3382]), it is not necessary that a result before unknown should be brought about, but it is sufficient if an old result is accomplished in a new and more efficient way. If the value and effectiveness of a machine are substantially increased, the new combination of old elements, which does it, is patentable."

In *E. H. Freeman Electric Co. v. Johns-Pratt Co.*, 204 Fed. 288, 122 C. C. A. 512, the same rule is expressed in the first headnote in the following language:

"Each and every separate element of a combination may be old, and yet the combination as a whole may show patentable novelty and invention, if the several elements so coact as to produce a result which is either new in itself, or by means of such coaction is produced in a novel or improved way."

Tested by the rule laid down in these decisions, and in many others which might be cited, there is no question in my mind that the Crosby combination of old elements in his device for accomplishing the desired result, was patentable.

[2] It is claimed, however, that complainant's cane sling as now in commercial use—as it is now manufactured and sold—is a different device from that shown in his patent. The changes made by the complainant company in its cane sling are these: First, the change from a pair of jaws locked in closed position by a spring-pressed dog, to a tumbling hook, held in closed position by a spring-actuated dog, the latter being, as was the former, for the purpose of releasing the compressed bundle; and, second, the change from the use of a rope to a chain, it having been found, as the evidence shows, that the latter was more desirable for the reasons that the rope was affected by the dampness and mud in the cane fields, and was not as durable as a chain would be. Also the change from the rope to a chain necessitated a change in the device from a cam to a pawl, that is, instead of retarding the backward motion of the rope, after the cane had been sufficiently compressed, by the pressure of a cam on the rope, the backward motion of the chain is prevented by the pressure of a pawl against the links of the chain, thus holding the chain rigidly in position, and also the face of the pulley over which the rope passed was changed from a concave surface to fit the rope, to a V-shaped surface to fit the links of the chain.

The complainant company, as I understand from the evidence, manufactured a large number of cane slings in strict accordance with its patent, which were sold and no complaint was made of them in any way, but as the manufacture and sale of these cane slings progressed, it was found advisable to make the changes indicated for the purpose of accomplishing the results obtained before and to accomplish them in a more satisfactory manner. As to the change from the rope to a chain, the one is easily the equivalent of the other. As to the change from a cam to a pawl, exactly the same result was obtained, that is to prevent the binding element from sliding backward after having been drawn taut. And as to the other change, the releasing means, the same result was accomplished by the substitution of the tumbling hook for the closed jaws.

It will be seen from many authorities, some of which will be cited herein, that the interpretation of the law on the subject of equivalents is very broad, the only necessary factors being that the element substituted shall, in practically the same arrangement of parts, perform the same function in accomplishing the same result, and that it shall have been known as a proper substitute for the element displaced thereby at the time of the issuance of the patent. Under this interpretation of the law, there can be no doubt but that the changes from the patented device to the present commercial device of complainant company are each and all mere equivalents, and not such changes as would deprive the

commercial device of the protection of the letters patent granted to complainant on its original device.

What seems to be the law on this subject is very clearly stated in Walker on Patents (3d Ed.) p. 297, as follows:

"No substitution of an equivalent, for any ingredient of a combination covered by any claim of a patent, can avert a charge of infringement of that claim. But like substitution of something which is not an equivalent will have that effect. The doctrine of equivalents may be invoked by any patentee, whether he claimed equivalents in his claim, or described any in his specifications, or omitted to do either or both of those things. The patentee, having described his invention and shown its principles, and claimed it in that form which most perfectly embodies it, is, in contemplation of law, deemed to claim every form in which his invention may be copied, unless he manifests an intention to disclaim some of these forms. Combination patents would generally be valueless in the absence of a right to equivalents, for few combinations now exist, or can hereafter be made, which do not contain at least one element, an efficient substitute for which could readily be suggested by any person skilled in the particular art."

Continuing upon the same subject, this authority says, in section 353:

"Function must be performed in substantially the same way by an alleged equivalent, as by the thing of which it is alleged to be an equivalent, in order to constitute it such. This substantial sameness of way is not necessarily an identity of merit, nor a theoretical scientific sameness. In a purely scientific sense, a screw always performs its function in a substantially different way from a lever, and in substantially the same way as a wedge. Screws and wedges are equally inclined planes, while a lever is an entirely different elementary power. But screws and levers can practically be substituted for each other in a larger number of machines than screws and wedges can be similarly substituted. When a lever and a screw can be interchanged and still perform the same function with a result that is beneficially the same, they are said to perform the same function in substantially the same way."

In *American Steel & Wire Co. of New Jersey v. Denning Wire & Fence Co.* (C. C.) 160 Fed. 108, 121, the court, in discussing this question of equivalents, says this:

"The term 'mechanical equivalent,' as used in the law of patents, means that each of the ingredients comprising the invention covers every other ingredient which, in the same arrangement of the parts, will perform the same function, if that was well known as a proper substitute for the one described in the specifications at the time of the patent" (citing *Imhaeuser v. Buerk*, 101 U. S. 647-656, 25 L. Ed. 945; *National Hollow B. B. Co. v. Interchangeable B. B. Co.*, 106 Fed. 693-710, 45 C. C. A. 544).

And further in the same opinion the court says this:

"The authorities concur in holding that the substitution of an equivalent of a thing in the sense of the patent law is the same as the thing itself; so that if two devices do the same work in substantially the same way and accomplish substantially the same result, they are the same even though different in name, form, and shape."

See, also, decision of the Supreme Court of the United States in *United States v. Soci  t   Anonyme Des Ancienne Etablissements Cail*, 224 U. S. 309, 322, 32 Sup. Ct. 479, 56 L. Ed. 778.

Coming next to the question of infringement by the defendants of complainant's patent, it is not difficult of determination. It is perfectly plain from the oral evidence and from the exhibits in evidence that the defendants have infringed the complainant's device as changed

from the exact features of its patented structure to that of its commercial structure. The defendants' testimony shows that they had before them all of the patents granted for cane slings when they were considering the character of sling they would manufacture and sell, and the form adopted by them is so close an imitation of complainant's device as that the slight difference in the shape of the device for holding the chain when the bundle is constricted and in the shape of the releasing dog are certainly not sufficient to justify the defendants in the manufacture and sale of their sling, and, as shown in the operation in the courtroom, in the presence of the court, it works in precisely the same way as the complainant's sling. In this illustration of their practical use in the presence of the court the two slings were operated on the same bundle of cane at the same time, one supporting each end of the bundle, and the result of this illustration or exhibition was that the operation of the two slings was practically, if not identically, the same. It having been held above that the commercial device of complainant is protected by letters patent granted to complainant on its original device, it necessarily follows that defendants' device is a clear and undoubted infringement of Crosby's letters patent.

[3] It may be proper to refer briefly to some suggestions made by the defendants in the brief filed by them. The first of these is that the Crosby patent is void because, in making the application, he did not make the proper oath. The claim is that he used the word "the" instead of the word "his" in the phrase "that he does not know and does not believe that the same was ever known or used before *the* invention or discovery thereof." It seems to me this would be wholly insufficient as a basis for any objection to the sufficiency of the patent. It is held, however, that infringers have no right to make points like this on the oath attached to the application, even if such an oath is absolutely necessary to the validity of the patent. *Holmes Burglar Alarm Tel. Co. v. Domestic, etc., Tel. Co.* (C. C.) 42 Fed. 220-222.

Another point made by the defendants is that the patent is void "because the application was not completed and prepared for examination, in essential parts within one year after the date of filing the application." Rev. St. § 4894 (U. S. Comp. St. 1901, p. 3384). The record does not show that more than a year elapsed between a letter and its reply, although exactly one year did elapse in one instance. The correspondence between the attorneys for Crosby and the Patent Office seems to have been continuous and at intervals of within one year, so that this point is not sustained by the proof.

[4] "That the application was not prosecuted within one year after official action therein, and no showing was made why the delay was unavoidable," and therefore the patent is illegal and void, is another point made by the defendants. As has been stated, the correspondence between Crosby's attorneys and the Patent Office was continuous. It is true it was several years before the patent was finally granted, but during all that time suggestions were being made by the examiner of the Patent Office, which brought about changes by Crosby from time to time, until finally the patent and the drawings of the same were completed to the satisfaction of the Patent Office and the patent was grant-

ed, as stated, on May 3, 1904. It seems to me the courts will not look with great favor on objections to the history of a patent in the Patent Office when it has been finally granted after thorough examination, when such points are collaterally made, and particularly when made by a recognized infringer of the patent.

I do not think any of these points are meritorious, even in the event they would be sustained if made directly against the validity of the patent.

The utility of complainant's cane sling is manifest from the evidence, which shows that 270,000 of these cane slings have been manufactured and sold by complainant, and, so far as this evidence shows, the use of them has been perfectly satisfactory to the purchasers. Complainant's commercial success in selling these cane slings for quite a number of years is clearly established by the evidence in the case.

The result of the foregoing is that complainant is entitled to a decree against the manufacture and sale by the defendants of these cane slings, because the same are an infringement of letters patent No. 758,959, granted to Oliver Crosby, the complainant, the American Hoist & Derrick Company, assignee.

GRAND UNION TEA CO. v. EVANS, Dist. Atty. of Multnomah County, et al.

(District Court, D. Oregon. August 17, 1914.)

No. 6261.

1. INJUNCTION (§ 85*)—STATE STATUTE—ENFORCEMENT—CRIMINAL OFFENSE.

A court of equity has jurisdiction of a suit to enjoin state officers from threatened enforcement of a state peddlers law, as against transactions constituting interstate commerce, and affecting complainant's property rights, though the violation of the law is punishable as a criminal offense.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. § 85.*]

2. INJUNCTION (§ 118*)—ENFORCEMENT OF PEDDLERS LAW—INTERSTATE COMMERCE—RELATION BETWEEN COMPLAINANT AND REPRESENTATIVES.

Where complainant employed many representatives in Oregon to sell its goods in interstate commerce, adopting several methods to secure itself from loss, such as requiring bonds from agents, shipping goods to them C. O. D.; requiring agents to pay drafts attached to bills of lading, or to establish a credit with complainant, etc., a bill to restrain the enforcement of the Oregon Peddlers Law (Laws 1909, p. 386) against complainant and its agents, alleging that complainant's solicitors are its agents and representatives receiving orders for it and not for themselves, and that the goods handled by them remain and are complainant's property until delivered to the customer, sufficiently alleged that the relation between complainant and its solicitors was that of principal and agent, and not that of buyer and seller so as to deprive complainant of capacity to sue.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 223-242; Dec. Dig. § 118.*]

3. COMMERCE (§ 40*)—INTERSTATE COMMERCE—PEDDLERS LAW.

Complainant, a New Jersey corporation, was engaged in selling goods packed and labeled for it in New York, from which place they were forwarded by complainant for sale and distribution to various parts of the Union. Complainant maintained a store in Portland where a small part

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of its merchandise was sold at retail, but the principal part of its business was done through solicitors who took orders for future delivery, which were sent to the store, where they were filled and the goods shipped to or delivered to the solicitors, who delivered the same to the customers, and collected the price on their next trip over their respective routes. The agents were not permitted to sell goods at retail from their wagons, or in any other manner than by taking orders for future delivery, and all goods not accepted by customers were returned to the store. All of the goods shipped to agents were shipped to and addressed to the company, in care of the agent, and remained the property of the company until actually delivered. The Portland store did not keep a stock of goods with which to fill orders taken by the solicitors, but orders for goods were sent to complainant each week, prior to the actual receipt of the customers' orders by the agent, but while such orders were being taken in the field and during the time the goods were in transit. *Held*, that such transactions constituted interstate commerce, and that complainant and its agents were therefore not subject to the Oregon Peddlers Law (Laws 1909, p. 386).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 29, 30; Dec. Dig. § 40.*]

In Equity. Suit by the Grand Union Tea Company, a New Jersey corporation, against Walter H. Evans and others, officers of Multnomah, Clatsop, and Hood River counties, to restrain them from enforcing or attempting to enforce against complainant and its representatives the Oregon Peddlers Law. Decree for complainant.

Maurice B. Dean, of New York City, and John M. Gearin, of Portland, Or., for plaintiff.

Walter H. Evans, of Portland, Or., A. J. Derby, of Hood River, Or., and C. W. Mullins, of Astoria, Or., for defendants.

Before GILBERT, Circuit Judge, and WOLVERTON and BEAN, District Judges.

BEAN, District Judge. This is an application for a preliminary injunction restraining various officers of the state from enforcing or attempting to enforce, as against the plaintiff and its representatives, the Oregon Peddlers Law, upon the ground, among others that, as applied to the plaintiff, the law constitutes an unconstitutional interference with interstate commerce. An order to show cause was issued, which was answered by a motion to dismiss.

From the complaint it appears that the plaintiff is a New Jersey corporation engaged in selling goods prepared and manufactured for it by Jones Bros. Company, a New York corporation. The goods, when manufactured, are packed and marked with the label and name of the plaintiff and delivered to it at the factory, from which place they are forwarded by the plaintiff for sale and distribution to various parts of the Union. The plaintiff maintains a store in Portland where a small part of its merchandise is sold at retail over the counter, but the principal part of its business in Oregon is done through solicitors who go regularly from place to place on fixed routes soliciting and taking orders for future delivery. The orders, when taken, are sent to the Portland store by mail, or taken there personally by the solicitors, where they are filled and the goods shipped to or delivered to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the solicitors, who deliver the same to the customers and collect the purchase price on their next trip over their respective routes. The agents or solicitors are allowed a certain percentage of the original price as a commission, but are not permitted to sell goods at retail from their wagons or in any other manner than by taking orders for future delivery, and all goods not accepted by customers are returned to the store, and placed in stock for sale over the counter.

The agents or solicitors are, for convenience, divided into five classes: First, those who have given a bond to the company to save it harmless from loss for the value of goods placed in their custody for delivery. Second, those who act on a C. O. D. basis; that is, at the time the goods to fill the orders taken by them are shipped, a bill of lading with draft attached is sent to some local bank where the agent desires receipt of the goods, or sent along with the goods to the local freight office, and the agent is required to pay such draft before receiving possession of the goods. Third, those who send in with the orders taken by them cash or checks to cover the value thereof, less commission. Fourth, those who have established a credit with the company and are not required to pay for goods shipped to fill orders taken by them until they secure a second order. And, fifth, those who have deposited cash with the plaintiff as security for goods shipped to them.

All of the goods shipped to agents to fill orders previously taken are shipped to and addressed to the company in care of the agent and remain the exclusive property of the company until actually delivered to the customers, and all cards, memoranda, or information concerning the customers along the various routes belong to the plaintiff, and the agents or solicitors are required to deliver the same to the plaintiff upon the termination of their relation with it.

The Portland store does not keep a stock of goods on hand with which to fill orders taken by the solicitors, but experience has shown the manager thereof about how many orders will come in each day and each week in the usual course of trade, and in order to fill the continually recurring orders, he will anticipate, by a few days only, the procurement of goods sufficient to fill such orders by ordering them from places outside of the state. Goods not of a perishable nature, such as soap and baking powder, are sent from the home office by water to Portland. These goods are, to some extent, kept in stock, but the orders of the Portland store are not greater than may be received in car load lots and as are necessary to fill the constantly recurring orders. Practically all the other goods, such as teas, coffees, chocolates, cocoas, etc., are ordered from Seattle in the state of Washington in no greater amounts than necessary to fill the recurring orders received in the usual course of trade, and so as to match orders which are being taken when the goods to fill them are in transit. The course of business being as follows: The manager of the Portland store makes up his orders for shipment on Friday or Saturday to send to Seattle on the following Monday. The goods arrive at Portland on Friday or Saturday of the same week they are ordered, and are used to fill the orders which the solicitors send in

to the store the following week, but which were taken by them the same week the goods were ordered from Seattle, or the preceding week. The goods do not arrive at the store until after the orders from customers have actually been taken and probably one-half thereof actually received by the store manager. When received, the goods are in the usual packing cases, cartons or parcels, and are unpacked in the basement of the store or wareroom in the rear of the store, and are kept separate and apart from goods for local sale, except teas and coffees, which are kept in the main store for cleanliness and convenience. Orders from the several agents when received are filled from the packing boxes in the basement of the store by employes who do nothing else but fill orders, except that the orders for tea and coffee are taken from the main store. At all times the goods are constantly in transit from the time they are shipped by the plaintiff at its home office until they are in the hands of the customers along the various routes, and remain no longer in the Portland store than necessary to match up orders which are coming in from continually recurring sources along well-defined and certain routes. In every case, with the possible exception of soap and baking powder, which is only a small part of the gross business of the plaintiff, the goods when the orders are taken are without the state.

The motion to dismiss is based on three grounds: (1) That a court of equity is without jurisdiction; (2) that the relation between the plaintiff and its various solicitors is that of vendor and vendee and not principal and agent, and therefore the plaintiff is not the proper party to this suit; (3) that the plaintiff is not engaged in interstate commerce, and therefore its agents or solicitors are subject to the provisions of the Peddlers Act.

[1] The first question is disposed of by the recent case of *Little v. Tanner* (D. C.) 208 Fed. 605, in which it was held that a court of equity has jurisdiction of a suit enjoining state officers from threatened enforcement of a void statute which affects property rights, although its violation is punishable as a criminal offense. See, also, *Adams Express Co. v. N. Y.*, 232 U. S. 14, 34 Sup. Ct. 203, 58 L. Ed. 483.

[2] The second question is concluded by the averment of the complaint, which for the purposes of this motion must be assumed to be true. It is clearly alleged that the solicitors are agents and representatives of the plaintiff, receiving orders for it and not for themselves; that the goods handled by them remain and are the property of the plaintiff until delivered to the customer. The method adopted to secure plaintiff from loss on account of goods handled by its agents is merely a matter of convenience, and does not change the actual relation of the parties from that of principal and agent to vendor and vendee.

[3] The general principles by which it has been determined that the taking of orders in one state for goods to be shipped from another constitutes Interstate Commerce, exclusively under federal control and not subject to the burden of state legislation, have so often been announced by the Supreme Court as "to cause them to be elemen-

tary." *Browning v. Waycross*, 233 U. S. 16, 34 Sup. Ct. 578, 58 L. Ed. 828, decided April 6, 1914. The sole question, therefore, in any given case, is whether the manner in which the business is carried on comes within the rules laid down. It would be a waste of time to review the cases and point out their similarity and dissimilarity to the one in hand. It is enough that in our opinion the facts stated in the complaint bring this case within *Crenshaw v. Arkansas*, 227 U. S. 389, 33 Sup. Ct. 294, 57 L. Ed. 565, and *Stewart v. Michigan*, 232 U. S. 665, 34 Sup. Ct. 476, 58 L. Ed. 786, decided March 23, 1914. The only difference, if any, between it and the *Crenshaw Case* is that it may be assumed, although not stated, that in the *Crenshaw Case* the goods were not ordered by the local representative of the vendor until the customers' orders had been received by him, while in this case the shipments were ordered prior to the actual receipt of the customers' orders by the agent, but before or while such orders were being taken in the field and during the time the goods were in transit. This, we take it, does not affect the character of the business. It was a mere matter of detail in the manner of conducting it.

We conclude, therefore, that the plaintiff was engaged in Interstate Commerce, and therefore the Peddlers Act does not apply to its business.

Injunction will issue.

HUTCHINSON v. PHILADELPHIA & G. S. S. CO.

(District Court, E. D. Pennsylvania. September 11, 1914.)

No. 979.

1. CORPORATIONS (§ 564*)—RECEIVERS—INTERVENTION BY STOCKHOLDER.

Where a creditors' suit was instituted against a corporation, and a receiver was appointed to conserve the corporation's assets, which were sold after proper public advertisement, a stockholder's petition to intervene, merely alleging that plaintiff in the creditors' suit and others, who were stockholders and directors of the corporation, became stockholders and directors in a company organized to purchase the assets, but without any charge of fraud or collusion showing want of good faith, and concluding merely that it was petitioner's "belief" that such persons combined to acquire the assets and business of the corporation at an inadequate price, not, however, based on information that such was the case, and without any charge of fraud or collusion, except by a suggestion, was insufficient to entitle petitioner to have the sale set aside, etc.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2176, 2177, 2255; Dec. Dig. § 564.*]

2. CORPORATIONS (§ 319*)—CREDITORS' SUIT—DIRECTOR.

That a creditor of a corporation is also a director does not impair his right to sue the corporation on the indebtedness at law or in equity.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1415, 1416-1425; Dec. Dig. § 319.*]

3. CORPORATIONS (§ 564*)—SALE OF ASSETS—RECEIVERS—LIABILITY TO STOCKHOLDER—REMEDY.

Where the assets of a corporation had been sold in receivership proceedings at the instance of a creditor, who was also a director, the right of a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

stockholder to hold the complainant in that suit, the receiver, and the other directors liable to him personally for losses incurred as a stockholder by reason of such sale was enforceable by a separate bill against them, and not by intervention in the receivership proceedings.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2176, 2177-2255; Dec. Dig. § 564.*]

4. CORPORATIONS (§ 564*)—SALE OF ASSETS—RECEIVERS—STOCKHOLDERS—OBJECTIONS—LACHES.

Where a suit was instituted by a creditor and director of a corporation to sell its assets through a receiver, to preserve the interests of all creditors so far as possible, and to continue the business, and such proceeding had progressed to a final decree and sale, a stockholder's right to intervene in such proceeding and object thereto, more than 18 months after decree and sale, was barred by laches.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2176, 2177, 2255; Dec. Dig. § 564.*]

In Equity. Action by S. E. Hutchinson against the Philadelphia & Gulf Steamship Company. On petition of Samuel S. Bloom for leave to intervene. Denied.

R. H. Locke and E. D. Mitchell, both of Philadelphia, Pa., for petitioner.

George P. Rich and Conlen, Brinton & Acker, all of Philadelphia, Pa., opposed.

THOMPSON, District Judge. Upon bill filed January 8, 1913, by S. E. Hutchinson, a creditor, and answer admitting the allegations of the bill, a receiver was appointed on the same day to take charge of and preserve the property of the defendant and continue the operation of its steamship line. Upon various petitions of the receiver, orders shown to be necessary for preservation of assets of the company and continuance of the business of the company as a going concern were regularly granted at various times, and, upon petition of April 24, 1913, setting forth the danger of loss to the company and to creditors and stockholders of the good will of the company, the receiver was authorized to sell the good will, leases, office fixtures, and furniture, tackle, and loading equipment of the company for \$15,000 in cash and \$45,000 worth of the common stock of the American Transportation Company, a Delaware corporation. On July 11, 1913, upon showing by petition that it was impossible to further continue the transportation business of the company, the receiver was authorized to sell the steamships Evelyn and Mae, the company's only remaining assets, at private sale. On March 10, 1914, upon a showing of the efforts of the receiver to sell the steamships at private sale and failure so to do, an order was entered directing public sale upon due notice by advertisement. As appears by the petition for confirmation of sale, the receiver set April 8, 1914, as the time for public sale, and due advertisement was made in the leading maritime papers of the Atlantic and Pacific coast; but no bona fide bid was received, either on the vessels offered separately or both together. The receiver accordingly readvertised, as appears

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by proof of publication, and set June 20, 1914, as the time for an adjourned public sale of the steamers, and at this sale both vessels as a whole were knocked down by the auctioneer to Andrew B. McGinnis, Esq., the highest bidder. Due advertisement of application for confirmation of sale on July 10, 1914, was made and upon request of counsel, who desired to be heard, the hearing upon petition for confirmation was deferred to July 20, 1914. No objections being made, the sale was confirmed.

[1] The present petition for leave to intervene was subsequently presented in open court upon notice to counsel for the receiver and for the purchaser of the vessels. The petitioner represents that he is a duly registered stockholder and holds stock for which he paid \$6,050 in cash. The petition appears to be based upon allegations of inadequacy of price in the sales of the assets of the company, and allegations that the plaintiff, S. E. Hutchinson, and S. P. Wetherill, Jr., the receiver, were stockholders and directors of the defendant company; that, at the time the application was made for the appointment of the receiver, the company was not insolvent; that, because of the known solvency of the company, the petitioner, Bloom, was misled as to the real nature of the receivership proceedings, which he subsequently learned were adverse to his interest; that the sale of April 24, 1913, of the assets, transportation facilities, etc., exclusive of the two ships, was "to a new company, the Philadelphia-New Orleans Transportation Company, or its subsidiary, the American Transportation Company"; that, before and at the time of the application for appointment of a receiver, S. E. Hutchinson and Warren Webster were stockholders and directors of the Philadelphia & Gulf Steamship Company; that Henry Brinton was a stockholder of the company, and J. W. S. Holton was a stockholder, director, and vice president of the company, and chairman of its executive committee; that the Philadelphia-New Orleans Transportation Company was not in existence prior to the receivership proceedings, but was chartered in the state of Delaware April 25, 1913; that S. E. Hutchinson, Warren Webster, Henry Brinton, and J. W. S. Holton are stockholders and directors of the Philadelphia-New Orleans Transportation Company, and J. W. S. Holton, is president of the same. The petitioner finally avers, that he "believes" that the proceedings in behalf of S. E. Hutchinson were procured by him, Warren Webster, J. W. S. Holton, S. P. Wetherill, Jr., Henry Brinton, and others to the petitioner unknown, for the purpose of acquiring the assets and business of the Philadelphia & Gulf Steamship Company, free and clear of the liens of all creditors, except mortgages, for a sum grossly out of proportion to the real and appraised value of the same, so that the entire assets of the Philadelphia & Gulf Steamship Company, worth approximately \$500,000 or more, have been disposed of for the approximate sum of \$25,000 cash, which sum is still subject to the lien of all creditors.

While the petition does not set out what relief is asked by the petitioner, it is apparent that it is desired either to set aside the sale of the good will, etc., or of the ships, or both, or that it is desired to

hold the directors personally liable for their acts. It is apparent that the allegations contained in the petition are too vague and uncertain to entitle the petitioner to set aside the sale. Taking first the sale of April 24, 1913, there is nowhere in the petition an allegation that a better price could have been obtained for the assets sold under that order, nor does the petition allege that the petitioner or any one else was willing to pay or offered to pay more for these assets. There is no denial that the sale of the steamships Mae and Evelyn, as shown by the receiver, was widely advertised, and that no bid was made for either of the vessels, separately or together, when they were first put up for public sale, and there is no allegation in the petition that a better price could have been obtained, nor any offer or expression of willingness by the petitioner to pay a better price than that finally obtained. Moreover, if the relief desired is to set aside the several sales of the assets of the company, he is undoubtedly barred by his laches, as it appears by the allegation in his petition that on December 28, 1912, he was notified by the receiver of the present proceedings. *State Trust Co. v. R. R. Co.* (C. C.) 120 Fed. 398.

As to any other relief, none of the parties said to have combined to acquire the assets of the company are parties to this suit, except Mr. Hutchinson, the plaintiff, and Mr. Wetherill, the receiver. There is no denial in the petition of the facts set out in the petition for leave to sell the Evelyn and Mae that all the stockholders were given an opportunity to subscribe to stock in a new company to take over these vessels. The naked averment that the plaintiff, Mr. Hutchinson, and others, who were stockholders and directors in the defendant company, became stockholders and directors in the company which is said to have been the purchaser of the pier facilities and good will of the company, would not be sufficient to sustain a bill against them, without a specific charge of fraud or collusion or showing of want of good faith. *Continental Bank v. Allis-Chalmers Co.* (D. C.) 200 Fed. 600; *Marks et al. v. Merrill Paper Co. et al.*, 203 Fed. 16, 123 C. C. A. 380; *Buchler v. Black* (D. C.) 213 Fed. 880.

[2, 3] The petition concludes with a statement as to petitioner's "belief" that the parties named in the petition combined to acquire the assets and business of the company at an inadequate price, but his belief is not based upon information that such is the case. There is no charge of fraud or collusion, except by suggestion. The bill is filed by Mr. Hutchinson as a creditor. There is no denial of the indebtedness of the company to him, and there is no rule of law or equity which prohibits a creditor of a corporation from bringing suit because he is also a director. It is apparent that the petition does not set out any legal or equitable ground upon which the petitioner could base a bill against the corporation, or against its officers or directors, if they were parties. If it is his desire to hold the plaintiff, Mr. Hutchinson, the receiver, and the other directors liable to him personally for losses incurred as a stockholder, his remedy would undoubtedly be by separate bill. *Forbes v. Railroad Co.*, 2 Woods. 323, Fed. Cas. No. 4,926; *Land Title & Trust Co. v. Asphalt Co.*

(C. C.) 114 Fed. 484; Lombard Ins. Co. v. Lumber Co. (C. C.) 74 Fed. 325.

The present bill was filed for the purpose of preserving the interests of all creditors so far as possible and of continuing the business. The proceedings have been regular and orderly throughout. To enforce in this proceeding a personal liability against the receiver or against the directors of the corporation would not be "in subordination to and in recognition of the propriety of the main proceedings." Supreme Court Rule in Equity 37 (198 Fed. xxviii, 115 C. C. A. xxviii).

[4] It would be entirely contrary to orderly procedure to permit a confusion of issues by allowing the petitioner to interfere with the present proceedings after raising no objection to them for a period of 18 months and standing by until after final decrees of sale were made. He cannot, upon discovery at this late date that the proceedings are "adverse to his interest," raise issues not germane to the present suit.

The prayer of the petition is denied, and the petition dismissed.

SMITH v. CAMAS PRARIE RY. CO.

(District Court, D. Idaho, Central Division. August 17, 1914.)

1. REMOVAL OF CAUSES (§ 107*)—MOTION TO REMAND—SUFFICIENCY OF PLEADINGS.

On a motion to remand, a federal court will not inquire into the sufficiency of the plaintiff's pleading.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 225-232, 234; Dec. Dig. § 107.*]

2. REMOVAL OF CAUSES (§ 3*)—CAUSES REMOVABLE—ACTION UNDER EMPLOYERS' LIABILITY ACT.

Where the plaintiff in an action in a state court to recover for the death of a railroad employé unequivocally bases the right of recovery on the federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), the cause is not removable whether or not the facts alleged are sufficient to state a cause of action under such act.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 4, 5; Dec. Dig. § 3.*]

At Law. Action by Elizabeth Smith as administratrix of the Estate of Charles H. Smith, deceased, against the Camas Prarie Railway Company. On motion to remand to state court. Motion granted.

Alex Kasberg, of Lewiston, Idaho, and Samuel T. Crane and F. A. McMaster, both of Spokane, Wash., for plaintiff.

Cannon, Ferris & Swan, of Spokane, Wash., and James E. Babb, of Lewiston, Idaho, for defendant.

DIETRICH, District Judge. The action was brought by the plaintiff as administratrix to recover damages from the defendant railroad company for the death of Charles H. Smith, who was run over and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

killed by one of the defendant's trains at Lewiston, Idaho, on the 17th day of November, 1913. Upon petition of the defendant, it was brought here from the state district court, where it was originally commenced, and the plaintiff now moves that it be remanded. Defendant concedes that if it is a case arising under the federal Employers' Liability Act of 1908, as amended, it should be remanded.

The showing made by the complaint is that at the time of the accident the defendant owned and was operating a line of railroad running between the city of Riparia, in the state of Washington, and the city of Grangeville, in the state of Idaho, and that Smith was in its employ as a member of a bridge gang. There is no question of the interstate character of the railroad, or of the business carried on by the defendant, or of the train by which Smith was killed. Nor, as I understand, does the defendant dispute that Smith's general employment as bridge carpenter was in interstate commerce. The ground upon which it is sought to base the right of removal is that, at the exact time of the accident, Smith was not so employed, for the day's work was done, and he was going from the work train in the defendant's yard at Lewiston, to his home in that city, for a purpose not shown to have had any relation to his employment. The allegation in that respect is that:

"On the 17th day of November, 1913, the said crew of men (the bridge gang), after they had finished their day's work, prepared and ate their evening meal in said car in the yards of the defendant at Lewiston, Idaho, and after the supper was over the said Charles H. Smith left the car, about 6:15 p. m. on said date, and after dark started for his home in the city of Lewiston, taking the most direct and usual way of travel," etc.

It is further alleged in terms that at the time of the accident Smith was employed in interstate commerce, and also that the plaintiff, as administratrix, prosecutes the action under the federal act. It is not controverted that, to bring a case within the terms of this act, the "defendant must have been, at the time of the occurrence in question, engaged as a common carrier in interstate commerce, and plaintiff's intestate must have been employed by said carrier in such commerce." *North Carolina Railroad Co. v. Zachary*, 232 U. S. 248, 256, 34 Sup. Ct. 305, 307 (58 L. Ed. 591). Nor is it to be doubted that if these facts appear the act is exclusive, and the rights and liabilities of the parties are referable to it alone. *North Carolina Railroad Co. v. Zachary*, *supra*; *Michigan Central R. R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417.

[1] The plaintiff urges that the cause of action as stated falls within the terms of the act, but further contends that, even if the complaint be held to be defective, it appearing that she intends and attempts to assert such cause of action, the sufficiency of the pleading cannot be inquired into upon a motion to remand. *Hax et al. v. Caspar* (C. C.) 31 Fed. 499. Counsel for the defendant concede that as a general rule the federal courts will not, on a motion to remand, determine whether the complaint shows a cause of action, but still it is apparent that their entire argument in support of their right to remove is that the facts stated in the complaint are insufficient

to constitute a cause of action under the act. It seems to be thought that an exception to the general rule should be recognized because, so it is contended, the plaintiff may, in the progress of the case, if it remains in the state court, seek a recovery under the state statute, should she fail to establish a cause of action under the federal act. But the fact is that she has unequivocally alleged that she is suing upon the right given her by the federal act, and by this declaration she is bound. Surely with the complaint as it now stands no court would require the defendant to anticipate and plead, or prepare its defense, against a cause of action arising under the state laws. The possible defenses are in certain important particulars dissimilar. In the one case the assumption of risk by the decedent must be pleaded, if relied upon as a defense. In the other, such a plea would be stricken out as wholly immaterial. 35 U. S. Stat. L. 65. For this reason, if for no other, it is clear that a plaintiff cannot be permitted to hold out that the cause of action is one under the federal act and during the course of the trial abandon this position and wage a claim of a substantially different character; at least this could not be done without an appropriate amendment to the pleading. If we here assume, without deciding, that under the rules of procedure prevailing in the Idaho state courts the granting of permission to make such an amendment is within the discretion of the court, the defendant could not be prejudiced, for immediately upon a change of the plaintiff's position as disclosed by such an amendment the right of removal would accrue. *Powers v. Chesapeake & O. R. R. Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673; *Remington v. Central Pacific Ry. Co.*, 198 U. S. 98, 25 Sup. Ct. 577, 49 L. Ed. 959; *Fritzlen v. Boatmen's Bank*, 212 U. S. 364, 29 Sup. Ct. 366, 53 L. Ed. 551. It is therefore thought that no substantial reason exists for making an exception to the general rule that on a motion to remand the courts will not inquire into the sufficiency of the pleading.

[2] By the federal act jurisdiction to adjudicate causes of action arising thereunder is conferred upon the state courts concurrently with the federal courts, and the defendant is denied the right of removal from one to the other. In good faith the plaintiff here went into the state court, unequivocally declaring that she sought a recovery under the act. It may be a fair question whether in her pleading she states facts sufficient to entitle her to recover, but, having the right to select the tribunal to which she would submit her claim, she should have this question, as well as all others, decided by the court whose jurisdiction she has invoked.

The motion is allowed.

UNITED STATES v. MIDWAY NORTHERN OIL CO. et al.

(District Court, S. D. California, N. D. May 29, 1914.)

No. 47.

MINES AND MINERALS (§ 2*)—PETROLEUM LANDS—WITHDRAWAL FROM ENTRY—AUTHORITY OF PRESIDENT—"TERRITORY."

Under Const. art. 4, § 3, vesting in Congress power to dispose of and make all needful rules and regulations respecting the territory and other property of the United States, the term "territory" being equivalent to the word "land," and the Revised Statutes declaring that all valuable mineral deposits in land belonging to the United States are open to exploration and purchase and the lands to occupation and purchase, and that any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor under the laws relating to placer mining claims, the power to withdraw petroleum lands from entry is vested solely in Congress, and hence the President had no constitutional authority to withdraw from entry over 3,000,000 acres of oil land in California and Wyoming in aid of proposed legislation affecting the use and disposition of petroleum deposits on the public domain.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 2; Nec. Dig. § 2.*

For other definitions, see Words and Phrases, vol. 8, pp. 6925-6927, 7814.]

In Equity. Bill by the United States of America against the Midway Northern Oil Company and others to nullify defendants' alleged rights in certain public land sought to be entered after an attempted withdrawal from entry by the President, September 27, 1909. Bill dismissed.

E. J. Justice, Sp. Asst. to Atty. Gen. (A. I. McCormick, of Los Angeles, Cal., and Wm. Denman, of San Francisco, Cal., of counsel), for the United States.

Geo. E. Whitaker, of Bakersfield, Cal., for certain defendants.

A. L. Weil, of San Francisco, Cal., for certain defendants.

Pillsbury, Madison & Sutro, of San Francisco, Cal., for certain defendants.

Oscar Lawler, of Los Angeles, Cal., for certain defendants.

Frank L. Short, for certain defendants.

DOOLING, District Judge. The bill avers, in substance, that defendants subsequent to March 1, 1910, entered upon the N. W. $\frac{1}{4}$ of section 32, township 12 N., range 23 W., S. B. M., which was then, and ever since has been, the property of plaintiff, and on June 6, 1910, discovered therein petroleum in paying quantities; that on September 27, 1909, the President regularly withdrew said land and the whole thereof from mineral exploration, and from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public land laws of the United States, and reserved the same for public uses, to wit, in order to secure a supply of fuel oil for the use of the navy, and that since said last-mentioned date none of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

said land has been subject to exploration for minerals, or to the initiation of any right under any of the public land laws of the United States. That defendants are now extracting vast quantities of mineral oil and petroleum from said lands, and committing waste and trespass thereon to plaintiffs' irreparable injury, and that defendants are so doing under the pretense that they have acquired valid mineral rights therein, by virtue of their entry upon said land and exploration and development thereof, and discovery of oil therein, but that by reason of such order of withdrawal of September 27, 1909, such claim of right is unfounded. The bill asks for an injunction, a receiver, an accounting, and a decree that defendants have no estate, right, or title to said land, or to any of the minerals contained therein, and that it be decreed that plaintiff has a perfect property in said land free and clear of any of the claims of defendants, and each and every one of them. The case turns upon the validity or invalidity of the executive withdrawal order of September 27, 1909, which order is as follows:

"Temporary Petroleum Withdrawal No. 5."

"In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination."

The accompanying lists embraced 3,041,000 acres of land, 170,000 acres thereof being in Wyoming and 2,871,000 acres in California. Included in this latter quantity is the land described in the bill.

It will be observed that while the bill declares the purpose of the withdrawal to have been to secure for the navy a supply of fuel oil, the order itself makes no such declaration, but states the purpose to be "In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain," and the history of the movement to secure such legislation indicates that the executive was dissatisfied with the existing laws in regard to the disposition of petroleum deposits and hoped to have them changed. It may be added, too, that the bill as originally filed contained no reference to the use of oil by the navy, but that this averment was added by an amendment made on the very day that the motion to dismiss was called for argument, although the bill itself had been filed nearly a year before.

At the time of this withdrawal, and at the time of defendants' entry upon the land, there were in force, and still remain in force the following statutory provisions:

"That all valuable mineral deposits in lands belonging to the United States * * * are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase; * * * and that claims usually called 'placers' including all forms of deposit, excepting veins of quartz or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims."

"That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims."

It is under these statutes that defendants claim. The effect of the withdrawal order, if valid, was to suspend the operation of these statutes, at least to the extent of withholding their application to such portion of the 3,041,000 acres of land described as still remained a part of the public domain.

The Constitution (article 4, section 3) vests in Congress the power to dispose of and make all needful rules and regulations respecting territory or other property of the United States, and it was early decided that "the term 'territory,' as there used, is merely descriptive of one kind of property; and is equivalent to the word 'lands'"; that "Congress has the same power over lands as over any other property belonging to the United States, and that this power is vested in Congress without limitation." *United States v. Gratiot*, 14 Pet. 526, 10 L. Ed. 573. The same proposition is differently, but no less forcibly stated as follows in other cases:

"No appropriation of public land can be made for any purpose, but by authority of an act of Congress." *United States v. Fitzgerald*, 15 Pet. 407, 10 L. Ed. 785.

"But public and unoccupied lands, to which the United States have acquired title, Congress * * * under the power conferred upon it by the Constitution, * * * has the exclusive right to control and dispose of, as it has with regard to other property of the United States." *Van Brocklin v. State of Tennessee*, 117 U. S. 151, 6 Sup. Ct. 670, 29 L. Ed. 845.

"The Constitution vests in Congress the power to 'dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise." *Wisconsin R. R. Co. v. Price County*, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687.

"With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made." *Gibson v. Chouteau*, 13 Wall. 92, 20 L. Ed. 534.

Congress, therefore, having the exclusive power to dispose of the land in question, and to make all needful rules and regulations in relation thereto, and having declared the minerals therein to be free and open to exploration and purchase and the land itself to occupation and purchase, under the placer mining laws, the operation of such laws should not be interfered with by any other department unless a clear authority exist for such interference. It is claimed by plaintiff that such authority does exist, having its basis in long acquiescence by Congress in the exercise by the executive of the power to reserve public lands for public purposes, and in the approval by Congress of the exercise of this power in many instances other than the one in question. It is also claimed that such authority inheres in the executive under the Constitution, subject only to the paramount authority of Congress. Many times the executive has withdrawn lands in the past, and many times Congress has either directly or indirectly approved such withdrawals. Many times, too, Congress has affirmatively authorized such withdrawals in advance of their making. The right to make such withdrawals has also frequently been passed upon by the courts in con-

crete and specific cases. In many instances such right has been upheld, in others it has not. An examination of the adjudicated cases upon this point, however, seems to me to indicate that in every instance where the right to make such withdrawals was upheld in the absence of congressional authorization, either direct or clearly to be implied, it was either because the lands withdrawn were actually devoted to a specific public purpose before the right of any third person had intervened, or because such withdrawal was necessary in order fully to effect the purposes of some existing law. An example will serve to illustrate each of these classes of cases.

In *Grisar v. McDowell*, 6 Wall. 363, 18 L. Ed. 863, decided by the Supreme Court in 1867, the question involved a military reservation which had been long occupied by the government for military purposes, and was indeed actually in the possession of the government and used for such purposes at the time the controversy arose, and the court said:

"From an early period in the history of the government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses. The authority of the President in this respect is *recognized* in numerous acts of Congress. * * * The action of the President in making the reservations in question was indirectly approved by the legislation of Congress in appropriating moneys for the construction of fortifications and other public works upon them. The reservations made at the same time embraced seven distinct tracts of land, and upon several of them extensive and costly fortifications and barracks and other public buildings have been erected."

This case taken in its entirety does not seem to me to support the proposition that 3,000,000 acres of land may be withdrawn by executive order from the operation of the laws enacted by Congress specifically providing for its disposition.

The so-called Des Moines River Cases will illustrate the second broad class of cases in which withdrawal orders have been upheld. In 1846, for the purpose of aiding to improve the Des Moines river from its mouth to Racoon creek, Congress granted to the territory of Iowa certain lands, being one equal moiety in alternate sections on a strip five miles in width on each side of said river. A doubt soon arose as to whether this grant carried any of the lands along the river above Racoon creek, and the first secretary having to do with the question was of the opinion that the grant did embrace such lands, and consequently reserved them from sale in order to carry out the law as construed by him. The validity of such reservation was before the Supreme Court in several cases, in each of which it was upheld, the court saying in one of them:

"Besides, if this power was not competent, which we think it was ever since the establishment of the land department, and which has been exercised down to the present time, the grant of 8th August, 1846, carried along with it, by necessary implication, not only the power, but the duty, of the land office to reserve from sale the lands embraced in the grant. * * * That there was a dispute existing as to the extent of the grant of 1846 in no way affects the question. The serious conflict of opinion among the public authorities on the subject made it the duty of the land officers to withhold the sales and reserve them to the United States till it was ultimately disposed of." *Wolcott v. Des Moines Co.*, 5 Wall. 681, 18 L. Ed. 689.

One of the grounds therefore upon which the reservation was held to be valid was the necessity of preserving intact the full measure of the grant, and to this extent at least the reservation was made in order that the provisions of the law, if it should ultimately be determined that the lands above Racoon creek were embraced therein, might be put fully into effect.

It has been held in later cases that the executive has no general power to withdraw lands from the operation of existing laws. In *Southern Pacific R. R. Co. v. Bell*, 183 U. S. 675, 22 Sup. Ct. 232, 46 L. Ed. 383, the court says:

"The power of the secretary to withdraw lands is exercised for the purpose of carrying out the grant to the railroad, and to prevent lands covered by said grant from being taken up by settlers before the road is completed and the patents issued to the company; but clearly that power cannot be exercised to withdraw lands which are beyond the intended limits of the grant."

So in *Brandon v. Ard*, 211 U. S. 11, 29 Sup. Ct. 1, 53 L. Ed. 68, where a grant was made in March, 1863, an attempted withdrawal in May, 1863, and a homestead settlement in June, 1866, over three years later, and when the withdrawal order, if effective at all, had been over three years in effect, the court speaking also of indemnity lands, says again:

"We cannot give to the withdrawal from sale, pre-emption or settlement of the lands upon which Ard entered in 1866 the legal effect which the plaintiffs in error insist must be given to it. It is conceded that the lands were not within the place or granted limits of either railroad, but were within indemnity lands. * * * The withdrawal of them from sale, or settlement, * * * prior to the definite location of the road and before they were regularly selected to supply deficiencies in place or granted limits, was without authority of law. Such unauthorized withdrawal did not stand in the way of Ard, in virtue of his settlement on them in 1866, under the then existing homestead laws, from acquiring such an interest in the lands as would be protected against their subsequent selection by the railroad company."

In a still later case the court again says:

"A rejection upon the ground stated was not authorized, for the Secretary of the Interior had no authority to withdraw from settlement lands within the indemnity limits of the grant which had not been before selected, and approved by him." *Osborn v. Froyseth*, 216 U. S. 571, 30 Sup. Ct. 420, 54 L. Ed. 619.

It is clear, therefore, that no general power of withdrawal exists, and while withdrawal orders have been very frequently upheld, I find no case broad enough to cover the withdrawal of over 3,000,000 acres of land from the operation of the mineral land laws, whether "in aid of proposed legislation," as stated in the order, or for the purpose of securing a supply of fuel oil for the navy as stated in the bill. I am fully aware of the importance of this and kindred cases because of the magnitude of the interests involved. But they are still more important because of the legal principles upon which they must be determined. The effect of the order of withdrawal of September 27, 1909, whatever its purpose, was practically to suspend the operation of the mineral laws as applied to the petroleum deposits in the public domain. If such power exist, plaintiff should be able to point to some clear legislative or constitutional provision upon which it rests. I am not

content to seek for it in the dicta of decisions, or in some shadowy twilight zone lying between the powers expressly granted to the Congress and the powers expressly granted to the President. The power to dispose of the public lands has been given to the Congress by the Constitution, and I find no conflicting power granted the President by that instrument derogatory to the power given the Congress in this regard. The congressional will as to these lands is clearly expressed in the laws above cited, and the right to nullify this will is not lodged in either the executive or judicial department. On the contrary, it is equally the duty of the executive as of the judicial department to see that this will is carried into effect. The promulgation of the order in question I believe to be but one manifestation of a growing tendency to concentrate in the executive more of power than can be traced to any specific constitutional or legislative provision. As this tendency in the present instance leads to an encroachment upon the domain of the Congress, I am unwilling to further it by any decree of this court, and for this reason it is ordered that the application for an injunction and a receiver be denied, and the bill itself dismissed.

WOOLFOLK v. JONES.

(District Court, E. D. Virginia. August 6, 1914.)

1. INJUNCTION (§ 235*) — EXTENT OF LIABILITY ON BOND — CONDITION "TO ABIDE THE DECISION OF THE COURT."

The use of the words "to abide the decision of the court" in the condition of an injunction bond required by a federal court, unless the injunction is to restrain enforcement of a judgment or decree of a court, does not bind the obligors to pay a judgment that may be rendered against complainant on the merits of the case, in the absence of proof showing the loss of the debt as the result of the injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 529-537; Dec. Dig. § 235.*]

2. INJUNCTION (§ 239*)—LIABILITY ON BOND—DAMAGES AND COSTS.

Complainant secured an injunction restraining defendant from prosecuting two actions at law against him on the ground that he had an equitable defense, and on the giving of a bond conditioned that he "shall abide the decision of said court and pay all damages and costs which shall be adjudged against him in case said injunction shall be dissolved." The controversy was tried on the merits in the equity suit, resulting in a money decree against complainant, who proved insolvent. *Held*, that the surety on his bond was not bound for the payment of such decree, but that under the provision for "damages and costs" defendant was entitled to recover on the bond interest on the amount of the decree during the time recovery was delayed by the granting of the injunction and the costs incurred in the trial of the suit, which were largely in excess of what they would have been in the actions at law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 542, 543; Dec. Dig. § 239.*]

3. INJUNCTION (§ 239*)—LIABILITY ON BOND—COSTS.

An injunction bond in a federal court, conditioned that the principal shall abide the decision of the court and pay all damages and costs which shall be adjudged against him in case the injunction shall be dissolved,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

inures to the benefit of a master and stenographer in whose favor costs are adjudged against such principal, and it is immaterial that the defendant only is named as obligee.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 542, 543; Dec. Dig. § 239.*]

4. INJUNCTION (§ 239*)—LIABILITY ON BOND—ACCRUAL OF LIABILITY—DISSOLUTION OF INJUNCTION IN PART.

Where an injunction restraining the prosecution by defendant of two actions at law was, on final hearing, dissolved as to the principal one of such actions, but not as to the other, and on such hearing there was a substantial recovery by defendant on the merits, the fact that the injunction was not entirely dissolved does not discharge the surety on the bond from liability.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 542, 543; Dec. Dig. § 239.*]

In Equity. Suit by Joseph W. Woolfolk against John T. Jones. On petition by defendant and others for decree against complainant and the surety on his injunction bond. Petition granted in part.

The defendant John T. Jones instituted in the law and equity court of the city of Richmond, against the complainant Joseph W. Woolfolk, two actions at law, one to recover \$10,000, and the other \$25,000, which suits were by appropriate proceedings removed into this court. Before trial, the complainant Woolfolk filed his bill in this cause, seeking to enjoin the prosecution of the two suits at law on the ground, among others, that it was impossible for him to make defense at law, and averred and charged that the defendant Jones was largely indebted to him. This court, before hearing the suits at law, on the 15th day of June, 1912, granted the injunction prayed for, and on the 22d day of June, 1912, the cause was referred to a master to inquire and report as to plaintiff's indebtedness to the defendant Jones, by reason of the alleged contracts set forth in the declarations in the two common-law suits, and in the bill and proceedings mentioned, and also of the amount of damages, if any, the complainant was entitled to recover from the defendant Jones, by reason of the facts and transactions set up in the bill, and said special master was authorized to inquire and report as to any other matters by him deemed pertinent, or which he might be required by any party in interest to report on. The cause was regularly proceeded with before the special master, running through the summer and fall of 1912, and a great mass of testimony taken, and upon being finally argued and submitted, the special master, on the 25th day of February, 1913, filed an elaborate report stating his conclusions of the law and findings of fact, the substance of which was that the defendant Jones was entitled to recover nothing on the contract in the \$10,000 suit, and that he was not entitled to recover on the contract in the \$25,000 suit, but that, by reason of certain transactions in connection with the sale of the real estate under the contract set forth in the second suit, he was entitled to recover \$8,651.16. To this report exceptions were taken by the defendant, and by decree entered on the 23d day of October, 1913, the same were overruled as to the common-law suit to recover \$10,000, and the prosecution of the same permanently enjoined, and a decree of \$25,000 upon certain conditions with which the defendant Jones has complied, entered in favor of the defendant against the plaintiff, growing out of the transactions set forth in the second suit, with interest from the 14th day of March, 1910, instead of the sum of \$8,651.16 allowed by the special master. The court further adjudged costs in favor of the defendant against the plaintiff, Woolfolk, and by subsequent order on the 26th day of November, 1913, decreed against said complainant in favor of Henry R. Miller, special master, in the sum of \$2,500, and in favor of O. Raymond Brown, stenographer, in the sum of \$310.15. Upon the decree in favor of said John T. Jones, execution was duly issued and returned no effects, and the said Henry R. Miller and O. Raymond Brown have each been unable to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

realize anything on account of the decree against said Woolfolk; he appearing to be utterly insolvent.

At the time of granting the injunction on the 15th of June, 1912, the court required the complainant to enter into bond within five days from the date thereof, in the sum of \$10,000, with surety to be approved by the court or the judge thereof, conditioned according to law, which bond was, on the 17th day of June, 1912, duly executed by the complainant, Woolfolk, payable to the defendant John T. Jones, with the American Surety Company of New York as his surety, upon the following condition: "Now, therefore, if the said Joseph W. Woolfolk shall abide the decision of said court, and pay all damages and costs which shall be adjudged, against him because of the granting of said injunction in case said injunction shall be dissolved, then this obligation shall be void; otherwise to remain in full force and virtue." Subsequently the defendant Jones, and Messrs. Miller and Brown, being unable as aforesaid to realize anything upon the decree in their favor against said Woolfolk, each presented petitions in this cause, asserting a liability under the injunction bond against said Woolfolk and the surety thereon, the contention of Jones being, in effect, that he is entitled to a decree against the principal and surety for the face value of said bond, since the same was executed in his name and to abide the order of the court, and the said Miller and Brown that they, whether said Jones was entitled to recover on said bond or not, were entitled to recover the amount due them for costs, and if said Jones was entitled to recover on his theory of the bond, that nevertheless the sum thus decreed to be paid to him should be applied first to the payment of costs of the inquiry in which he and Woolfolk were jointly interested. The American Surety Company denied all liability to either Jones or Miller and Brown by virtue of said bond, and insisted that no damages were properly recoverable upon the dissolution of the injunction.

Munford, Hunton, Williams & Anderson, of Richmond, Va., for Woolfolk.

George L. Christian and Marshall M. Gilliam, both of Richmond, Va., for Jones.

Henry R. Miller, of Richmond, Va., for petitioners Miller & Brown.

Wellford & Taylor, of Richmond, Va., for American Surety Co. of New York.

WADDILL, District Judge (after stating the facts as above). Three questions are presented for the consideration of the court: First, what is the true meaning of the bond in question, and the liability of the surety thereunder to the defendant, Jones; second, whether the petitioners Miller and Brown are entitled to recover thereunder the amount of the costs, respectively, allowed in their favor, and set up by them in their petition; and, third, whether any recovery under the circumstances could properly be had upon the bond. These will be disposed of in the order named.

[1] 1. The defendant Jones insists that the fair interpretation and meaning of the words "to abide the order of the court" is in effect to perform, to execute, to conform to, and to pay such order, and he cites quite a number of authorities in support of his contention, among them, *Molton v. Hooks*, 10 N. C. 342; *Fowler v. Thorn*, 4 Ark. 208; *Corson v. Tuttle*, 19 Me. 409; *Hodge and Wife v. Hodgdon*, 8 Cush. (Mass.) 294; *Erickson v. Elder*, 34 Minn. 370, 25 N. W. 804; *Jackson v. State*, 30 Kan. 88, 1 Pac. 317; 1 Amer. & Eng. Ency. p. 192. While some of these decisions—and others may be found—give color to the contention of the defendant, none of them were in cases in-

volution of injunction bonds, and it is not believed that any authority can be found sustaining the view that the use of the word "abide" in an injunction bond, unless to restrain the execution of a judgment or decree of a court, will be given the interpretation claimed for it, certainly to the extent of the payment of the debt in suit, in the absence of proof showing the loss of the debt as the result of the suit. This case, in the view of the court, must be determined in the light of the meaning of such language in injunction bonds taken by federal courts in cases not enjoining decrees or judgments. In granting an injunction in the federal court, the question of taking a bond or not, and the terms of such bond, is largely a matter of discretion with the court. *Russell v. Farley*, 105 U. S. 433, 437-439, 26 L. Ed. 1060; *Meyers v. Block*, 120 U. S. 206, 211, 7 Sup. Ct. 525, 30 L. Ed. 642; *Foster's Fed. Procedure* (5th Ed.) § 297, *High on Injunctions*, § 1566. Indeed, in the absence of a requirement of the bond by the court granting an injunction, damages are not recoverable at all, unless the institution and prosecution of the injunction proceedings be shown to have been malicious. The proper condition of an ordinary injunction bond in the federal court is "to answer all damages which the defendant * * * might sustain in consequence of said injunction being granted, should the same be thereafter dissolved." *Bein and Others v. Heath*, 53 U. S. (12 How.) 176, 13 L. Ed. 939; *Meyers v. Block*, supra, 120 U. S. 210, 212, 7 Sup. Ct. 525, 30 L. Ed. 642.

A careful consideration of the two cases last cited, make it entirely clear that injunction bonds to pay "such damages as may be sustained" do not mean to pay such sum as the court may decree to be paid on the merits of the case (certainly unless it can be shown that the collection of the debt was defeated in whole or in part by the delay caused by the injunction), but, on the contrary, cover only the damages and costs directly sustained as the result of suing out the injunction if the same should be dissolved.

The language "to abide the judgment of the court" in an injunction bond, while not generally used, is by no means new or unusual. Its insertion arises from the inherent power of the court in its discretion to grant or withhold injunctions, and to impose terms and conditions upon which the same may be either awarded or refused; that is to say, in granting to the complainant an injunction or withholding the same at the instance of the defendant, the court can impose such terms as will tend to secure the ends of justice. *Russell v. Farley*, 105 U. S. 438 et seq., 26 L. Ed. 1060, supra. The requirement, however, to abide the decision of the court ought not to be construed to afford any relief to which the party has not shown himself entitled, either under that or some other provision of the bond. The greatest latitude that should be given to the meaning of the particular words would be that which would enable the court to do justice between the parties litigant, and in the present case their use need be given but little added weight, so far as the merits of this case are concerned, the exact language of the bond being "to abide the decision of said court, and to pay all damages and costs in case the injunction be dissolved," etc. The ordinary use of the language "to abide the order of the court"

alone might be construed to mean as well the payment of damages and costs as the carrying out of a specific direction of the court regarding some collateral or incidental matter in the case. Here, however, nothing is actually sought to be decreed, not covered by the use of the language "damages and costs," unless the view be taken, which the court does not see its way clear to do, of interpreting the words to mean to pay the debt as on final determination on the merits. Such was certainly not the purpose of the court in taking the bond. The effort to have such a bond was urged at the time of granting the injunction, and refused because contrary to the ordinary condition of injunction bonds on suits of that character; and it is improbable that a bond for \$10,000 would have been taken had the purpose been to meet the final judgment in a suit enjoining two actions at law, involving \$35,000.

[2] Considering the damage which the defendant Jones is entitled to recover in this case, the conclusion reached is that, as no proof has been adduced of any actual loss in the collection of the principal of his debt by the delay from the injunction, the court can only award such damages as come within the term "damages and costs" in the bond, and that it cannot penalize the complainant Woolfolk in making allowances for aggravated interest in the premises, but for only such lawful interest as may have accrued by reason of the time consumed incident to the prosecution of the injunction suit, setting up a large indebtedness of \$40,000, alleged to be due to the complainant, and the added costs imposed upon the defendant by the assertion of this claim, and in adopting that cumbersome and expensive method of ascertaining and enforcing the rights of the parties. This the court can do from an inspection of the record and its knowledge of the proceedings had in the cause, and accordingly allows the said Jones the sum of \$1,835.33 on account of interest which accrued by reason of the delay in the entering of the decree in his favor, whereas a judgment at law would have been quickly had, such interest being at the rate of 6 per cent. per annum from the 1st day of August, 1912, to the 22d day of October, 1913, and the sum of \$2,000 as costs incurred in connection with the expensive and serious litigation in which he was involved, by the complainant Woolfolk, in the injunction proceedings. The testimony before the special master covered 561 pages of typewritten matter, and the report of the special master 82 pages, and the taking of testimony and proceedings incident to the injunction before the master and before the court, and the reference, covered a period of over 18 months. These two amounts, aggregating \$3,835.33, the court is satisfied is the least sum to which the defendant Jones is entitled, incident to damages and costs directly resulting from the issuing of the injunction against him, and for which he is entitled to a decree as well under the terms of the bond specifically providing for payment of damages and costs as under the provision to abide the decision of the court, as it would be inequitable, unfair, and unjust for him to be awarded a lesser sum.

[3] 2. Coming to the claims presented by the petitioners, Miller and Brown, one for services rendered by the special master appointed at the instance of the plaintiff Woolfolk, the obligor in the bond sued on, and the other for stenographic work before the special master, they

would seem to come within the plain terms of the bond given to cover damages and costs incident to the suing out of the injunction suit. Complainant sought the intervention of a court of equity to the end that there might be a full and complete inquiry, investigation, and determination in and of the several transactions set up by him in his bill against the defendant Jones, his claim being that he owed Jones nothing, and that the latter was indebted to him, and in this suit succeeded in having the prosecution of the suits at law enjoined. He executed the bond in suit conditioned to "abide the decision of the said court" and "to pay all damages and costs which shall be adjudged against him because of the granting of such injunction in case said injunction should be dissolved," and a most elaborate investigation was then entered upon at his instance. Clearly these claims come within the terms of the bond, and while primarily as between Woolfolk and Jones the former may owe the costs, and a decree may have been entered against him and not Jones for the amount of the two bills in question, still it does not follow that the bond given for costs will not inure to the benefit of the parties to whom the costs are due, if the principal in the bond, who is the complainant in the suit, fails to meet what is decreed against him as costs. There would seem to be no doubt about this proposition, unless it be the mere fact that the injunction bond is made payable to the defendant Jones, but that does not mean that only he can recover upon the bond, if the rights of others arising thereunder have not been satisfied. Its condition determines rights thereunder, and suit can be instituted in the name of the obligee therein for the benefit of persons whose rights arise under the same. The bond could as well have been taken in the name of the United States, or the clerk of the court, or in other names, or security taken in other ways, for instance, by stipulation, undertaking, or the mere deposit of cash or collateral (*Hutchins v. Munn*, 209 U. S. 246, 247, 28 Sup. Ct. 504, 52 L. Ed. 776; *Allen v. Jones* [C. C.] 79 Fed. 698; *Foster's Fed. Prac.*, supra, § 297; *Beach, Modern Equity Prac.* §§ 768, 769; 1 *Spilling on Injunctions*, § 932), and in either event such bond or other security would inure to the benefit of those whose rights were intended to be protected thereby. The bond here, it will be observed, while made payable to the defendant Jones, was not conditioned to pay only such costs and damages as he, the defendant and obligee alone, might sustain, but "to abide the decree of the said court" and pay all damages and costs which shall be adjudged against the complainant and obligor Woolfolk, because of the said injunction, should the same be dissolved. Under this bond not only is Jones protected, but persons entitled to costs incurred as well, and therefore the petitioners Miller and Brown are entitled to recover under said bond for the costs claimed by them; all effort on their part to secure the amounts having proved unavailing against the principal therein.

[4] 3. The surety in the injunction bond insists that no recovery can be had thereon, inasmuch as the injunction was not wholly dissolved, that is to say, as to the \$10,000 suit, and, moreover, because in awarding \$25,000 to the defendant Jones, and dissolving the injunction in the second suit, certain conditions were imposed upon him respect-

ing the perfecting of the title to some of the property involved in the litigation, and counsel cite authorities in support of their view. Much thought has been given to this contention, and the conclusion reached by the court is that the same is not well taken, inasmuch as the suit in equity was a single suit in which Woolfolk, the obligor in the bond in which the surety joined, sought to enjoin the prosecution of two suits, one for \$10,000 and the other for \$25,000. He only succeeded in part, and the plaintiff in the common-law suit substantially prevailed in the litigation, and so far as the conditions imposed upon the right of the defendant Jones to recover the \$25,000 are concerned, it was only because of formal and incidental matters regarding the titles, and he promptly complied with and conformed to the court's requirement in the premises.

It follows from what has been said that a decree may be entered against the defendant Joseph W. Woolfolk and the American Surety Company of New York under the injunction bond referred to, for the amounts heretofore ascertained, in favor of the defendant Jones for \$3,835.33; to the petitioner Miller \$2,500, and to the petitioner Brown \$310.15. The decree in favor of said Jones should provide that any sums received by him on account of interest by way of damages under this decree should be credited on his judgment against Woolfolk in the equity suit.

Ex parte GRAHAM.

(District Court, S. D. California. August 21, 1914.)

No. 836.

1. EXTRADITION (§ 32*)—INTERSTATE EXTRADITION—SUFFICIENCY OF INDICTMENT.

An indictment, in order to constitute a sufficient charge of crime to warrant interstate extradition, need show no more than that the accused is substantially charged with crime.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 36-38; Dec. Dig. § 32.*]

2. EXTRADITION (§ 30*)—INTERSTATE EXTRADITION—FUGITIVE FROM JUSTICE.

To constitute one a fugitive from justice to warrant his extradition from another state, he must have committed some criminal act when within the state, although the crime may not have been complete until other acts were done after he left the state.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 32; Dec. Dig. § 30.*]

On petition of Benjamin F. Graham for writ of habeas corpus.
Continued.

Gray, Barker & Bowen, Paul Schenck, and Oscar Lawler, all of Los Angeles, Cal., for petitioner.

Harry S. Stokes, of Nashville, Tenn., Earl Rogers, W. H. Dehm, Thos. Lee Woolwine, and W. H. Anderson, all of Los Angeles, for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ROSS, Circuit Judge. The petitioner, being held a prisoner by the representatives of the state of Tennessee under a warrant issued in extradition proceedings by the Governor of California upon the requisition of the Governor of Tennessee, seeks by habeas corpus to obtain his discharge from such imprisonment.

The Constitution of the United States provides as follows:

"A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime." Clause 2, § 2, art. 4.

To give effect to this constitutional provision Congress passed an act, approved February 12, 1793, c. 7 (1 Stat. 302), the substance of which is reproduced in section 5278 of the Revised Statutes (U. S. Comp. St. 1901, p. 3597) as follows:

"Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory."

Objection to the jurisdiction of this court in the premises was made, but was subsequently withdrawn, and as such jurisdiction is, I think, beyond question, nothing further on that subject need be said.

[1] The petitioner being held under warrant issued by the Governor of California, there are but two questions open to the consideration of this court—one a question of law, and the other a mixed question of law and fact. The former is as to the sufficiency of the indictment against the petitioner. The Supreme Court in the case of *Pierce v. Creecy*, 210 U. S. 387, 401, 28 Sup. Ct. 714, 718 (52 L. Ed. 1113), in considering the validity of an indictment on proceedings similar to the present, said:

"There must be objections which reach deeper into the indictment than those which would be good against it in the court where it is pending. We are unable to adopt the test suggested by counsel, that an objection, good if taken on arrest of judgment, would be sufficient to show that the indictment is not a charge of crime. Not to speak of the uncertainty of such a test, in view of the varying practice in the different states, there is nothing in principle or authority which supports it. Of course such a test would be utterly inapplicable to cases of a charge of crime by affidavit, which was held to be within the Constitution. In *Matter of Strauss*, 197 U. S. 324 [25 Sup. Ct. 535, 49 L. Ed. 774]. The only safe rule is to abandon entirely the standard to which the indictment must conform, judged as a criminal pleading, and consider only whether it shows satisfactorily that the fugitive has been in fact,

however inartificially, charged with crime in the state from which he has fled. *Roberts v. Reilly*, 116 U. S. 80, 95 [6 Sup. Ct. 291, 29 L. Ed. 544]; *Pearce v. Texas*, 155 U. S. 311, 313 [15 Sup. Ct. 116, 39 L. Ed. 164]; *Hyatt v. Corkran*, 188 U. S. 691, 709 [23 Sup. Ct. 456, 47 L. Ed. 657]; *Munsey v. Clough*, 196 U. S. 364, 372 [25 Sup. Ct. 282, 49 L. Ed. 515]; *Davise's Case*, 122 Mass. 324; *State v. O'Connor*, 38 Minn. 243; *State v. Goss*, 66 Minn. 291 [68 N. W. 1089]; *Matter of Voorhees*, 32 N. J. Law, 141; *Ex parte Pearce*, 32 Tex. Cr. R. 301 [23 S. W. 15]; *In re Van Sciever*, 42 Neb. 772 [60 N. W. 1037, 47 Am. St. Rep. 730]; *State v. Clough*, 71 N. H. 594 [53 Atl. 1086, 67 L. R. A. 946]."

And the court concluded its opinion with these words:

"This court, in the cases already cited, has said, somewhat vaguely, but with as much precision as the subject admits, that the indictment, in order to constitute a sufficient charge of crime to warrant interstate extradition, need show no more than that the accused was substantially charged with crime. This indictment meets and surpasses that standard, and is enough. If more were required, it would impose upon courts, in the trial of writs of habeas corpus, the duty of a critical examination of the laws of states with whose jurisprudence and criminal procedure they can have only a general acquaintance. Such a duty would be an intolerable burden, certain to lead to errors in decision, irritable to the just pride of the states and fruitful of miscarriages of justice. The duty ought not to be assumed unless it is plainly required by the Constitution, and, in our opinion, there is nothing in the letter or the spirit of that instrument which requires or permits its performance."

Looking at the indictment here, it is seen that it in effect charges that the petitioner did, on the 27th day of July, 1907, at the county of Davidson, of the state of Tennessee, fraudulently obtain \$3,000 of the money of one Thomas P. Ayres, in a certain specified way and by means of certain alleged fraudulent misrepresentations and pretenses. Such acts, if committed, constitute a crime under the laws of the state of Tennessee. The indictment must therefore be held sufficient.

Is the petitioner a fugitive from justice within the meaning of the above-quoted provisions of the Constitution and statutes of the United States? is the only other question that can be here considered.

In the case of *McNichols v. Pease*, 207 U. S. 100, 108, 109, 28 Sup. Ct. 58, 52 L. Ed. 121, the Supreme Court deduced the following principles from its previous decisions in the cases of *Robb v. Connolly*, 111 U. S. 624, 639, 4 Sup. Ct. 544, 28 L. Ed. 542, *Ex parte Reggel*, 114 U. S. 642, 652, 653, 5 Sup. Ct. 1148, 29 L. Ed. 250, *Roberts v. Reilly*, 116 U. S. 80, 95, 6 Sup. Ct. 291, 29 L. Ed. 544, *Hyatt v. Corkran*, 188 U. S. 691, 719, 23 Sup. Ct. 456, 47 L. Ed. 657, *Munsey v. Clough*, 196 U. S. 364, 372, 25 Sup. Ct. 282, 49 L. Ed. 515, *Pettibone v. Nichols*, 203 U. S. 192, 27 Sup. Ct. 111, 51 L. Ed. 148, 7 Ann. Cas. 1047, and *Appleyard v. Massachusetts*, 203 U. S. 222, 27 Sup. Ct. 122, 51 L. Ed. 161, 7 Ann. Cas. 1073:

"1. A person charged with crime against the laws of a state and who flees from justice, that is, after committing the crime, leaves the state, in whatever way or for whatever reason, and is found in another state, may, under the authority of the Constitution and laws of the United States, be brought back to the state in which he stands charged with the crime, to be there dealt with according to law.

"2. When the executive authority of the state whose laws have been thus violated makes such a demand upon the executive of the state in which the alleged fugitive is found as is indicated by the above section (5278) of the

Revised Statutes, producing at the time of such demand a copy of the indictment, or an affidavit certified as authentic and made before a magistrate charging the person demanded with a crime against the laws of the demanding state, it becomes, under the Constitution and laws of the United States, the duty of the executive of the state where the fugitive is found to cause him to be arrested, surrendered, and delivered to the appointed agent of the demanding state, to be taken to that state.

"3. Nevertheless, the executive, upon whom such demand is made, not being authorized by the Constitution and laws of the United States to cause the arrest of one charged with crime in another state, unless he is a fugitive from justice, may decline to issue an extradition warrant, unless it is made to appear to him, by competent proof, that the accused is substantially charged with crime against the laws of the demanding state, and is, in fact, a fugitive from the justice of that state.

"4. Whether the alleged criminal is or is not such fugitive from justice may, so far as the Constitution and laws of the United States are concerned, be determined by the executive upon whom the demand is made in such way as he deems satisfactory, and he is not obliged to demand proof apart from proper requisition papers from the demanding state, that the accused is a fugitive from justice.

"5. If it be determined that the alleged criminal is a fugitive from justice—whether such determination be based upon the requisition and accompanying papers in proper form, or after an original, independent inquiry into the facts—and if a warrant of arrest is issued after such determination, the warrant will be regarded as making a *prima facie* case in favor of the demanding state and as requiring the removal of the alleged criminal to the state in which he stands charged with crime, unless in some appropriate proceeding it is made to appear that he is not a fugitive from the justice of the demanding state.

"6. A proceeding by habeas corpus in a court of competent jurisdiction is appropriate for determining whether the accused is subject, in virtue of the warrant of arrest, to be taken as a fugitive from the justice of the state in which he is found to the state whose laws he is charged with violating.

"7. One arrested and held as a fugitive from justice is entitled, of right, upon habeas corpus, to question the lawfulness of his arrest and imprisonment, showing by competent evidence, as a ground for his release, that he was not, within the meaning of the Constitution and laws of the United States, a fugitive from the justice of the demanding state, and thereby overcoming the presumption to the contrary arising from the face of an extradition warrant."

And the Supreme Court closed its opinion in the case just cited as follows:

"When a person is held in custody as a fugitive from justice under an extradition warrant in proper form, and showing upon its face all that is required by law to be shown as a prerequisite to its being issued, he should not be discharged from custody unless it is made clearly and satisfactorily to appear that he is not a fugitive from justice within the meaning of the Constitution and laws of the United States. We may repeat the thought expressed in *Appleyard's Case*, above cited, that a faithful, vigorous enforcement of the constitutional and statutory provisions relating to fugitives from justice is vital to the harmony and welfare of the states, and that 'while a state should take care, within the limits of the law, that the rights of its people are protected against illegal action, the judicial authorities of the Union should equally take care that the provisions of the Constitution be not so narrowly interpreted as to enable offenders against the laws of a state to find a permanent asylum in the territory of another state.'"

To overcome the *prima facie* case made by the Governor's warrant under which the present petitioner is held, the latter must therefore show by clear and satisfactory proof that he is not a fugitive from justice.

[2] To constitute one a fugitive from the justice of a state, it is essential that he should in that state have incurred guilt. It is not enough that outside of the state he committed criminal acts intended to produce, and which did produce, detrimental effects within it.

Such acts said the Supreme Court, in *Strassheim v. Daily*, 221 U. S. 280, 285, 31 Sup. Ct. 558, 560 (55 L. Ed. 735), would—

"Justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power. *Commonwealth v. Smith*, 11 Allen [Mass.] 243, 256, 259; *Simpson v. State*, 92 Ga. 41 [17 S. E. 984, 22 L. R. A. 248, 44 Am. St. Rep. 75]; *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 356 [29 Sup. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047]; *Commonwealth v. Macloon*, 101 Mass. 1, 6, 18 [100 Am. Dec. 89]. We may assume, therefore, that Daily is a criminal under the laws of Michigan. Of course we must admit that it does not follow that Daily is a fugitive from justice. *Hyatt v. Corkran*, 188 U. S. 691, 712 [23 Sup. Ct. 456, 47 L. Ed. 657]. On the other hand, however, we think it plain that the criminal need not do within the state every act necessary to complete the crime. If he does there an overt act which is and is intended to be a material step toward accomplishing the crime, and then absents himself from the state and does the rest elsewhere, he becomes a fugitive from justice when the crime is complete, if not before. In *re Cook*, 49 Fed. 833, 843, 844; *Ex parte Hoffstot*, 180 Fed. 240, 243 [31 Sup. Ct. 222, 54 L. Ed. 1201]; In *re William Sultan*, 115 N. C. 57 [20 S. E. 375, 28 L. R. A. 294, 44 Am. St. Rep. 433]. For all that is necessary to convert a criminal under the laws of a state into a fugitive from justice is that he should have left the state after having incurred guilt there (*Roberts v. Reilly*, 116 U. S. 80 [6 Sup. Ct. 291, 29 L. Ed. 544]), and his overt act becomes retrospectively guilty when the contemplated result ensues. Thus in this case offering the bid and receiving the acceptance were material steps in the scheme, they were taken in Michigan, and they were established in their character of guilty acts when the plot was carried to the end, even if the intent with which those steps were taken did not make Daily guilty before. *Swift v. United States*, 196 U. S. 375, 396 [25 Sup. Ct. 276, 49 L. Ed. 518]."

If, therefore, the present petitioner had been apprehended within the state of Tennessee when, according to his affidavit filed in the proceedings before the Governor of California, he went there in or about the month of August, 1907, he would undoubtedly have been subject to prosecution under an indictment against him. But, as said by the Supreme Court in the case cited and from which the above quotation is taken, it does not follow from this that the petitioner is a fugitive from the justice of the state in which he did not commit the crime. On the contrary, I repeat that to constitute him a fugitive from the justice of the state of Tennessee the commission of some criminal act by him within that state is essential. And such is the effect of the decisions of the Supreme Court above cited.

The gist of the present inquiry, therefore, is whether Graham was in the state of Tennessee at the time he is alleged to have obtained the \$3,000 from Ayres by the means and in pursuance of the alleged false representations and pretenses, or was within that state at the time of the commission of any act connected with and culminating in such alleged fraudulent obtaining of the said money, whether such act was committed on the day specified in the indictment, or at any other time provable thereunder. If the said money was so obtained by the petitioner, the crime charged against him was then complete, and if any essential element of it was committed by him within the state of Ten-

nessee he is a fugitive from justice and must be remanded. If, however, the alleged crime was not committed by him within the state of Tennessee, he cannot, for the reasons above stated, be considered a fugitive from justice, even though he was subsequently within the state for a time.

Counsel for the state of Tennessee, insisting that they can show by competent evidence that the petitioner was within that state at the time of the alleged commission of the said crime notwithstanding the contention of the petitioner to the contrary, and having requested a reasonable time within which to procure such proof, and the petitioner likewise requesting further time within which to procure evidence in respect to that question, it is ordered that the matter be continued for further hearing to September 28, 1914, at 10:30 a. m.

In re CORDOVA SHOP.

(District Court, W. D. New York. August 5, 1914.)

1. CORPORATIONS (§ 28*)—ORGANIZATION—DE FACTO CORPORATION—USER.

Certain individuals contemplating engaging in the leather goods business intended to form a corporation, and for that purpose filed with the secretary of state a certificate of incorporation, paying the tax or fees for that purpose. No stock certificates were issued, or regular meetings of stockholders or directors called, and no reports were filed; nor was the certificate filed and recorded in the office of the clerk of the county wherein the business was conducted until October 22, 1909. In the meantime, however, the corporation commenced to manufacture and sell goods, and claimant did some work for it, and advanced money for its business, which was legitimately used in the business to pay maturing pay rolls, purchase supplies, and pay debts generally. *Held*, that the organization was a corporation de facto, and hence capable of assuming a liability for such advances.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 26, 70; Dec. Dig. § 28.*]

2. BANKRUPTCY (§ 340*)—CORPORATIONS—CLAIMS—ADVANCES.

In bankruptcy proceedings against a corporation, evidence *held* to require a finding that claimant made certain advances to the corporation to assist in carrying on its business, and that the advances were not made to one of the promoters under his agreement with his copromoters to finance the corporation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Cordova Shop. On application to review a referee's order disallowing the claim of Andrew B. Brown. *Reversed*.

George C. Riley, of Buffalo, N. Y., for trustee.

Frank A. Abbott, of Buffalo, N. Y., for claimant.

HAZEL, District Judge. The asserted claim is for money loaned the Cordova Shop, adjudicated a bankrupt July 29, 1913, before the completion of its incorporation, and is represented by a promissory note dated October 26, 1909, and signed by the president and sec-

retary after the legal perfection of incorporation. Upon objection by the trustee to the allowance of the claim in question, testimony pro and con was taken before the referee in bankruptcy upon the questions of the liability of a de facto corporation for money loaned it, and for labor and services performed for it, and upon the effect, in the way of ratification or affirmance of corporate indebtedness, of the delivery to the claimant of a promissory note as security. The trustee claims that the money was advanced by Brown to Lake, the president of the corporation, individually, to enable him to fulfill his contract with his associates, Kranz and Hilt, also officers of the Cordova Shop, to finance the company.

[1] The voluminous record submitted discloses a confusion of ideas, as well as a conflict in some important particulars between the testimony of the claimant and the erstwhile officers of the bankrupt; but, were it not that I think the referee has drawn unwarranted inferences herein, and based his conclusions on an error of law and mistake of fact, I should consider it unnecessary to restate any portion thereof. Briefly, however, the evidence shows that in November, 1908, the witnesses Lake, Hilt, and Kranz entered into an agreement in writing whereby each was to contribute property or money to the assets of a company to be organized and incorporated by them under the name Cordova Shop to engage in the leather goods business in the city of Buffalo. It was clearly the intention of the said witnesses to form a corporation, for on November 4, 1908, in accordance with the provision of the statute, they filed with the secretary of state a certificate of incorporation wherein Lake, Kranz, and the claimant, Brown, were described as directors. The capital stock of the company, as stated therein, was \$25,000, and the corporation tax or fees were duly paid. No stock certificates were issued, no regular meetings of stockholders or directors were called, and no reports were filed. Neither was there at that time a strict compliance with the requirements of the statute relating to the filing and recording of certificates; no certificate of incorporation being filed in the office of the clerk of the county wherein the business was conducted until October 22, 1909.

It appears, however, that immediately after filing the certificate of incorporation with the secretary of state the company commenced the manufacture and sale of leather goods; Lake being regarded as the president and his associates, Kranz and Hilt, as vice president and secretary, respectively. The capital stock of the corporation was not issued until October, 1909, when the incorporation of the company was finally completed. Immediately after business was engaged in, the claimant, Brown, did some carpenter work for the company and advanced between \$4,000 and \$5,000 for its benefit, which was legitimately used in the business in meeting maturing pay rolls, in purchasing supplies, and in the payment of its debts generally.

[2] The claimant substantially testified that he had known Lake for 25 or 30 years previous to the incorporation of the company; that Lake came to him in 1908 and stated that it was his intention to associate himself with Hilt and Kranz in the leather goods busi-

ness; that afterwards he was introduced by Lake to Hilt and Kranz, and stated to them that he would loan Lake and "these young men" \$1,500 to organize the business. He swore that he did not at this time, or at any time before the bankruptcy, know of a contract between Lake and his two associates in accordance with which the former was to finance the enterprise, while the latter were to contribute their patterns and formulas to the business. As there was much criticism of his testimony, due, perhaps, to the asperity with which he replied to questions put to him, it may not be inapt to quote a portion of his examination, to which, after all, we must look to ascertain his state of mind at the beginning of the transaction.

"A. The first time I think that we met was after the boys had come in to start to work, and I told Mr. Lake that I would loan him and these young men \$1,500. Q. That is, him? A. And the three men. Q. Do you know whether they had, at that time, filed their articles of incorporation? A. I didn't know anything about it. I heard since that they had a contract, but I don't remember ever seeing it. Q. That is, they had a contract between themselves? A. Yes; but I didn't know anything about it, except it has been brought up since this trouble has been brought on; and I believe it is here now. I don't know anything about it. I don't think I ever saw it. I told him I would be very glad—just previous to this I had started two or three young men in business—and I told them I would be very glad to loan them \$1,500; but I wanted my money back sure, and the way they talked there would be no question but I would get it back in a year's time, and they said they wouldn't need any more money than \$1,500. Q. Was there any talk at that time about your taking the stock in this company? A. That is not really clear, but as I remember it I told them I didn't want to go into the company; that I had a good business, and if there was any money in it they could make the money. * * * They wanted me to come in, but I didn't want to, and I promised to give them the money as fast as they needed it, and then they called on me to do some work. * * * Q. Then what occurred after that? A. Now, I cannot tell which one came down; but at different times they said they had to have money for pay rolls, and a few times they came and got money for either material or debts they had to pay. Q. And would different members come; that is, sometimes Kranz and sometimes Lake, and sometimes Hilt? A. Yes; and sometimes I would go down there when I was downtown, and I gave it to whoever was there. I gave all those other moneys after rather under protest, because I only agreed to give them \$1,500, and I gave it under protest, because they thought they could start their business nicely on that amount of money."

It does not clearly appear that any of the incorporators were aware that the requirements of the statute with respect to incorporation had not been fully complied with, except that the witness Hilt testified that subsequently to the filing of the certificate in the office of the secretary of state the corporation was "hanging in the air," and there was a question "whether the business was worth while organizing." But this is immaterial, and the presumption, in view of the circumstances, is strongly in favor of an honest intention to form a corporation. That processes and patterns were contributed by the witnesses Hilt and Kranz, and were actually used in business carried on under the corporate name specified in the certificate of incorporation, that bank accounts were carried in the corporate name, and business conducted thereunder, is not disputed, and indicate a bona fide intention and attempt to form a corporation. Incorporation was concededly incomplete, because of failure to fulfill all the statutory

requirements; but user, accompanied by all the essentials of a de facto corporation, is to my mind clearly shown. *Methodist Episcopal Union Church v. Pickett*, 19 N. Y. 482; *Emery v. DePeyster*, 77 App. Div. 65, 78 N. Y. Supp. 1056; *Eaton v. Aspinwall*, 19 N. Y. 119; *Raisbeck v. Oesterricher*, 4 Abb. N. C. (N. Y.) 444.

A subscriber to the capital stock of the company no doubt could have been held on his subscription, even though the statute relating to incorporation was not fully complied with; and why the claimant, who paid the bills and performed labor for the company at the request of the incorporators in the early period of its attempted organization should not have his claim allowed, is not apparent, unless it can be clearly established that he did in fact loan the money to Lake on his personal liability. It is not proven that such was his intention, although it must be conceded that equivocal testimony on this point was drawn from the witnesses Lake and Kranz. But nowhere in the record is shown more than a surmise or suspicion that the claimant was aware of Lake's arrangement with his associates to finance the company, or that throughout the initial stages of the transaction he looked to Lake individually for repayment. It is true that Lake testified that on March 16, 1909, he gave his personal note to cover advances previously made by Brown, and that thereupon he credited to himself on the books of the company the sum of \$4,300, the amount of such advances by Brown; but Brown denies accepting the personal note of Lake in satisfaction of his claim, and asserts the subsequent voluntary delivery to him of the promissory note of the corporation, which would seem to confirm his refusal of the Lake note. Certainly he should not be held responsible for Lake's acts of apparent duplicity, unless the evidence clearly indicates that they were with his sanction and because of Lake's individual liability to him.

Both Brown and Lake testified that there was an understanding in the beginning that the former should have the option of taking shares of stock for his indebtedness; but it is not disputed that subsequently, in January, 1909, Brown decided not to take any shares of stock, but to require a return of his money. Upon this subject Lake testified as follows:

"Q. And that was the arrangement with him. He had his option. You were going to have a large amount of the stock, and you gave him the option of either taking stock in the company or taking your individual note and you keep the stock. That was your arrangement? A. No; the option was to take stock, or that we were to pay for the work he had done for us and the moneys he had advanced. Q. And you were the one that was to do the paying? A. As president of the company. Q. As an individual? A. No; I wouldn't say that. Q. You gave him your individual note, didn't you? A. Yes. Q. Why did you give him your individual note? A. Well, the matter was still, at that time, in such shape that we knew we had to have more money from Mr. Brown. Q. This wasn't to get more money. This was to pay up the amount that had been advanced, wasn't it? A. It was to be his security for it."

So that, even if it be assumed herein that a personal note was given, it appears to have been fairly regarded by the maker as collateral security for an indebtedness of the company for which it was primarily liable. The witness Hilt swore that he supposed Lake had given his

personal note for the debt; that when he learned from the bookkeeper that the company had paid interest thereon he made inquiries, and the bookkeeper, in the absence of Brown, said it was a personal note of Lake's; and that later he was informed by Lake that as the money from Brown was put into the business the note should in fact have been a Cordova Shop note. Such testimony, properly interpreted, would seem to negative the conclusion that the loans and advances were not made to the company.

It was further held by the referee that the promissory note in question, upon which subsequently \$1,000 and interest were paid by the corporation, was without consideration, and hence not binding upon it. The evidence fairly shows that when the incorporators became aware of the incompleteness of the incorporation proceedings they took steps to complete the same. Meetings were held by the directors, shares of stock were issued, officers formally elected, and a duplicate certificate of incorporation was filed in the county clerk's office. The prior advances of Brown and his request for a note were discussed. No adequate reason is discoverable for disbelieving the testimony of Mr. Houpt upon this subject, or for failing to give it proper weight. His narrative of the occurrence discloses no repudiation of Brown's claim, but, on the contrary, shows express recognition thereof, and unanimous agreement among the incorporators to execute and deliver the promissory note in question. It is inconceivable that Kranz and Hilt would not at such a time have interposed objections to making the company responsible, if in fact the loans were not for its benefit, but were merely to enable Lake to fulfill his agreement to finance the company or to contribute to the capital stock. They had been faithful to their contractual engagement, and in my opinion would not have supinely acquiesced in making the corporation responsible if no sufficient consideration had been received by it. Even though the note was not executed and delivered on the day it bears date, its subsequent execution and delivery, as testified to by the witness Hilt, were nevertheless, I think, in good faith and for the benefit of the corporation.

Counsel for the trustee criticizes the use of the personal pronoun "I" in the body of the note, inferring therefrom that the note was not originally made as a corporation note, but was afterwards changed to transfer Lake's liability to the corporation. There are, however, no facts in support of the argument; Houpt testifying, in explanation of the wording of the note, that he invariably used the pronoun "I" when drawing a corporation note.

It is also contended that the acceptance of 398 shares of stock at the time of making the note militates against its validity. Such collateral concededly added little to the security of the note, unless the payee attached importance to the personnel of the officers of the corporation; but these are incidental details, which should not weigh against the claimant and his repeated assertion that he at all times looked to the company for a repayment of the advances made by him.

My conclusion is that the note, subject to the amount paid on account, should be allowed, and the decision of the referee reversed.

CONNOLE v. NORFOLK & W. RY. CO.

(District Court, S. D. Ohio, E. D. September 2, 1914.)

No. 1758.

1. COMMERCE (§ 27*)—INTERSTATE AND INTRASTATE COMMERCE.

An interstate carrier may, through the same employé or employes, engage at a given time in intrastate commerce and at another time in interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

2. EVIDENCE (§ 33*)—JUDICIAL NOTICE—LEGISLATIVE JOURNALS.

A court in interpreting a statute may take judicial notice of legislative journals.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 47; Dec. Dig. § 33.*]

3. STATUTES (§ 217*)—AMENDMENT—CONSTRUCTION.

Where during the passage of a statute words of enlargement were stricken out by amendment and words of limitation inserted in their stead, a court in construing the statute as finally passed, would hold that the legislative intent was to restrict its application.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 293; Dec. Dig. § 217.*]

4. MASTER AND SERVANT (§ 250½, New, vol. 16 Key-No. Series)—INJURY TO SERVANT—WORKMEN'S COMPENSATION ACT—CONSTRUCTION—INTERSTATE EMPLOYÉS.

Ohio Workmen's Compensation Act (Act March 14, 1913, 103 Ohio Laws, p. 90) § 51, provides that the act shall apply to employers and their employes engaged in intrastate and also in interstate and foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States only to the extent that their mutual connection with the intrastate work may and shall be clearly separable and distinguishable from the interstate and foreign commerce, and then only when such employer and any of his workmen, working only within the state with the approval of the State Liability Board of Awards and so far as not forbidden by any act of Congress, voluntarily accept the provisions of the act. *Held* that the act does not apply to employers and their employes engaged exclusively in interstate commerce, but does apply to those engaged in both interstate and intrastate commerce where their mutual connection with intrastate work is separable from interstate and foreign commerce when, and only when, they elect to be governed by the act.

[What law governs master's liability for injuries to servant, see note to Mexican Cent. Ry. Co. v. Jones, 48 C. C. A. 232.]

At Law. Action by T. J. Connole against the Norfolk & Western Railway Company. On motion to strike out petition. Sustained.

Smith W. Bennett, of Columbus, Ohio, for plaintiff.

James I. Boulger, of Chillicothe, Ohio, for State Atty. Gen., as amicus curiæ.

Bannon & Bannon, of Portsmouth, Ohio, and Henry J. Booth, of Columbus, Ohio, for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SATER, District Judge. The defendant by its motion seeks an interpretation of section 51 of the Ohio Workmen's Compensation Act (103 Ohio L., 72, 90) a copy of which is set forth in the margin.¹

[1] Plaintiff says that the averments in the petition do not admit of any construction other than that the defendant was entirely occupied at the time of his injury in purely intrastate commerce, but as to this counsel do not agree. An interstate carrier may, through the same employé or employes, engage at a given time in intrastate commerce, and at another in interstate commerce. *Illinois Cent. R. Co. v. Behrens*, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051. It will answer present purposes best, and probably conform to the true meaning of the petition, to treat it as charging that both he and the defendant were, as regards the particular service he was performing at the time he received his injury, engaged in intrastate commerce, although defendant is also an interstate carrier and has at all times engaged in interstate business. The defendant's position is that, even if both were engaged in purely intrastate business at the time plaintiff was injured, the defendant, being also an interstate carrier engaged in interstate commerce, is not amenable to the provisions of the Ohio act unless it and some, at least, of its workmen working only in this state, with the approval of the State Liability Board of Awards, had voluntarily accepted the provisions of such act by filing their written acceptances thereof with such board, and unless such acceptances had also been approved by such board; and that in that event the defendant would be subject to the provisions of the act for the period only for which the premiums called for by the act had been paid. Because there is no averment in the petition that the defendant and any of its workmen had thus accepted and become bound by the provisions of the act, the defendant moves to strike from the petition the following paragraph:

"Plaintiff further says that at said time said defendant was as to this plaintiff an employer as defined in and subject to the provisions of an act of the General Assembly of the state of Ohio, duly passed and approved March 13 (14), 1912, and entitled: 'An act to further define the powers, duties and jurisdiction of the *State Liability Board of Awards* with reference to the collection, maintenance and disbursement of the state insurance fund for the benefit of injured, and the dependents of killed employes and requiring contribution thereto by employers, and to repeal sections [here follows a list of the sections] of the General Code.' And said defendant had not at said time, and has not now, complied with any of the provisions of said act."

¹ Section 51. The provisions of this act shall apply to employers and their employes engaged in intrastate and also in interstate and foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, and then only when such employer and any of his workmen working only in this state, with the approval of the state liability board of awards, and so far as not forbidden by any act of Congress, voluntarily accept the provisions of this act by filing written acceptances, which, when filed with and approved by the board, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms, during the period or periods for which the premiums herein provided have been paid. Payment of premium shall be on the basis of the pay roll of the workmen who accept as aforesaid.

[2, 3] When interpreting a statute a court may take judicial notice of legislative journals. Endlich, *Interpretation of Statutes*, § 33; *Blake v. National Banks*, 23 Wall. 307, 23 L. Ed. 119; *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 414, 29 Sup. Ct. 527, 53 L. Ed. 836; *State v. McCollister*, 11 Ohio, 46, 55; *The Saratoga* (D. C.) 9 Fed. 322, 330; *Cooper v. Richmond & D. R. Co.* (C. C.) 42 Fed. 697, 700, 8 L. R. A. 366; *American Net & Twine Co. v. Worthington*, 141 U. S. 468, 474, 12 Sup. Ct. 55, 35 L. Ed. 821; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 37, 15 Sup. Ct. 508, 39 L. Ed. 601; *Knowlton v. Moore*, 178 U. S. 41, 77, 20 Sup. Ct. 747, 44 L. Ed. 969; *Chesapeake & Potomac Telephone Co. v. Manning*, 186 U. S. 238, 245, 22 Sup. Ct. 881, 46 L. Ed. 1144; *Division of Howard County*, 15 Kan. 195; *Dr. J. L. Stephens Co. v. United States*, 203 Fed. 817, 823, 122 C. C. A. 135. In the last-named case it appeared that when the bill which became the Pure Food and Drugs Law was under consideration, an amendment was offered to narrow one of its broad provisions. The amendment was defeated. It was held that such action on the part of Congress is practically conclusive that it intended that the broad provision should remain unmodified, and that the narrower interpretation, which counsel sought and which the amendment contemplated, could not prevail. If the refusal of a legislative body to narrow comprehensive language shows an intention to enact a comprehensive statute, then the converse of that proposition is also true, and if it appears that by amendment words of enlargement are stricken out and words of limitation inserted in their stead, the court should hold that the legislative intent was to restrict. An instructive case enforcing the effect of a restrictive amendment to a bill on its passage is that of *State v. McCollister*, *supra*.

[4] The earlier portions of section 51 make the act applicable to employers and employes engaged in interstate or foreign commerce (notwithstanding any federal act affecting them) to the extent only that both are engaged in intrastate work alone at the time of the happening of an injury to an employé; that is to say, the work must be clearly separable and distinguishable from interstate or foreign commerce to bring the employer and its injured employé within the terms of the statute. After thus making the act applicable to such persons, the section further provides:

"And then only [shall the provisions of the act apply to them] when such employer and any of his workmen working only in this state, with the approval of the state liability board of awards, and so far as not forbidden by the act of Congress, voluntarily accept the provisions of this act by filing written acceptances, which, when filed with and approved by the board shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included within its terms, during the period or periods for which the premiums herein provided have been paid."

The section, with certain changes, only one of which affects anything here under consideration, is the same as section 6604—18 of the Washington statute (Remington & Ballinger's *Anno. Codes, Supp.* 1913). The only change that need be noted here is the substitution

in the Ohio act of the words "and then only when" for the words "except that any such," occurring in that of Washington. The words in the Washington act enlarge the classes of persons to whom the act may apply, whereas the Ohio act restricts such classes. The one extends the application of the statute and the other limits it. The Washington statute is plain and intelligible, but does not appear to have been construed. After the bill which became the Workmen's Compensation Act was introduced in the General Assembly (section 51 being then the same, in so far as it need here be considered, as section 6604—18, Washington statute), an amendment was offered in the Senate to strike out the words, "except that any such," and to insert in lieu thereof the words, "and then only when." The motion prevailed, and the bill as thus amended became the present law. The amendment was probably offered, as counsel suggest, to avoid any objection that might arise under the commerce clause of the federal Constitution and federal legislation enacted in pursuance of such authority. The author of the amendment may have misapprehended the state of the law, but this may not be presumed. 8 Cyc. 804. On the contrary, the court must presume that the Legislature acted advisedly and with full knowledge of the situation, and must accept its action as that of the body having full power to act and acting only when it had acquired sufficient information to justify its action. *Chesapeake & Potomac Telephone Co. v. Manning*, 186 U. S. 245, 22 Sup. Ct. 881, 46 L. Ed. 1144, *supra*.

In view of the language found in other portions of the statute indicating an intent to make the law applicable to all workmen who are not engaged in interstate commerce, the court is in effect asked to interpret the section as if it were phrased as it appeared in the original bill. In *Knowlton v. Moore*, 178 U. S. 77, 20 Sup. Ct. 747, 44 L. Ed. 969, *supra*, it is said:

"We are * * * bound to give heed to the rule that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."

It is urged that, if section 51 be interpreted according to its plain language, inequality and injustice will result in that the law is then rendered inapplicable to persons employed by an interstate carrier (unless the acceptances and approval named in such section be first had), and probably offends the constitutional provision against class legislation, and that so to interpret it will endanger, if not destroy, the entire act, notwithstanding the provision in section 59 that, should any section or provision of the act be held unconstitutional or invalid, such holding shall not affect the validity of the act as a whole, or any part thereof other than the part so decided to be unconstitutional. The language of the section, in so far as here involved, is clear, and by deliberate action the Legislature inserted words of limitation. To accede to the construction asked by plaintiff is for the court to legislate, or to state it more accurately, to nullify legislative action and strike out what the General Assembly inserted and insert what it deliberately struck out. This a court may not do.

It would be presumptuous to pass at this time on the constitutionality

of the Workmen's Compensation Act. Should the constitutional question ever be properly presented, it will then be time for the court to determine whether the act falls within any constitutional inhibition. If it does not, it will be upheld; but the court will not then be permitted to resort to a forced construction to sustain it. Attorney General v. City of Eau Claire, 37 Wis. 400; 26 Am. & Eng. Ency. Law, 643; *Bailley v. P. W. & B. R. Co.*, 4 Har. (Del.) 389, 44 Am. Dec. 593, 605. Nor may it interpret the section under consideration in a particular way to allay a fear that the validity of the act may, at some future time, be assailed, if such particular interpretation be not now given.

In *Bate Refrigerating Co. v. Sulzberger*, supra, which involved the construction of a portion of the patent law, Mr. Justice Harlan said:

"In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But as declared in *Hadden v. Collector*, 5 Wall. 107, 111 [18 L. Ed. 518]: 'What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' 'Where the language of the act is explicit,' this court has said, 'there is great danger in departing from the words used, to give an effect to the law, which may be supposed to have been designed by the Legislature. * * * It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions.' *Scott v. Reid*, 10 Pet. 524, 527 [9 L. Ed. 519]."

He then considered the injury that might result to American inventors from the enforcement of the law if construed as written, and added:

"If the statute thus construed does not give to the inventor all the benefits he would like to have, the remedy is with another department of the government, and it is not for the courts to tamper with the words of a statute, or by strained construction of legislative enactments, the language of which is clear and explicit, to accomplish results not contemplated by Congress. This court, speaking by Chief Justice Marshall, in *United States v. Fisher*, 2 Cranch. 358, 385 [2 L. Ed. 304], said that where the meaning of the Legislature was plain, 'it must be obeyed.'"

If the statute as enacted in its operation exempts from its provisions and discriminates against a given class of employes, the fault lies with the General Assembly. It alone may correct the statute. The amendment may have rendered surplusage the words, "and so far as not forbidden by any act of Congress," but that fact will not nullify the intent clearly expressed by the amendment itself. A like conclusion was reached by Judge Rogers, of the court of common pleas of this (Franklin) county.

I am unable to find that any construction has been placed upon the section by any executive department of the state whose duty it is to interpret or enforce it. In the Ohio Law Reporter of August 14, 1913, pp. 179, 180, is a discussion of the Workmen's Compensation Act, in which it is said:

"It does not apply to employers and to their employes engaged exclusively in interstate commerce, but it applies to those engaged in both interstate and

intrastate commerce to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, but only upon the election of both employer and employes to be governed by its provisions."

That statement coincides with the conclusion here reached.
The motion to strike out is sustained.

SCHMERTZ WIRE GLASS CO. et al. v. CONTINUOUS GLASS PRESS CO.

(District Court, W. D. Pennsylvania. August 25, 1914.)

No. 28.

STIPULATIONS (§ 18*)—EFFECT.

Where, in a suit for infringement of patent on a wire glass manufacturing machine, it was stipulated, for the purpose of determining complainants' profits, that the cost to complainants of producing half-inch wire glass was the same as that of defendant, to wit, 15 cents per square foot, and the cost of grinding and polishing 18.79 cents per square foot, such stipulation, until withdrawn, was conclusive; and it was error, because of certain evidence introduced before the master, to find that the cost to complainants to manufacture such wire glass was 40 cents per square foot, and to determine the damages on that basis.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 41-54; Dec. Dig. § 18.*]

In Equity. Suit by the Schmertz Wire Glass Company and another against the Continuous Glass Press Company for violation of patent. On exceptions to master's report. Sustained in part.

Arthur J. Baldwin and Drury W. Cooper, both of New York City, for plaintiffs.

Augustus B. Stoughton, of Philadelphia, Pa., and Ward & Gray, of Wilmington, Del., for defendant.

BUFFINGTON, Circuit Judge. In this case Henry B. Robb, then clerk of the Circuit Court for the Eastern district, was, by agreement of the parties, appointed master to state an account, and on his death the work was continued and the accounting completed by George Brodbeck, deputy clerk. Turning first to the exceptions filed by the plaintiff, we note that in his report the master awarded complainants as damages all their loss of profits caused by defendant's sale of wire glass made on the infringing machine. This sum, viz., \$13,564.85, the master arrived at by taking the difference between the fixed selling price obtained for such glass by complainant during the infringing period and deducting therefrom complainants' cost of manufacture. This cost price was fixed by stipulation as follows:

"It is stipulated between the parties that, for the purposes of this accounting, the cost to the complainant of producing one-half inch wire glass is the same as that of the defendant, namely, 15 cents per square foot, and the cost of grinding and polishing is the same as that of the defendant, namely, 18.79 cents per square foot. This cost is the cost of producing stock sheets, and takes no account of loss resulting from cutting to size."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The master, instead of following this stipulation, and basing such allowance to the defendant at 33.79 cents, allowed it 40 cents, per square foot, making a difference of \$2,247.95. The plaintiff objects to such allowance by its first and second exceptions, which are:

"(1) That the master found that the cost to complainants of manufacturing polished wire glass was 40 cents per square foot, whereas the master should have found and reported that such cost was 33.79 cents per square foot.

"(2) That the master found that the total damages to the complainants from the infringement amounted to \$13,564.85, whereas he should have found that the total damages to the complainants from the infringement amounted to \$15,812.81."

The ground of this departure by the master from the stipulation was that in the examination of one of plaintiff's witnesses it was shown that the Schmertz Wire Glass Company did not manufacture any glass, but was a patent holding company. The Mississippi Wire Glass Company, the other complainant, was a selling company only, and the Mississippi Glass Company, a subsidiary company, was the manufacturing company for the complainants. In the accounts between the complainants and their subsidiary, the amount paid for such wire glass to the latter by the former was 40 cents per square foot. The master accordingly reported:

"The master finds that the cost to plaintiff of manufacture is 40 cents, since this is what the plaintiff pays the subsidiary company, and plaintiff is not entitled to the profit of the subsidiary company, the Mississippi Glass Company, in this accounting."

We fail to see any justification for this view. The purpose of the stipulation was to fix facts. The stipulation that, "for the purposes of this accounting, the cost to the complainant of producing one-half inch wire glass is the same as that of the defendant, namely, 15 cents per square foot, and the cost of grinding and polishing is the same as that of the defendant, namely, 18.79 cents per square foot," accepted the defendant's cost of manufacture and made it the basis of this accounting. Until that stipulation was withdrawn, it remained the ascertained and fixed basis of accounting. We accordingly sustain these exceptions, and find the charge should be \$15,812.81, instead of \$13,546.86, found by the master.

The third exception is:

"That the master found 'the case is not such an aggravated case of willful and malicious infringement as would seem to be required for multiplication of damages,' whereas he should have found and reported that under the circumstances of the willful and flagrant character of the infringement complainants are entitled to treble damages under the Revised Statutes, sections 4919 and 4921."

After argument and due consideration we are of opinion the master is not shown to have committed error in his action in this respect. The exception is therefore dismissed.

We turn next to the defendant's exception, not in effect heretofore disposed of, which is:

"(1) Exception is taken to the master's ruling converting the admittedly correct account of defendant's operations, including inventory at cost and

showing the total amount received less inventory to be \$25,370.62, and total amount spent \$26,085.99, from an actual loss of \$715.37, into an estimated profit of \$8,550.72, by adding to the inventory, or charging defendant, at cost, with part of the glass made and not sold, and not in inventory, and left after the part sold had been picked from all that was made, for two reasons: First, because in the way that defendant's business was actually conducted there was no profit to it from this glass so made and not sold or otherwise profitably disposed of; and, second, because there is no evidence that this glass realized cost, or any other price, the evidence being that it was not sold, and realized nothing, and is not in inventory or in existence."

In disposing of it we note that the defendant filed a statement with the master showing there was made by the defendant of the polished infringing glass 57,318 feet. From this there was deducted as worthless or cullett 12,232 feet, leaving a balance of 45,086 feet to be accounted for. Of this latter amount 36,200 feet were sold, and therefrom was realized \$25,370.62. As against this sum the defendant contends there should be charged \$26,085, being the cost of producing the whole 57,318 feet. In our view this contention cannot be sustained. Assuming the very unsatisfactory proof that 12,232 feet of this glass was worthless or cullett, and that no proportionate part of the \$26,085 should be charged to it, we are clear that there is no warrant for not charging a due proportion of such cost of \$26,085 to the 8,886 feet of glass remaining on hand. In other words, we think that approximately $\frac{86}{45}$ of the total cost of \$26,085, or \$20,868, should be apportioned to the 36,200 feet sold. If this is done, it will be seen that the difference between the amount realized, viz., \$25,370.62, and the proper proportionate cost, viz., \$20,868, that is, \$4,502.62, is the profit with which the defendant should be charged for the glass sold. If, in addition to this, the 12,232 feet of glass, which the defendant's own statement concedes was polished, is to enter into the account, and the proper proportion of cost chargeable to the glass sold is $\frac{26}{57}$, instead of $\frac{86}{45}$, the master would have been warranted in finding that the share of expense of producing the \$25,370 glass sold was approximately \$12,000, showing a profit of approximately \$13,000 on the glass sold. In view of the large size of this item of unaccounted for glass, and the vague testimony as to its disappearance, we feel that the master more likely erred in favor of, than against, the exceptant. We are satisfied that no injustice is done to the exceptant by dismissing the exception complained of.

A decree drawn in accordance with these holdings may be prepared for entry.

GOODWIN FILM & CAMERA CO. v. EASTMAN KODAK CO.

(District Court, W. D. New York. June 24, 1914.)

ATTORNEY AND CLIENT (§§ 141, 177*)—LIEN—COUNSEL.

Where, on the illness of the attorney of record, other counsel took charge of the proceedings and prepared the case for argument on appeal, but was not substituted as the attorney of record, such counsel was entitled to recover the reasonable value of his services outside of his contract with the attorney of record; but he had no general lien, the right to which is limited to the attorney of record, especially where it appeared that there was no fund or property belonging to the client in the possession of counsel or the court out of which compensation for counsel's services might be made.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 347, 386; Dec. Dig. §§ 141, 177.*]

In Equity. Suit by the Goodwin Film & Camera Company against the Eastman Kodak Company. On motion to vacate a final decree and grant a lien to one Wetmore as counsel for complainant. Petition dismissed.

See, also, 207 Fed. 351; 213 Fed. 231, 239.

Wetmore & Jenner, of New York City (Samuel H. Ordway, of New York City, of counsel), for petitioner.

Charles A. Brodek, of New York City, for complainant on motion to dismiss.

Philipp, Sawyer, Rice & Kennedy, of New York City, for defendant.

HAZEL, District Judge. This motion to vacate and set aside the final decree herein, in order that the question of the right of Mr. Wetmore, counsel for the complainant company, to a lien on the proceeds thereof for compensation for services, may be decided, is denied. Considering that Mr. Davidson continued in the case as the attorney of record bringing the action, the fact that the petitioner at the request of the complainant company had the principal responsibility of preparing the case for argument on appeal to the Circuit Court of Appeals during the temporary illness of Mr. Davidson does not operate to transfer to the former the right to enforce an attorney's lien. I thoroughly believe that Mr. Wetmore's assumption of the case, with its increased responsibilities after decision by this court in favor of the complainant company, entitles him, outside of his contract with the solicitor of record, to compensation for services rendered based on quantum meruit; but my examination of the adjudications bearing upon the question of attorney's lien convinces me that he did not secure a general lien, either statutory or nonstatutory; such a lien being reserved to the solicitor or attorney of record, as distinguished from counsel advising or assisting the attorney bringing suit.

It also appears herein that there is no fund or property belonging to the complainant company in the possession of either the petitioner

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or the court out of which compensation for the petitioner's services might be made. No reported cases are called to my attention wherein it is distinctly held that a counsel, as distinguished from an attorney of record, is entitled to enforce a lien upon a judgment or decree; and although there are a number of cases holding that a counsel may enforce a specific lien upon a paper, fund, or other specific property in his possession belonging to his client, a general lien has invariably been limited to the appearing attorney. The latter may include in his lien the services of counsel, but the courts have never accorded that protection to counsel alone in obtaining payment for services. *Foster v. Danforth* (C. C.) 59 Fed. 750; *Tuttle v. Claffin* (C. C.) 86 Fed. 964. In the latter case Judge Lacombe expresses the view that it is immaterial whether the claim of counsel is asserted directly or indirectly through the solicitor, but this intimation of counsel's right to enforce a general lien, if it may be so termed, must be read in conjunction with another part of the opinion, wherein it is substantially stated that upon the fruits of the judgment recovered by the solicitors and counsel "the solicitor has a lien for the fair and reasonable value of his services, including disbursements of counsel." It is also important to note that in that case the fund was in the custody of the court for disbursement in satisfaction of liens and claims asserted thereto.

Other cases were cited by petitioner to sustain his right to a lien, and the right of the court to annul the decree, in order to determine and adjust his compensation; but they are not directly in point. That counsel has no right of lien, and that the attorney of record alone is entitled thereto under the New York statute (Judiciary Law [Consol. Laws, c. 30] §§ 474 and 475), has many times been squarely held. In *re Dailey v. Wellbrock*, 65 App. Div. 523, 72 N. Y. Supp. 848; *Kennedy v. Carrick*, 18 Misc. Rep. 38, 48 N. Y. Supp. 1127; *Holmes v. Bell*, 139 App. Div. 455, 124 N. Y. Supp. 301; *Morey v. Schuster*, 159 App. Div. 602, 145 N. Y. Supp. 258.

It follows that the petition must be dismissed.

EUBANK v. BRYAN COUNTY STATE BANK OF CADDO, OKL., et al.†

(Circuit Court of Appeals, Eighth Circuit. August 29, 1914.)

No. 4099.

1. BANKS AND BANKING (§ 42*)—LOANS TO DIRECTOR—LIEN ON STOCK—OKLAHOMA STATUTES.

The banking laws of Oklahoma (Rev. Laws 1910, § 262) provides that the affairs and business of any banking association organized thereunder "shall be managed or controlled by a board of directors"; by section 270 that it shall be unlawful for "any active managing officer * * * to borrow directly or indirectly money from the bank with which he is connected," and that both the officer receiving and the one making such a loan shall be deemed guilty of larceny; and by section 294 that no transfer of stock shall be valid as against the bank "where the registered holder thereof is in debt to the bank for any matured and unpaid obligation" in effect giving the bank a lien on the stock for such debt. *Held*, that a director of a bank is an "active managing officer" within the meaning of section 270 and cannot be relieved from responsibility as such by any action of the other directors, and consequently that a loan of money made by the bank to him is illegal, and the bank cannot assert a lien on his stock therefor as against a prior bona fide pledgee.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 50, 56-60; Dec. Dig. § 42.*]

Lien of banks on stock, see note to *Curtice v. Crawford County Bank*, 56 C. C. A. 179.]

2. BANKS AND BANKING (§ 40*)—TRANSFERS OF STOCK—VALIDITY.

A good-faith purchaser or pledgee of the stock of a banking corporation to whom the certificates have been duly assigned and delivered is the owner in equity of such stock, though the certificates may not be transferred to him on the books as required by a by-law or rule of the corporation.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 49, 51-54; Dec. Dig. § 40.*]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit in equity by W. C. Eubank against the Bryan County State Bank of Caddo, Okl., and S. W. Maytubby. Decree for defendants, and complainant appeals. Reversed.

This suit was brought by the appellant W. C. Eubank, a citizen of Texas, against the Bryan County State Bank of Caddo, Okl., a banking corporation organized under the laws of that state, and S. W. Maytubby, as liquidating agent of said bank, as defendants, February 21, 1912, in which the appellant as plaintiff claimed as against the defendants the prior right to 80 shares of the capital stock of the bank of the par value of \$100 each. The plaintiff claims such right to the stock as pledgee thereof by one H. M. Dunlap who was a director, and the president of the bank, as security for the payment of two loans of money, one of \$4,000, made by plaintiff to Dunlap April 1, 1903, and one of \$2,000, made February 1, 1908, and for which Dunlap made to plaintiff his two promissory notes upon said dates respectively, and assigned and delivered to him on February 1, 1908, a certificate for 50 shares of the stock of defendant bank as security for the payment of the first of said notes, and a certificate for 30 shares of such stock as security for the second loan.

The defendant bank claims the prior right to the stock under the banking laws of Oklahoma to secure an alleged indebtedness of Dunlap to the bank, who was its president and a director thereof and became indebted to it, as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Index.

it claims, when he was the owner of said stock which was never transferred to the plaintiff upon its books.

The case was heard upon an agreed statement of facts, the material portions of which are:

"That the Bryan County State Bank was organized January 27, 1908, under the banking laws of Oklahoma with a capital stock of \$40,000 fully paid, and commenced business as such bank February 1, 1908; that said H. M. Dunlap was a subscriber to the capital stock of said bank, was named as one of its directors in the articles of its incorporation, was elected its first president by its board of directors, and remained such director and president until the bank went into liquidation in January, 1911.

"April 1, 1903, Dunlap borrowed from plaintiff \$4,000, for which he made to plaintiff his promissory note for that amount due in one year with interest, and to secure the same assigned and transferred to plaintiff 50 shares of the capital stock of the Choctaw National Bank of Caddo, Okl., which said stock then stood in the name of Dunlap, who was also president of said Choctaw National Bank. The principal of this note was renewed from time to time by Dunlap, the last renewal maturing April 1, 1908.

"January 15, 1908, the plaintiff sent to the Choctaw National Bank the stock of that bank which he held as security for said \$4,000 note, to be surrendered to Dunlap upon receipt by that bank from Dunlap of a like amount of the capital stock of the defendant bank to be held by plaintiff as security for said \$4,000 note, in lieu of the stock of the Choctaw National Bank. This was done at Dunlap's request, to facilitate the liquidation of the Choctaw National Bank, and the organization of the Bryan County State Bank in lieu thereof. The change was made as requested by Dunlap, and on February 1, 1908, the organization of the defendant bank was completed and it began business. On the same day its board of directors met pursuant to the call of the president, H. M. Dunlap (who was present as one of said board), and adopted the following resolutions:

"Resolved, that the duties of the president of this bank to be such as are defined in the banking laws of the state of Oklahoma, that he act in an advisory capacity with the other officers of such bank, and that he render every service that occurs to him for the good of such bank, and that he act generally in an advisory capacity with the other officers thereof.

"That the duties of the first vice president of this bank be in connection with the cashier, the active management of such bank, and charge of all the details of its management; that he and the cashier together shall constitute the discount committee, and shall pass upon all loans made by the bank advising with the president when deemed necessary and subject to the supervision of the board of directors, and to preside at all meetings in the absence or disqualification of the president, and to otherwise, in the absence of the president, perform all the duties devolving either by law or by the by-laws upon the president. * * *

"The duties of the cashier shall be to have charge of the cash, and the details of the accounts of the bank subject to the general supervision and direction of the first vice president, as hereinbefore mentioned, and to act upon the discount committee. * * *

"On this date said board also by its resolution gave Dunlap credit upon the books of the bank for \$8,000, and this resolution was re-enacted by the board January 11, 1910.

"On the same day 50 shares of the capital stock of the bank evidenced by certificate No. 33 for 30 shares, and certificate No. 34 for 20 shares were issued in the name of Dunlap and were by him assigned and delivered to the plaintiff on said date in lieu of that of the Choctaw National Bank as security for said note of \$4,000.

"February 12, 1908, Dunlap borrowed from the plaintiff the further sum of \$2,400, and made to him his promissory note therefor due in one year with interest; and as security for its payment assigned to the plaintiff 30 shares of the capital stock of the defendant bank evidenced by certificate No. 1 for 20 shares, and certificate No. 2 for 10 shares, both issued to Dunlap and by him transferred and delivered to plaintiff on that date as security for said note of \$2,400.

"April 1, 1908, the \$4,000 note was again renewed by Dunlap to plaintiff and the time of payment thereof extended for one year, plaintiff retaining said 50 shares of the capital stock of the defendant bank as security therefor.

"July 7, 1910, Dunlap wrote to the plaintiff at Sherman, Tex., as follows:

"Mr. W. C. Eubank, Sherman, Texas—Dear Sir: For the purpose of facilitating a transaction of mine here, I want you to send in the stock attached to my note to you for \$4,000 and transfer it to another party, have him make the proper indorsement and return to you. I should like to know that this will be agreeable to you. I would want the stock to stand just where it is on the note and the certificates sent to the bank for the proper transfer, indorsement and return to you.

"Yours truly,

[Signed] H. M. Dunlap.'

"Pursuant to this request, plaintiff, on July 10, 1910, caused to be sent to the defendant bank through the Merchants' & Planters' National Bank of Sherman, Tex., certificates Nos. 33 and 34 of the stock of the defendant bank in a letter which reads in this way:

"The Merchants' and Planters' National Bank.

"Sherman, Texas, July 10, 1910.

"Bryan County State Bank, Caddo, Okla.—Gentlemen: At the request of Mr. W. C. Eubank, we inclose you certificates 33 and 34 aggregating fifty shares of your stock to be substituted in accordance with the blank instructions attached and which is to be signed by the party to whom these shares are to be transferred. The shares themselves are to be transferred in blank. Return the certificates and instructions to us after they are executed as above directed, and very much oblige.

"Very respectfully yours, [Signed] F. A. Batsell, Asst. Cashier.'

"On July 11, 1910, Henry W. Wells, who was then cashier of the defendant bank and who was prior thereto its assistant cashier, delivered to plaintiff 30 shares of its capital stock evidenced by certificate No. 77, and 20 shares thereof evidenced by certificate No. 78, which had been issued to said Wells in lieu of certificates Nos. 33 and 34, and by him assigned and delivered to the plaintiff as collateral security for said \$4,000 note; Wells writing to the plaintiff a letter which reads as follows:

"July 11, 1910.

"Mr. W. C. Eubank, Sherman, Texas—Dear Sir: You will please hold the attached fifty shares of stock in the Bryan County State Bank as represented by certificates Nos. 77 and 78 as collateral to and subject to the terms of the \$4,000 note dated April 1, 1908, due twelve months after date, to which reference is made for fuller description, given to you by H. M. Dunlap in lieu of certificates Nos. 33 and 34 for a like amount of stock in said bank which you now have and exchange for accommodation of Mr. H. M. Dunlap and myself.

"Yours very truly,

[Signed] Henry W. Wells.'

"Said certificates Nos. 77 and 78 were received and accepted by the plaintiff in lieu of such certificates Nos. 33 and 34 for a like amount of the stock of the defendant bank.

"The stock of the defendant bank so assigned to plaintiff was never transferred to him upon the books of that bank, and the 50 shares thereof evidenced by certificates Nos. 77 and 78, which were issued to Henry W. Wells in lieu of certificates Nos. 33 and 34 at the request of Dunlap, stand upon its books in the name of said Wells, and the 30 shares evidenced by certificates Nos. 1 and 2 stand upon its books in the name of Dunlap its president; all of which certificates are in the usual form of the certificates of the capital stock of said bank; and it is agreed that Wells held said certificates Nos. 77 and 78 as trustee for Dunlap.

"On February 7, 8, and 10, 1908, Dunlap gave to the bank for money borrowed by him from it, his three notes for \$2,000, \$3,000, and \$2,500 respectively, aggregating \$7,500, and on May 8, 1908, one note for \$500, amounting in all to \$8,000. These notes were renewed from time to time and finally paid in full on or before October 20, 1909, except the one of February 7, 1908, for \$2,000.

"November 5, 1909, Dunlap made to the bank his promissory note for \$3,800, for money borrowed, from the proceeds of which the note of February 7, 1908, for \$2,000 was paid.

"December 5, 1909, Dunlap gave to the bank his note for \$2,000, and on January 11, 1910, another note for \$2,000. These notes with the one of November 5, 1909, for \$3,800 aggregating \$7,800, were held by the bank and unpaid January 21, 1911, when it ceased doing business and went into liquidation; the defendant S. W. Maytubby being appointed liquidating agent, and who when this suit was commenced was settling its affairs as such liquidating agent.

"The depositors and all other creditors of the defendant bank have been paid in full.

"The assets of the bank after the payment of all its debts and liabilities are insufficient to pay its stockholders in full for the stock held by them.

"That Dunlap at all the dates herein mentioned was justly and truly indebted to the plaintiff in the full amount of said notes, and plaintiff held said shares of stock as security for the payment thereof."

It is alleged in the bill of complaint that on June 6, 1911, the defendant bank recovered judgment and decree in the district court of Bryan county, Okl., against H. M. Dunlap for \$19,053.87 and costs, upon various transactions between the bank and said Dunlap in a suit in which the bank asserted, and was adjudged to have, a lien upon said certificates of stock Nos. 1, 2, 77, and 78, for the 80 shares of the capital stock of said bank in controversy herein. This is admitted by the answer. The plaintiff, however, alleges that he was not a party to that suit, knew nothing thereof while it was pending, and is not bound by its decree; and that defendant bank is not entitled to and in fact has no lien upon such stock as against him under the laws of Oklahoma.

Upon the facts as above stated, the District Court dismissed the bill upon the merits at plaintiff's costs, and awarded the stock in controversy to the defendant bank. The plaintiff appeals.

V. B. Hayes, of Durant, Okl., and McReynolds & Hay, of Sherman, Tex., for appellant.

McPherrren & Cochran, of Durant, Okl., for appellees.

Before SANBORN and CARLAND, Circuit Judges, and REED, District Judge.

REED, District Judge (after stating the facts as above). [1] That the appellant (plaintiff) is a pledgee in good faith and for value of the 80 shares of the stock of the Bryan County State Bank in controversy, to secure a bona fide debt owing him by Dunlap, is not, and could not, under the foregoing facts, be successfully controverted. That fact will therefore be considered as established. Does the fact that such stock was not transferred to him upon the books of the bank deprive him of the right to participate in the final liquidation of its assets in proportion to the amount of such stock as against the other stockholders, its depositors and all creditors of the bank other than such stockholders (if they can be regarded as creditors) having been paid in full?

The provisions of the banking laws of Oklahoma bearing upon this question are (the sections referred to are those of the Revised Laws of Oklahoma 1910, Annotated):

Section 262: "The affairs and business of any banking association organized under the laws of this state shall be managed or controlled by a board of directors of not less than three nor more than thirteen in number, who shall be selected from the stockholders. * * * Any director, officer or

other person who shall participate in any violation of the laws of this state, relative to banks and banking, shall be liable for all damages which said bank, its stockholders, depositors or creditors shall sustain in consequence of such violation. The board shall select from among their number the president and secretary, and shall select from among their stockholders a cashier. Such officers shall hold their offices for a term of one year and until their successors are elected and qualified. * * * The board of directors shall hold at least two regular meetings each year, and at such meetings a thorough examination of the books, records, funds and securities held by the bank shall be made and recorded in detail upon its record book, and a certified copy thereof shall be forwarded to the bank commissioner and to each stockholder of record within ten days."

Section 264: "The violation of any of the provisions of this chapter by the officers or directors of any bank organized or existing subject to the laws of this state shall be sufficient cause to subject the said bank to be closed and liquidated by the bank commissioner and for the annulment of its charter."

Section 266: "No bank shall employ its moneys, directly or indirectly, in trade or commerce, * * * and shall not invest any of its funds in the stock of any other bank or corporation, nor make any loans or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of such shares, unless such securities or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale, and after the expiration of six months any such stock shall not be considered as part of the assets of any bank. * * *"

Section 268: "The total liabilities to any bank of any person, corporation or firm, for money borrowed, including in the liabilities of such company or firm the liabilities of the several stockholders, officers or members thereof, shall not at any time exceed twenty per cent. of the capital stock of such bank. * * *"

Section 270: "It shall be unlawful for any active managing officer of any bank organized or existing under the laws of this state to borrow, directly or indirectly, money from the bank with which he is connected; and the officer making or authorizing a loan to any such person, as well as the person receiving the same, shall be deemed guilty of a larceny of the amount borrowed."

Section 273: "Every bank shall make at least four reports each year, and oftener if called upon by the bank commissioner and according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signatures of at least two of the directors. * * *"

Section 282: "Every banker, officer, employé, director or agent of any bank who shall neglect to perform any duty required by this chapter, * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not to exceed one thousand dollars, or by imprisonment * * * or by both" (as provided in this section).

Section 290: "The president and cashier of every incorporated bank shall cause to be kept at all times a correct list of the names and residences of all the shareholders in the bank and the number of shares held by each, in the office where its business is transacted. * * *"

Section 294: "The shares of stock of an incorporated bank shall be deemed personal property, and shall be transferred on the books of the bank in such manner as the by-laws therefor may direct, but no transfer of stock shall be valid against a bank or any creditor thereof so long as the registered holder thereof shall be liable as a principal debtor, surety or otherwise to the bank for any debt, nor in such cases shall any dividend, interest or profits be paid on such stock so long as such liabilities continue, but all such dividends, interests or profits shall be retained by the bank and applied to the discharge of such liabilities, and no stock shall be transferred on the books of any bank where the registered holder thereof is in debt to the bank for any matured and unpaid obligations."

Section 295: "It shall be unlawful for any bank to loan its funds to its stockholders on their stock as collateral security; and the total indebtedness of the stockholders of any bank shall at no time exceed fifty per cent. of its paid-up capital: Provided, that any bank may hold its stock to secure a debt previously contracted."

The District Court was of opinion, and so held, that Mr. Dunlap as president of the defendant bank was not an active manager thereof within the meaning of section 270 of the Oklahoma banking law, in view of the resolution of the board of directors of February 1, 1908, respecting his duties as president; and that the loan of the bank to him was not therefore within the prohibition of that statute. If the duties of Dunlap as one of the managers of the bank depended alone upon the fact that he was its president, it may be that the board of directors might prescribe and limit his duties, a question that need not now be determined, for section 262 of the Oklahoma statute imposes upon the directors of the bank, of which Dunlap was one, the positive duty of its management and control. His duties as one of the managers of the bank arose therefore from the fact that he was one of its directors, and not alone from the fact that he was its president; and these duties we think cannot be restricted or limited by any action of the board of directors. *Bank v. Lanier*, 11 Wall. 369, 376, 20 L. Ed. 172. Aside from this, the resolution imposes upon Dunlap as president the duty of acting in an advisory capacity with the other officers of the bank, and rendering to them "every service that occurs to him for its good." Obviously this does not limit his duties and obligations to the bank as one of its directors and managers, but rather enlarges, if anything, his duties as president of the bank.

Section 282 of the Oklahoma statute provides that "every banker, officer, employé, director or agent of a bank who shall neglect to perform any duty required by this chapter, * * * shall be deemed guilty of a felony." The duty of a director of the bank to participate in the management and control of its affairs is certainly one imposed by this statute, and the failure to perform that duty is declared by the act to be a felony punishable by fine or imprisonment, or by both.

A careful reading and consideration of the banking law of Oklahoma convinces beyond any doubt that it was its purpose to impose upon the principal officers and directors of banks organized under its provisions the positive duty of its management and control; and not that they should act as mere figureheads or dummies upon whom no responsible duty should rest. That Mr. Dunlap as president and director of this bank was its controlling spirit and was one of its active managers, sufficiently appears from the agreed facts; and that the loans made to him by the bank and for which it now asserts and claims a lien upon the stock thereof pledged to the plaintiff was in violation of the banking act of Oklahoma and unlawful. Notwithstanding this, it is contended in behalf of the bank that it may rightly enforce its debt against Dunlap as a lien upon the stock in controversy standing in his name and in the name of Wells upon its books as the registered holders thereof under section 294, above, of the Revised Laws of

Oklahoma; and *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188, and other cases following the rule of that case are cited in support of this contention.

In *National Bank v. Matthews*, the bank had made a loan in good faith to Price & Co., and as security therefor had taken a mortgage upon certain real estate of Matthews. The debt not being paid at maturity, the bank was about to foreclose the mortgage to enforce the payment of the debt from the real estate covered thereby, when Matthews sought to enjoin such foreclosure upon the ground that the mortgage was void as having been made in violation of the National Bank Act. It was held by the Supreme Court that the loan having been made in good faith the taking of the mortgage as security did not invalidate the debt; that only the government could successfully challenge the validity of the mortgage and that the mortgagor could not do so. The fact that the loan of the bank was made in good faith and was not in violation of law was held an important factor in the determination of the case.

In the present case the loans by the bank to Dunlap were in direct violation of the Oklahoma bank act. Sections 266 and 294 of that act only give at most a lien to the bank upon its stock for a valid debt owing to the bank and contracted in good faith, and not for one contracted in violation of its provisions. *National Bank v. Matthews* and the cases following it do not, we think, sustain the contention of the bank.

[2] The present case falls within the rule that a good-faith purchaser or pledgee of the stock of a banking corporation to whom the certificates have been duly assigned and delivered is the owner in equity of such stock, though the certificates may not be transferred to him upon its books as required by a by-law or rule of the corporation. Such an entry is not for the purpose of transferring the beneficial ownership of the stock in the absence of a statute so requiring, but is for the protection of parties dealing with the bank and to enable it to know who are its stockholders entitled to vote at its meetings and to receive dividends when declared; in other words, it is intended to prescribe a method of transfer which shall be deemed effectual in all matters relating to the internal government and management of the corporation, rather than to prescribe a method of transfer which is to be observed between a stockholder and third parties. *Bank v. Lanier*, 11 Wall. 369, 20 L. Ed. 172; *Bullard v. Bank*, 18 Wall. 589, 21 L. Ed. 923; *Johnston v. Laffin*, 103 U. S. 800, 26 L. Ed. 532; *Masury v. Arkansas Nat. Bank*, 93 Fed. 603, 35 C. C. A. 476; *Nicollet National Bank v. City Bank*, 38 Minn. 85, 35 N. W. 577, 8 Am. St. Rep. 643. And see *Ardmore State Bank v. Mason*, 30 Okl. 568, 120 Pac. 1080, 39 L. R. A. (N. S.) 292; *Farmers' & Merchants' Bank v. Cherokee Trust Co. et al.*, 32 Okl. 700, 123 Pac. 153—arising under the Oklahoma bank act now under consideration.

In *Johnston v. Laffin*, 103 U. S. 800, 26 L. Ed. 532, a case involving the sale of capital stock of a national bank, Mr. Justice Field speaking for the court said:

"Shares in the capital stock of associations, under the national banking law, are salable and transferable at the will of the owner. They are, in that respect, like other personal property. The statute recognizes this transferability, although it authorizes every association to prescribe the manner of their transfer. Its power in that respect, however, can only go to the extent of prescribing conditions essential to the protection of the association against fraudulent transfers, or such as may be designed to evade the just responsibility of the stockholder. It is to be exercised reasonably. Under the pretense of prescribing the manner of the transfer, the association cannot clog the transfer with useless restrictions, or make it dependent upon the consent of the directors or other stockholders. * * * The entry of the transaction on the books of the bank, where stock is sold, is required, not for the translation of the title, but for the protection of the parties and others dealing with the bank, and to enable it to know who are its stockholders, entitled to vote at their meetings and receive dividends when declared. * * * Purchasers and creditors, in the absence of other knowledge, are only bound to look to the books of registry of the bank. But as between the parties to a sale, it is enough that the certificate is delivered with authority to the purchaser, or any one he may name, to transfer it on the books of the company, and the price is paid. If a subsequent transfer of the certificate be refused by the bank, it can be compelled at the instance of either of them. * * *

In *Masury v. Arkansas National Bank*, 93 Fed. 603, 35 C. C. A. 476, Judge Thayer, speaking for this court upon this same question, said:

"In a great number of cases it has been held, and such must be regarded as the prevailing rule, that such a provision (that stock in a corporation shall be transferred only on its books), when found either in a special charter or in a general incorporation act, or in the by-laws of a corporation, is intended to prescribe a method of transfer which shall be deemed effectual, as between the corporation and its stockholders, in all matters relating to the internal government and management of the corporation, rather than to prescribe a method of transfer which must be observed as between a stockholder and third parties. Notwithstanding such a provision in the charter of a corporation, a stockholder thereof may divest himself of all beneficial interest in his stock by a written assignment of the same and a delivery of his stock certificate, or by the indorsement and delivery of his stock certificate, or, as some authorities hold (*Cook, Stock & S.* §§ 308, 375), by the delivery of his stock certificate without indorsement, although no transfer is made on the books of the corporation. A transfer of his stock in either of the two ways first above indicated, although such transfer is not registered on the corporate books, estops the stockholder from claiming any further title to the stock so transferred, as against subsequent bona fide purchasers thereof for value"—citing a number of cases.

See, also, *Nicollet National Bank v. City Bank*, 38 Minn. 85, 35 N. W. 577.

Section 294 of the Revised Laws of Oklahoma plainly authorizes the sale and transfer by the owner of shares of the capital stock of a bank organized under the Oklahoma bank act. It provides, however, that they shall be transferred upon the books of the bank in such manner as its by-laws may direct; but that no stock shall be transferred on the books of the bank when the registered holder thereof is in debt to the bank for any matured and unpaid obligations (section 266) previously contracted in good faith.

If there is any by-law of the defendant bank prescribing the manner of transferring the shares of its capital stock upon its books the

agreed facts do not show it. Dunlap assigned 50 shares of the stock in controversy to the plaintiff February 1, 1908, the day the organization of the bank was completed, and on February 12, 1908, 30 shares. On these dates Dunlap made to the bank his promissory notes for \$7,500; but on February 1st he was given credit upon its books by the board of directors for \$8,000; and this resolution was re-enacted by the board of directors January 11, 1910, the date of the last loan made by the bank to Dunlap. What these credits were for does not appear. On May 8, 1908, he made another note to the bank for \$500. These notes were all paid to the bank on or before October 20, 1909, except the one of \$2,000, dated February 1st, and that was paid November 5, 1909, from the proceeds of the note of \$3,800, made that date. All the notes of Dunlap so held by the bank when the stock in controversy was assigned to the plaintiff (if those of February 1st may be said to have been so held by it) were paid on or before November 5, 1909, and the notes now claimed by the bank originated on or after that date, long after the assignment of the stock to plaintiff. On this date, therefore, there was nothing to justify the bank in refusing, if it had then been requested to transfer the stock in question to the plaintiff as pledgee thereof upon its books, conceding, without admitting or holding, that the loans of the bank made to Dunlap were in good faith and not in violation of the Oklahoma bank act.

It seems incredible that Wells, the cashier of the bank, its vice president, and directors other than Dunlap, did not know of the pledge of this stock of Dunlap to the plaintiff long before the last loan was made to Dunlap; but whether or not they actually knew thereof is not important, for their duty required them to know that the loans of the bank to Dunlap as one of its directors were forbidden by the act under which the bank was organized and doing business, and that such loans were unlawful in their inception, and were not therefore in good faith. The bank and its stockholders, whose agents its managers and directors were in making these loans, cannot equitably be awarded this stock as against the plaintiff who is a good-faith holder thereof without notice of any claim or right thereto by them.

It is said that plaintiff must be presumed to know that the Oklahoma bank act gave to the bank a lien on such stock for the debt of Dunlap to it, and took the assignment of the certificates subject to the rights of the bank under such lien. Admitting that plaintiff must be presumed to know the law, he had the right to assume, and to act upon the assumption, that its directors and managers would not deliberately violate that law.

The District Court erred in dismissing the bill and awarding the stock in controversy to the bank for the benefit of its stockholders. Its decree is reversed, and the cause remanded to that court, with directions to grant the prayer of the bill and award the beneficial interest in the stock in controversy to the plaintiff, and it is ordered accordingly.

Reversed.

GALBRAITH v. ROBSON-HILLIARD GROCERY CO. et al.

(Circuit Court of Appeals, Eighth Circuit. July 29, 1914.)

No. 140.

BANKRUPTCY (§ 293*)—COURTS—MORTGAGE LIEN—VALIDITY—PREFERENCES.

Where a bankrupt's trustee had possession of certain real property belonging to one of the bankrupts and located in another state, the bankruptcy court in which the proceedings were pending had exclusive jurisdiction to determine the validity of the lien of a mortgage executed by the bankrupt owner to secure a pre-existing debt of the bankrupts, which the trustee claimed was a voidable preference, and to determine such question by any mode of proceedings which, with reference to the particular case, would constitute due process of law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417; Dec. Dig. § 293.*]

Petition to Revise Order of the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Petition by John P. Galbraith, as trustee in bankruptcy of John Magnuson and another, doing business as John Magnuson & Co., to set aside a certain mortgage executed by John Magnuson and wife to S. Robson, to secure a pre-existing debt due from the bankrupt firm to the Robson-Hilliard Grocery Company, a Minnesota corporation. A referee's order dismissing the petition for want of jurisdiction was affirmed by the District Court, and petitioner files a petition to revise. Order and decree vacated, and cause remanded for further proceedings.

Todd & Kerr, of St. Paul, Minn., for petitioner.

Leach & Leach, of Owatonna, Minn., for respondents.

Before HOOK and CARLAND, Circuit Judges, and REED, District Judge.

CARLAND, Circuit Judge. This is a petition to revise in matter of law an order of the District Court for the District of Minnesota, affirming an order of the referee in bankruptcy made January 19, 1914, whereby he sustained objections to his jurisdiction to hear the petition of petitioner, made by counsel for respondents. The petition filed with the referee set forth the following facts: That the petitioner, John T. Galbraith, was the duly appointed, qualified, and acting trustee in bankruptcy of the estate of John Magnuson and Victor J. Magnuson, copartners as John Magnuson & Co., and as individuals. That the Robson-Hilliard Grocery Company of Pipestone, Minn., was a corporation duly organized and existing under and by virtue of the laws of the state of Minnesota. That among the assets of said estate in the possession of said John P. Galbraith, as trustee aforesaid, was the following described land lying and being in the county of Sully, state of South Dakota, to wit, "The east half of section 33, township 114, range 74 west." That heretofore, and prior to the 21st day of February, 1913, said bankrupts had purchased on open account from the said Robson-Hilliard Grocery Company goods, wares, and merchandise

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the agreed value of about \$1,700, which said indebtedness on said 21st day of February, 1913, was past due and wholly unsecured, and that on or about the said 21st day of February, 1913, for the purpose of securing said past due and pre-existing indebtedness, and at the solicitation and request of said Robson-Hilliard Grocery Company, and not otherwise, John Magnuson, one of said bankrupts, and wife, executed a certain mortgage covering said real estate to S. Robson, of Pipestone, Minn., which said mortgage recited a consideration of \$1,700. That said mortgage was filed for record in the office of the register of deeds in and for Sully county, S. D., on the 25th day of February, 1913, and recorded in Book 34 of Mortgages, p. 634, and that ever since said 25th day of February, 1913, said mortgage purported to constitute a lien and incumbrance against said property. That said bankrupts were wholly insolvent on February 21 and 25, 1913, and that fact on those dates was well known to said Robson-Hilliard Grocery Company, and to said S. Robson, and said Robson-Hilliard Grocery Company and said S. Robson at all of said times had reasonable cause to believe that said bankrupts and each of them were on said date wholly insolvent. That the bankrupts filed a petition in voluntary bankruptcy on April 3, 1913, both as copartners and individually, and that said bankrupts were on the 3d of April adjudicated bankrupts. That the value of the assets of said bankrupts will not pay to exceed 40 per cent. of the approved claims against the estate. That said S. Robson and the Robson-Hilliard Grocery Company claim to be owners and holders of said mortgage, and have refused to satisfy the same of record, and that the lien created by said mortgage is wholly invalid, for the same created an unlawful preference in contravention of the provisions of the Bankruptcy Law. The prayer of the petition prayed for an order of the court, citing the said S. Robson and Robson-Hilliard Grocery Company of Pipestone, Minn., to appear and show cause, if any there should be, at a time and place to be fixed by the court, why an order should not be then and there entered ordering and directing said Robson or Robson-Hilliard Grocery Company, to deliver up said mortgage to said trustee, and to execute and deliver a certificate of discharge thereof sufficient in form to properly purge the record of said register of deeds office of said purported lien and incumbrance. The referee granted an order to show cause, and at the return day thereof the Robson-Hilliard Grocery Company and S. Robson, by their counsel, appeared and objected to the matters involved in said petition being heard or determined or adjudicated in a summary manner by said referee or by said court on the ground that said court had no jurisdiction to determine the same, and that said S. Robson and the Robson-Hilliard Grocery Company did not consent to have the matters involved in said petition heard, tried, or determined in said United States District Court, in a summary manner. The referee sustained the objection of respondents, and the validity of this ruling of the referee was by a petition for review certified to the District Judge, who, upon a hearing thereof, affirmed the ruling of the referee, as hereinbefore stated. There was no question in the court below but that the real estate, upon which the lien is claimed,

was in the possession of the United States District Court for the District of Minnesota, by its trustee in bankruptcy. This fact was alleged in the petition, and the referee so certified to the judge of the District Court. While the question raised by this appeal is important, we do not think the determination thereof is difficult in view of the decisions of the Supreme Court of the United States and of this court. The United States District Court for the District of Minnesota, whose power and authority, so far as its jurisdiction existed the referee was exercising, had exclusive jurisdiction to determine the validity of the lien of the mortgage by virtue of its possession of the real estate upon which the lien was claimed. *Robertson v. Howard*, 229 U. S. 254, 33 Sup. Ct. 854, 57 L. Ed. 1174; *Whitney v. Wenman*, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157; *Wabash Railroad v. Adelbert College*, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. Ed. 642, and cases cited; *Herbert v. Crawford*, 228 U. S. 204, 33 Sup. Ct. 484, 57 L. Ed. 800; *Murphy v. Hoffman Co.*, 211 U. S. 563, 29 Sup. Ct. 154, 53 L. Ed. 327; *Babbitt v. Dutcher*, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814; *United States Fidelity Co. v. Bray*, 225 U. S. 205, 32 Sup. Ct. 620, 56 L. Ed. 1055.

The following language is quoted from *Babbitt v. Dutcher*, *supra*, in support of the proposition that the United States District Court for the District of Minnesota did not have jurisdiction to hear the matters arising upon the petition of the trustee:

"There are two classes of cases arising under the act of 1898 and controlled by different principles. The first class is where there is a claim of adverse title to property of the bankrupt, based upon a transfer antedating the bankruptcy. The other class is where there is no claim of adverse title based on any transfer prior to the bankruptcy, but where the property is in the physical possession of a third party or of an agent of the bankrupt, or of an officer of a bankrupt corporation, who refuses to deliver it to the trustee in bankruptcy. In the former class of cases a plenary suit must be brought, either at law or in equity, by the trustee, in which the adverse claim of title can be tried and adjudicated. In the latter class it is not necessary to bring a plenary suit, but the bankruptcy court may act summarily and may make an order in a summary proceeding for the delivery of the property to the trustee, without the formality of a formal litigation."

Isolated paragraphs may be taken from the opinion of a court and separated from the context, may often seem to support a principle which the court, in rendering the opinion, had not in mind. The case of *Babbitt v. Dutcher* was as follows: The Randolph-Macon Coal Company was a Missouri corporation and was duly adjudicated a bankrupt March 26, 1907, by the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri. *Babbitt* was appointed trustee. He made demand upon the president of the coal company for the possession of the corporation's records and stock books which were kept in the office maintained by the company in New York City. Their request was refused. Thereupon the trustee made application to the District Court in and for the Southern District of New York, by petition, for an order directing *James T. Gardiner*, the president, and *Howard Dutcher*, the secretary, of the company, or either of them, to deliver to him the stock certificate book, the cor-

poration minute book, and the stock register of said company, together with all other records and documents belonging to said company in their possession or under their control. Gardiner and Dutcher were within the jurisdiction of the District Court for the Southern District of New York, and the books and papers referred to were within their custody. Thereafter a hearing was had on the petition, and the District Judge refused to grant the order prayed for, for the reason that he had no jurisdiction to make it or to entertain proceedings instituted by a trustee in bankruptcy duly appointed in a bankruptcy proceeding pending in another district. The Supreme Court on appeal said:

"We have no doubt that the books and records in question passed, on adjudication, to the trustee, and belong in the custody of the bankruptcy court, and, there being no adverse holding, that the bankruptcy court had power upon a petition and rule to show cause to compel their delivery to the trustee. *Bryan v. Bernheimer*, 181 U. S. 188 [21 Sup. Ct. 557, 45 L. Ed. 814]; *Mueller v. Nugent*, 184 U. S. 1 [22 Sup. Ct. 269, 46 L. Ed. 405]; *Louisville Trust Co. v. Cominger*, 184 U. S. 18 [22 Sup. Ct. 293, 46 L. Ed. 413]; *First National Bank v. Title & Trust Co.*, 198 U. S. 280 [25 Sup. Ct. 693, 49 L. Ed. 1051]; *Whitney v. Wenman*, 198 U. S. 539 [25 Sup. Ct. 778, 49 L. Ed. 1157]."

Proceeding then to the real question in the case, namely, as to whether the District Court of the United States in and for the Southern District of New York had jurisdiction to entertain this particular proceeding and grant the relief prayed for, Chief Justice Fuller used the language first above quoted.

It is clear that the learned Chief Justice had in mind, first, claims of adverse title to property of the bankrupt, based upon a transfer antedating the bankruptcy; and, second, where there is no claim of adverse title based on any transfer, prior to the bankruptcy, but where the property is in the physical possession of a third party or of an agent of the bankrupt or of an officer of a bankrupt corporation who refuses to deliver it to the trustee in bankruptcy. Now *Babbitt v. Dutcher* was a proceeding to obtain the possession of books and papers; hence the language used must be construed with reference to such a proceeding.

When this view is taken, the language first above quoted simply refers to cases where the bankruptcy court is seeking to obtain possession of property, and, as thus understood and interpreted, the language of course is eminently correct, but the language in no wise refers to a case where the bankruptcy court has possession of the property. In this very case of *Babbitt v. Dutcher* the Supreme Court decided that the District Court of the United States for the Southern District of New York had jurisdiction in the summary proceeding adopted to compel a delivery of the books and papers. In *re Rathman*, 183 Fed. 913, 106 C. C. A. 253, this court, by Judge Sanborn, said:

"(1) The bankruptcy court has jurisdiction to draw to itself, and to determine by summary proceedings after reasonable notice to claimants, the merits of controversies between the trustee and such claimants over liens upon and the title to property claimed by the trustee as that of the bankrupt which has been lawfully reduced to the actual possession of the trustee or of some other officer of the bankruptcy court as the property of the bankrupt. *Murphy v. John Hoffman Co.*, 211 U. S. 562, 569, 570, 29 Sup. Ct. 154, 53 L. Ed. 327; *White v. Schloerb*, 178 U. S. 542, 545, 546, 548, 20 Sup. Ct.

1007, 44 L. Ed. 1183; In re Eppstein, 156 Fed. 42, 84 C. C. A. 208, 17 L. R. A. (N. S.) 465; Thomas v. Woods, 173 Fed. 585, 587, 590, 97 C. C. A. 535, 537, 540, 26 L. R. A. (N. S.) 1180 [19 Ann. Cas. 1080]; Mound Mines Co. v. Hawthorne, 173 Fed. 882, 886, 97 C. C. A. 394, 398; Goodnough Mercantile & Stock Co. v. Galloway (D. C.) 156 Fed. 504, 509; In re McMahon, 77 C. C. A. 668, 669, 671, 147 Fed. 684, 685, 687; Whitney v. Wenman, 198 U. S. 539, 549, 553, 25 Sup. Ct. 778, 49 L. Ed. 1157."

In *Shea v. Lewis*, 206 Fed. 877, 124 C. C. A. 537, this language was cited with approval. It is true that in both *In re Rathman* and *Shea v. Lewis*, supra, the court held that the court had no jurisdiction to entertain the proceeding in which the controversy arose, but it was based in each case upon the fact that the United States District Court of South Dakota or Minnesota did not have possession of the property involved; the same being in the possession of the owners and claimants thereof. But the question as to when the bankruptcy court could take jurisdiction by summary proceedings was involved and decided.

In *T. E. Wells & Co. v. Sharp*, 208 Fed. 396, 125 C. C. A. 609, this court held that the United States District Court for South Dakota had jurisdiction to proceed in a summary way to decide the validity of a lien claimed by T. E. Wells & Co. against certain property of the Plymouth Elevator Company, a bankrupt, on the ground that the T. E. Wells & Co., who had been in the possession of the property, had voluntarily delivered it to the trustee. This court decided in the same case that, if the property had remained in the possession of T. E. Wells & Co., the proceeding would rightly have been a plenary suit, but there is nothing in this case that conflicts with the general rule.

The case of *In re McMahon*, 147 Fed. 684, 77 C. C. A. 668, was a case in all respects similar to the one at bar, and it was there held by the Court of Appeals of the Sixth Circuit that the summary proceedings to determine the validity of the lien of a mortgage was proper.

See, also, *Remington on Bankruptcy*, vol. 1, § 1796; *In re Noel* (D. C.) 137 Fed. 694; *In re Eppstein*, 156 Fed. 42, 84 C. C. A. 208, 17 L. R. A. (N. S.) 465; *Loeser v. Bank Co.*, 163 Fed. 212, 89 C. C. A. 642; *In re Bacon*, 210 Fed. 129, 126 C. C. A. 643; *In re Granite City Bank*, 137 Fed. 818, 70 C. C. A. 316.

An examination of the authorities convinces us that, in a case like the one at bar, the court, having possession of the property, has the exclusive jurisdiction to determine the validity of the lien thereon, and that it may adopt any mode of proceeding which with reference to the particular case is due process of law. The court in this case having possession of the property, it is not necessary to discuss the question as to when a court of bankruptcy may by summary proceedings obtain the possession of property belonging to the estate of the bankrupt.

The petition to revise is granted; the order and decree below is vacated and set aside, and the case remanded for further proceedings not inconsistent with the views herein expressed.

REED, District Judge (concurring). I concur in the foregoing opinion for the reason that, by the decision of the referee approved by the

judge upon petition for review, it is held in effect that the referee had no jurisdiction to require the Robson-Hilliard Grocery Company to appear and show cause why it should not be required to deliver its mortgage to the trustee and cancel the same of record. That the referee had jurisdiction (the property covered by the mortgage of the grocery company having been reduced to possession by the trustee as alleged) to make such an order upon proper notice to it and proof of the facts alleged in the petition asking for the order, I have no doubt.

The grocery company appeared in response to the notice and objected to "the matters involved in the petition of the trustee being heard or determined in a summary manner by said referee, or by said court, on the ground that said court had no jurisdiction to determine the same," and that it did not consent to have said matters so tried, heard or determined in a summary manner. The District Court filed no opinion and stated no reason for approving the order of the referee sustaining this objection. If it was sustained upon the ground that the referee had no jurisdiction or authority to require the grocery company to appear and show cause why it should not cancel and surrender its mortgage if the facts alleged in the petition were true, its ruling was error, for the referee had undoubted jurisdiction to require it to do so, if the facts alleged were true. If it was sustained upon the ground that the referee had no authority to hear and determine the alleged matter summarily, then it does not appear that the referee would have done so (admitting, for the present without deciding, that he could not rightly do so), and it should have been presumed that he would have heard and determined the matter in such manner as would accord to the parties the right to establish their respective claims in the usual course of equitable procedure, and his ruling was premature.

The grocery company should have been required, it seems to me, to answer or otherwise take issue upon the facts alleged in the petition of the trustee, and the issues so raised should have been heard and determined in such manner as would accord to the grocery company the right to show if it could do so that its mortgage, though made within the four months immediately preceding the bankruptcy, was not in fact a preference within the meaning of the bankruptcy act.

When a referee in bankruptcy may, and when he may not, determine summarily questions in bankruptcy proceedings pending before him is determined by the Supreme Court in *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, *Louisville Trust Co. v. Com-ingor*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413, *First National Bank v. Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051, and other cases; and the rule held in those cases has never been departed from, so far as I can discover, but has been consistently adhered to in later cases by that court. See *Collier on Bankruptcy* (10th Ed., 1914) 489 et seq. That a court of bankruptcy, having the rightful custody of the bankrupt estate, has exclusive jurisdiction to determine all claims of third parties to such property is not doubted.

In *Re McMahon*, 147 Fed. 684, it is expressly held at page 687 of the opinion (as I read it) 77 C. C. A. 668, that the proceedings to which

McMahon was made a party to have the trust deed of the bankrupt to him canceled and set aside was not in the strict sense a summary proceeding, but was in its essence a petition to bring in persons (under section 2 [7] of the bankruptcy act [Act July 1, 1898, c. 541, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3421)]), asserting liens upon the property of the bankrupt, for the purpose of determining the rights of such persons in such property, and is in substance a plenary suit; and such in effect is the nature of the proceedings here under review.

The petition to revise should be sustained, and the cause remanded to the court of bankruptcy, with directions to require the Robson-Hilliard Grocery Company to answer or otherwise take issue upon the petition of the trustee, and to proceed in such manner as will accord to the parties a full hearing and opportunity to show whether or not the mortgage of the grocery company is or is not a voidable preference under the bankruptcy act.

OMAHA ELECTRIC LIGHT & POWER CO. v. CITY OF OMAHA et al.

(Circuit Court of Appeals, Eighth Circuit. May Term, 1914.)

No. 3141.

1. COURTS (§ 356*)—CIRCUIT COURTS OF APPEALS—PROCEDURE—BILL OF REVIEW.

The practice of the English Chancery Court and of the federal trial courts in equity in entertaining bills of review is not properly applicable to courts of appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 356.*]

2. COURTS (§ 405*)—CIRCUIT COURTS OF APPEALS—JURISDICTION—EFFECT OF ORDER STAYING MANDATE.

By an order staying its mandate pending an appeal to the Supreme Court from its decision, a Circuit Court of Appeals retains its jurisdiction, so that a dismissal of the appeal leaves the cause still pending in that court, which may revise or change its decree, although the term at which it was entered has passed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097-1099, 1101, 1103; Dec. Dig. § 405.*]

Jurisdiction of Circuit Court of Appeals in general, see notes to *Lau Ow Bew v. United States*, 1 C. C. A. 6; *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475.]

3. COURTS (§ 405*)—CIRCUIT COURTS OF APPEALS—REVISAL OF DECREE AFTER TERM.

A Circuit Court of Appeals entered a decree on appeal, affirming a decree of a District Court dismissing a bill to enjoin enforcement of a city ordinance, but on the taking of an appeal to the Supreme Court entered an order staying its mandate. The appeal was dismissed by the Supreme Court for want of jurisdiction, but in the meantime another suit had been brought in the same District Court by a different plaintiff to enjoin enforcement of the same ordinance, and a similar decree had been reversed on direct appeal by the Supreme Court, which held the ordinance void and by its mandate directed a decree granting the injunction. *Held*, that a bill filed by leave in the Circuit Court of Appeals by the plaintiff in the suit there pending, designated as a "bill in the nature of a bill of review," would be treated as a petition for rehearing, and that under the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

circumstances the court would set aside its former decree, although the term at which it was entered had passed, and enter one in conformity with that of the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097-1099, 1101, 1103; Dec. Dig. § 405.*]

4. COURTS (§ 85*)—RULES OF COURT—POWER TO DISREGARD.

A court may in an exceptional case set aside one of its rules as applicable to such case.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 294, 296-301; Dec. Dig. § 85.*]

Appeal from the Circuit Court of the United States for the District of Nebraska; W. H. Munger, Judge.

Suit in equity by the Omaha Electric Light & Power Company against the City of Omaha and Waldemar Michaelson. On bill in the nature of bill of review, treated as a petition for rehearing. Former decree (179 Fed. 455, 102 C. C. A. 601) set aside, and new decree entered.

See, also, 230 U. S. 123, 33 Sup. Ct. 974, 57 L. Ed. 1419.

William D. McHugh, of Omaha, Neb., for appellant.

W. C. Lambert and Benjamin S. Baker, both of Omaha, Neb. (John A. Rine and L. J. Te Poel, both of Omaha, Neb., of counsel), for appellees.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. In 1884 the city of Omaha, by ordinance, granted to plaintiff a franchise empowering it to use the streets and alleys of the city for the purpose of transacting "a general electric light business." Thereafter in the progress of the art of electricity the company used its system for distributing electricity not only for lighting purposes, but also for heat and power. On the 26th of May, 1908, the city council, by resolution, directed its electrician to disconnect all wires of the plaintiff used in transmitting current for heat and power. Thereafter the plaintiff filed its bill in the United States Circuit Court for the District of Nebraska, setting up its franchise and claiming the right under it to use its system for all the purposes aforesaid, and asking a temporary injunction to restrain the enforcement of the resolution. Issue was joined, evidence taken, and a final decree entered on the 22d day of July, 1909, dismissing the bill for want of equity upon the ground that plaintiff had no right under its franchise to distribute electricity for power and heat. 172 Fed. 494. An appeal was sued out to this court, and on the 20th of April, 1910, an opinion was filed here holding that plaintiff's franchise had expired by limitation of time, and that it, therefore, had no franchise to use the streets and alleys for distributing electricity for any purpose whatsoever. 179 Fed. 455, 102 C. C. A. 601. Pursuant to this opinion a decree was entered affirming the decree of the trial court. Plaintiff sued out an appeal to the Supreme Court of the United States to review this decision, and a super-seedeas was thereupon granted and an order entered staying the mandate of this court.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 216 F.—54

Soon after our decision the Old Colony Trust Company, the trustee in a mortgage upon all of the Electric Light Company's property and franchises, filed a bill in equity against the same defendants in the District Court of the United States for the District of Nebraska, in which it alleged that the franchise rights of the plaintiff under the ordinance of 1884, and the practical construction placed thereon by the parties through a long course of dealing, included the right to distribute electric current for the purpose of power and heat as well as light. It specifically claimed the protection of the fourteenth amendment and the contract clause of the federal Constitution, and prayed an injunction to restrain the enforcement of the resolution above referred to as an impairment of the rights thus asserted. The city of Omaha filed its answer, denying the existence of the franchise for any purpose. The cause was submitted upon the pleadings and evidence, and a decree was entered following the decision of this court in the Electric Light Company Case, dismissing the bill for want of equity on the ground that all rights under said ordinance had expired prior to the bringing of the action. The Old Colony Trust Company appealed from this decree direct to the Supreme Court of the United States. Both appeals were heard together and opinions handed down June 16, 1913. The appeal from our decision in the Electric Light Company Case was dismissed for want of jurisdiction, because the complaint failed to raise clearly any federal question. 230 U. S. 123, 33 Sup. Ct. 974, 57 L. Ed. 1419. In the Old Colony Trust Co. Case the court held that the ordinance granted a perpetual franchise, which included the right to distribute electricity for power and heat as well as light. 230 U. S. 100, 33 Sup. Ct. 967, 57 L. Ed. 1410. A decree was entered in accordance with this opinion, reversing the decree of the District Court of Nebraska and remanding the cause to that court with directions to restrain the enforcement of the resolution.

The dismissal of the appeal from our decision leaves our decree standing, though it is in direct conflict with the decision of the Supreme Court.

Plaintiff, at the December, 1913, term of this court at St. Louis, while the stay of our mandate was still in force, presented its bill, designated "a bill in the nature of a bill of review," giving the foregoing history of the litigation, and praying for a revision of our decree, and, upon notice to defendants, moved for permission to file the same. Defendants appeared and filed written objections. The matter was fully argued, and an order entered allowing the motion and ruling the defendants to answer the bill. An answer has been filed which admits all material facts and raises only questions of law, and the case is now before us for disposition on the merits.

For the purposes of this application there is no material difference in the issue in the Electric Light Company Case, and the Old Colony Trust Company Case. The wrong in each was the threatened enforcement of the resolution. The right of the plaintiff in each was created by the ordinance granting the franchise. The resolution and ordinance were set out in full in both complaints. The controversy turned upon whether the Electric Light Company had a subsisting right under the ordinance which the enforcement of the resolution would impair. In the

Old Colony Trust Company Case the facts showing the practical construction which the parties themselves had put upon the ordinance were set forth with greater fullness than in the other case. This, however, was used by the Supreme Court, not for the purpose of creating an estoppel, but for the purpose of applying a familiar canon of construction with a view to ascertaining the true meaning of the ordinance. It is that meaning, however ascertained, which defines the right of the plaintiff in each case. The Old Colony Trust Company had no right except that which it derived from the Electric Company. The ordinance measures both. The plaintiffs are different in name, but identical in right.

In the Electric Light Company Case the trial court held that the ordinance did not grant the right to distribute current for heat and power, and dismissed the bill, thus leaving the city free to execute its resolution to cut all wires used for those purposes. We held that all rights granted by the ordinance had expired by limitation, and affirmed the decree of the trial court. The Supreme Court held in the Old Colony Trust Co. Case, that the franchise granted by the ordinance was perpetual; that it embraced the right to distribute current for heat and power, as well as light, and directed the trial court to issue an injunction to restrain the enforcement of the resolution. If we send down a mandate pursuant to our decree, we shall declare, in square conflict with the mandate of the Supreme Court, that the company has no franchise to distribute current for heat and power, and that the city has the right to cut all wires used for those purposes.

If we have the power to revise our decree and issue a mandate in harmony with that of the Supreme Court, it is plainly our duty to do so. This we should do not only to protect the rights of the plaintiff as a litigant, but as a matter of public policy to preserve the orderly administration of justice and avoid an unseemly conflict of judicial mandates.

A learned argument has been submitted by counsel dealing with bills of review in courts of chancery in this country and England. Much of this seems to us irrelevant. It has long been settled that the practice on rehearings in the English Courts of Chancery is not applicable to federal appellate courts. In *Brown v. Aspden*, 14 How. 25, 14 L. Ed. 311, Chief Justice Taney, speaking for the court, said:

"A motion has been made for a rehearing in this case, and we have been referred to the practice of the English Chancery Court in support of the application. The argument presupposes that this court, in cases in equity, has adopted the rules and practice of the English chancery. But this is a mistake. The English chancery is a court of original jurisdiction; and this court is sitting as an appellate tribunal. It would be impossible, from the nature and office of the two tribunals, to adopt the same rules of practice in both. * * * In the House of Lords, in England, to which the appeal lies from the Court of Chancery, a rehearing is altogether unknown. A reargument, indeed, may be ordered, if the house desires it, for its own satisfaction. But the chancery rules in relation to rehearings, in the technical sense of the word, are altogether inapplicable to the proceedings on the appeal.

"Undoubtedly this court may and would call for a reargument, where doubts are entertained which it is supposed may be removed by further discussion at the bar. And this may be done after judgment is entered, provided the order for reargument is entered at the same term. But the rule of the court is

this: That no reargument will be heard in any case after judgment is entered, unless some member of the court who concurred in the judgment afterwards doubts the correctness of his opinion, and desires a further argument on the subject. And when that happens, the court will, of its own accord, apprise the counsel of its wishes, and designate the points on which it desires to hear them.

"There is certainly nothing in the history of the English Court of Chancery to induce this court to adopt rules in relation to rearguments, analogous to the chancery practice upon applications for a rehearing. According to the general practice of that court, one rehearing, where the application has been sanctioned by the signature of two counsel, is a matter of course. And this facility in obtaining one rehearing, has naturally led to others, and in cases of interest or difficulty, two, or even three, rehearsings have sometimes been allowed, under the special leave of the court, before the decree was enrolled, and, consequently, before it could be removed to the House of Lords. The natural result of this practice is to produce some degree of carelessness in the first argument, and hesitation and indecision in the court. But the great evil is in the enormous expenses occasioned by these repeated hearings, and the delays which it produces in the decision, which often prove ruinous to both parties before the final decree is pronounced. Nor is the mischief confined to the particular suit in which such proceedings and delays are permitted to take place. A multitude of others are always behind it, waiting anxiously to be heard. And the result of the practice of which we are speaking has been such that, although the court has always been filled by men of the highest order, distinguished for their learning and industry, yet the expenses and delays of the court have become a byword and reproach to the administration of justice, and Parliament has at length been compelled to interpose.

"And if this court should adopt a practice analogous to that of the English chancery, we should soon find ourselves in the same predicament; and we should be hearing over again at a second term almost all the cases which we had heard and adjudged at a former one, and upon which our own opinions would have been definitely made up upon the first argument. We deem it safer to adhere to the rule we have heretofore acted on. And no reargument will be granted in any case, unless a member of the court who concurred in the judgment desires it; and when that is the case, it will be ordered without waiting for the application of counsel."

See, also, *Winchester v. Winchester*, 121 Mass. 127, opinion by Chief Justice Gray, afterwards Mr. Justice Gray of the Supreme Court of the United States.

[1] If the English chancery practice as to rehearsings is inapplicable in federal courts of appeal, much less could their practice as to bills of review be received. Such bills could never be entertained until after the time for filing petitions for rehearing had expired. In England that time was fixed by the enrollment of the decree. In this country, by a legal fiction, it has been held that all decrees shall be deemed to be enrolled on the last day of the term, and this fixes the point after which bills of review may be filed. By repeated decisions of the Supreme Court, however, jurisdiction of causes ends with the adjournment of the term, unless it is retained by some appropriate proceeding, and the same is true of the Circuit Courts of Appeal. In the great majority of cases the mandate has gone down transmitting the case to the trial court. It is quite clear, therefore, that a bill of review, based on the practice of the English chancery courts, and of the federal trial courts in equity, cannot properly apply to courts of appeal. There are many other features which make such bills unfit for appellate courts. When based on errors of law, they may be filed as a matter of right. They may also be filed at any time dur-

ing the period allowed for appeals, and the pendency of an appeal would in most cases toll the running of the statute. *Ensminger v. Powers*, 108 U. S. 292, 2 Sup. Ct. 643, 27 L. Ed. 732.

Appellate jurisdiction is exercised solely for the purpose of review. In the interest of a prompt administration of justice, causes should be retained by such courts only for a brief period. To provide against possible errors in their decisions a short time is now permitted by their rules for filing petitions for rehearing. It would be intolerable if, after causes have been fully argued and decided, and counsel have had an opportunity to call attention to any errors of fact or of law in the written opinion of the court, there could then be opened up an indefinite vista for a re-examination and revising of the decree by means of bills of review. When suits reach appellate courts their issues, both of law and fact, are usually well defined. There is ample time for the preparation of written briefs in which the case can be fully presented. There is never any occasion for the haste and lack of opportunity for investigation which sometimes lead trial courts into error. When an appellate court, after such a presentation, has fully considered a case, and reduced its conclusions to a written opinion, and counsel have had an opportunity to point out any mistakes in the opinion, by petition for rehearing, the result must be held to be as free from error as any human action can be. The evils that would accrue from applying to such judgments the doctrines of bills of review in chancery are manifest and intolerable.

In *Southard v. Russell*, 16 How. 547, 569 (14 L. Ed. 1052), the Supreme Court said:

"The better opinion is that a bill of review will not lie at all for errors of law alleged on the face of the decree after the judgment of the appellate court."

The same view is expressed by Story in his *Equity Pleading*, § 408. See, also, *Nashua & L. R. Co.*, 169 Mass. 157, 47 N. E. 606, 608; *Street's Federal Equity Practice*, § 2178.

After the decision on appeal and the remanding of the case to the trial court, a bill of review may be filed on the ground of newly discovered evidence. In order to prevent a conflict of jurisdiction, however, it is necessary in such a case to first obtain the consent of the appellate court whose judgment is to be reviewed. *Southard v. Russell*, 16 How. 547, 14 L. Ed. 1052; *Keith v. Alger*, 124 Fed. 32, 59 C. C. A. 552. Such a bill does not seek a revising of the decree, but proceeds to a new decree upon new evidence.

In *Kimberly v. Arms* (C. C.) 40 Fed. 548, it is said that application was made to the Supreme Court "for leave to file bills of review for alleged errors in the judgments or decrees" in *Bently v. Coyne*, 4 Wall. 509, 18 L. Ed. 457, and *Rubber Co. v. Goodyear*, 9 Wall. 805, 19 L. Ed. 828. An examination of these cases leaves no doubt that both bills were based upon newly discovered evidence rather than error apparent. The case of *Bently v. Coyne*, 4 Wall. 509, 18 L. Ed. 457, is a mistaken citation. The case to which the court intended to refer is the next one in the report, *Purcell v. Miner*, in which the petition for rehearing is considered at 4 Wall. 519, 18 L. Ed. 459.

Both our power and practice, therefore, on the present application, must be found, not in the practice of trial courts on rehearings or bills of review, but in the rules and decisions of appellate courts defining their practice as to the re-examination of their own decrees. For a new case analogies may be found in the former field, but not rules. Notwithstanding the naming of the application as "a bill in the nature of a bill of review," we must treat it simply as a petition for rehearing.

The term at which our decree was entered has been adjourned, and several other terms have intervened. It is urged that this deprives us of jurisdiction to grant a rehearing. The Supreme Court has frequently stated in unqualified language that it has no power to review its judgments or decrees after adjournment of the term. *Brown v. Aspden*, 14 How. 25, 14 L. Ed. 311; *Brooks v. Railroad Co.*, 102 U. S. 107, 26 L. Ed. 91; *United States v. Knight*, 1 Black, 488, 17 L. Ed. 80; *Public Schools v. Walker*, 9 Wall. 603, 19 L. Ed. 650; *Bushnell v. Crooke Mining & Smelting Co.*, 150 U. S. 82, 14 Sup. Ct. 2, 37 L. Ed. 1007. In 1884 this was embodied in rule 30 of the Court, 108 U. S. 591, 32 Sup. Ct. xii. That court has also stated quite as frequently that it cannot grant a rehearing after its mandate has gone down. *Sibbald v. United States*, 12 Pet. 488, 9 L. Ed. 1167; *Noonan v. Bradley*, 12 Wall. 121, 125, 20 L. Ed. 279; *Browder v. McArthur*, 7 Wheat. 58, 5 L. Ed. 397; *Peck v. Sanderson*, 18 How. 42, 15 L. Ed. 262; *Washington Bridge Co. v. Stewart*, 3 How. 413, 11 L. Ed. 658; *Kingsbury v. Buckner*, 134 U. S. 650, 671, 10 Sup. Ct. 638, 33 L. Ed. 1047; *Hudson v. Guestier*, 7 Cranch, 1, 3 L. Ed. 249. In all of the foregoing cases both events had occurred at the time the petition for rehearing was presented. The term had adjourned and the mandate had gone down. At that time mandates were never sent down during the term, except on motion and special order. At the adjournment of the term, mandates were issued in all cases decided, unless motion for rehearing had been filed. *Blatchford's Rules of United States Courts*, 183. The adjournment of the term and the going down of the mandate being contemporary events, the court never had occasion to consider the effect of staying its mandate alone. In 1895 rule 39 was adopted, which reads as follows:

"Mandates shall issue as of course after the expiration of thirty days from the day the judgment or decree is entered, unless the time is enlarged by order of the court, or of a justice thereof, when the court is not in session, but during the term." 159 U. S. 709, 32 Sup. Ct. xiv.

The year following, in *Bank of Commerce v. Tennessee*, 163 U. S. 416, 16 Sup. Ct. 1113, 41 L. Ed. 211, a mandate was recalled, petition for rehearing granted, and the decree revised. It is manifest, therefore, that at the present time the going down of the mandate does not divest the court of power to grant a rehearing.

Being a court of final resort the Supreme Court has never had occasion to stay its mandate during the pendency of an appeal. Its stays have been confined entirely to petitions for rehearing. Neither its decisions nor its rules can, therefore, control us as an intermediate court in meeting the precise question raised by this application.

[2] That question is: What effect does the order staying our mandate have upon our jurisdiction to entertain a motion for rehearing? The exact question was before the Circuit Court of Appeals of the First Circuit in *Burget v. Robinson*, 123 Fed. 262, 59 C. C. A. 260, and is answered in an able opinion by Judge Putnam. The jurisdiction is there sustained upon grounds which seem to us sound.

It is a universal rule that the perfecting of an appeal transfers the cause to the appellate court, and that it remains there until it is remitted to the trial court by the sending down of the mandate. *Credit Co. v. Ark. Cen. Ry. Co.*, 128 U. S. 258, 9 Sup. Ct. 107, 32 L. Ed. 448; *Lockman v. Lang*, 132 Fed. 1, 65 C. C. A. 621; *Thomas v. Thomas*, 27 Okl. 784, 113 Pac. 1058, 35 L. R. A. (N. S.) 124, 133, Ann. Cas. 1912C, 713; *Aspen Smelting Co. v. Billings*, 150 U. S. 31, 36, 14 Sup. Ct. 4, 37 L. Ed. 986; *Ott v. Boring*, 131 Wis. 472, 111 N. W. 833, 11 Ann. Cas. 857; *In re Jessup's Estate*, 81 Cal. 408, 22 Pac. 1028, 1031, 6 L. R. A. 591. An order staying the mandate is similar in its jurisdictional effect to the order of a trial court permitting the filing of a motion for a new trial. Such an order tolls the running of the statute limiting the time for taking out a writ of error, and retains the court's control of its judgment notwithstanding the adjournment of the term. *Kingman v. Western Mfg. Co.*, 170 U. S. 675, 678, 680, 18 Sup. Ct. 786, 42 L. Ed. 1192; *Burget v. Robinson*, 123 Fed. 262, 59 C. C. A. 260.

The jurisdiction of an appellate court differs radically from that of a trial court. It exists solely for the purpose of review. As soon as that is finished the suit is remitted to the trial court. Retention of the cause affords the strongest evidence that in the judgment of the court its work is not complete or any action taken final. To be sure, the object we had in mind at the time of staying the mandate was to await the action of the Supreme Court. Our jurisdiction, however, was not confined by such intention. So long as we retained the cause, it was subject to our full appellate power, including the correction of our decree.

[3] The cause is, therefore, still pending in this court. What we will do with the present application is not a matter of jurisdiction, but a matter of sound practice.

We stayed our mandate to await the directions of the Supreme Court in regard to our decree. Because the plaintiff failed to clearly claim the protection of the federal Constitution, that court was without jurisdiction to give its direction in this suit; but in another suit, involving the same ordinance and resolution, brought against the same defendants by a plaintiff which derives all its rights from the plaintiff in the present suit, that court has spoken its directions. While no mandate can run from its decision to our decree, a mandate of judicial authority does run from it, which we ought not to disregard. We entered our stay for the purpose of determining what mandate should be issued. In the meantime the Supreme Court has issued its mandate to the District Court of Nebraska declaring that the ordinance confers a perpetual franchise upon the plaintiff, and authorizes it to distribute current for heat and power, as well as light, and directs that

court to issue an injunction restraining the city from interfering with those rights. We must now decide what mandate we will issue to the same court. Shall we declare, in direct contravention of the mandate of the Supreme Court, that plaintiff's franchise has terminated, and that it has no right to distribute current for any purpose, and authorize the city authorities to cut its wires and destroy its business? What would be the duty of the trial court, if we were to issue such a mandate? Certainly our duty is plain. We ought to harmonize our decree and mandate with those of the Supreme Court.

Our attention is called to our rule which limits the time to present petitions for rehearing to 60 days from the date of the judgment or decree. In our opinion that rule was not intended to control such a case as the one with which we are now dealing. It was intended to prescribe the practice as to matters which are in existence at the time when a decree is entered. It is entirely plain that if the decision of the Supreme Court had been rendered before our decree, our decree would have been different. Applying the analogies of Lord Bacon's first ordinance in regard to bills of review, that decision constitutes new matter which hath arisen since the decree. In fact, it is precisely the kind of new matter which the chancellor had in mind in framing the second clause of his ordinance. This is plain from his sixth ordinance, which reads as follows:

"No decree shall be made upon pretense of equity against the express provision of an act of Parliament. Nevertheless, if the construction of such act of Parliament hath for a time gone one way in general opinion and reputation, and after, by a later judgment, hath been controlled, then relief may be given upon matter of equity for cases arising before the said judgment, because the subject was in no default."

The "later judgment" here referred to would seem to be at least one form of "new matter" arising after the decree referred to in the first ordinance. See, also, *Jopp v. Wood*, 2 DeG. J. & S., 323.

[4] Furthermore, the case is so exceptional that we would be justified under the decisions of the Supreme Court in setting aside our rule if it were applicable to the case. *Poultney v. City of LaFayette*, 12 Pet. 472, 9 L. Ed. 1161; *United States v. Breitling*, 20 How. 252, 9 L. Ed. 900; *Burget v. Robinson*, 123 Fed. 262, 59 C. C. A. 260.

It is also urged that a variance in judicial decisions is not a sufficient cause to justify us in disturbing our decree. *Tilgham v. Werk* (C. C.) 39 Fed. 680, and *Hoffman v. Knox*, 50 Fed. 484, 1 C. C. A. 535, are said to support this contention. If there was no change in the situation of the parties after the entering of the decree in the first case cited, so as to make a revision of the decree inequitable, we should have thought a bill of review would have properly lain in that case after the decision of the Supreme Court of the United States in *Tilghman v. Proctor*, 102 U. S. 707, 26 L. Ed. 279. As to the second case cited, there had been such a radical change in the situation of the parties since the rendering of the decree as made the bill of review inequitable. The first decree had been executed by sale of the property involved, and the rights of the third parties had intervened. Furthermore, the plaintiff in that suit asked only a partial revision of

the decree seeking thereby to have all that part of it which would be beneficial to him retained, and to destroy the part under which innocent third parties had acquired rights. Neither of the cases cited presented a situation similar to that with which we are now dealing.

The judgment entered herein, therefore, on the 20th day of April, 1910, is hereby vacated and set aside, and on the authority of the decision of the Supreme Court in the Old Colony Trust Company Case a decree will be entered reversing the decree of the lower court with direction to enter a decree against the enforcement of the resolution of 1908, in accordance with said opinion of the Supreme Court.

UNITED STATES GYPSUM CO. v. KARNACA.

(Circuit Court of Appeals, Eighth Circuit. July 29, 1914.)

No. 4096.

1. MASTER AND SERVANT (§ 121*)—PLACES TO WORK—STATUTE REQUIRING GUARDING OF MACHINERY.

Code Supp. 1907, Iowa, § 4999a2, which makes it the duty of the owner of any manufacturing or other establishment where machinery is used, among other things, to properly guard "machinery of every description," as construed by the Supreme Court of the state, is intended to require the guarding of all machines of a character dangerous to employes operating them or working in their vicinity.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. § 121.*]

2. MASTER AND SERVANT (§ 289*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

Evidence considered, and *held* not sufficient to establish the contributory negligence as a matter of law of an employe in a gypsum mill, who was injured by a revolving screw, used to force gypsum through a conveyor, and which was left unguarded through the employer's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

In Error to the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Action at law by Peter Karnaca against the United States Gypsum Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Fred J. Dawley, of Cedar Rapids, Iowa (Dawley, Jordan & Dawley, of Cedar Rapids, Iowa, on the brief), for plaintiff in error.

B. J. Price, of Ft. Dodge, Iowa (M. M. Joyce, of Ft. Dodge, Iowa, on the brief), for defendant in error.

Before SANBORN and CARLAND, Circuit Judges.

CARLAND, Circuit Judge. This action was brought by Karnaca to recover damages from the Gypsum Company for a personal injury he received while in its employ, and which as he alleges was caused by the negligence of the company. He recovered a verdict. The company brings the case here, assigning as error the ruling of the trial court

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

refusing to direct a verdict in its favor. The company has specified the particulars in which the evidence was insufficient to sustain a verdict as follows: (1) There was no evidence for the jury that the company was negligent. (2) There was no evidence for the jury that the machinery on which Karnaca was injured was of a such a dangerous character as to require a guard. (3) There was no evidence for the jury that it was practicable to guard the conveyer without interfering with the operation thereof. (4) The evidence showed Karnaca to have been guilty of contributory negligence. Karnaca specified in his complaint as acts of negligence: (1) Failure to use ordinary care to furnish him with a reasonably safe place to work. (2) Failure to use ordinary care to furnish him with proper tools and appliances to remove the clogged gypsum without being compelled to place his hands in close proximity to the unguarded revolving conveyer screw. Under specification 1, Karnaca mentioned the failure to properly guard the conveyer screw as provided by section 4999a2, Supplement, Iowa Code. (3) In permitting an obstruction to remain over and across the door of bin No. 5, thereby causing Karnaca to place his hands near the conveyer screw. (4) Failure to warn Karnaca of the dangers of his employment.

[1] Section 4999a2, reads as follows:

"It shall be the duty of the owner, agent, superintendent or other person having charge of any manufacturing or other establishment where machinery is used, to furnish and supply or cause to be furnished and supplied therein, belt shifters or other safe mechanical contrivances for the purpose of throwing belts on and off pulleys, and, wherever possible, machinery therein shall be provided with loose pulleys; all saws, planers, cogs, gearing, belting, shafting, set screws and machinery of every description therein shall be properly guarded."

In construing this statute the Supreme Court of Iowa, in *McCarney v. Bettendorf*, 156 Iowa, 418, 136 N. W. 920, said:

"Enough has been said to indicate the reasons for our conclusion that the clause 'machinery of every description' should not be restricted to the kinds or class particularly mentioned, but given the broad construction, evidently intended by the Legislature, as meaning all machines of a character dangerous to employes operating them or working in their vicinity. Machines, or parts likely, if unguarded, to injure those operating or coming in contact with them, are particularly mentioned, and directed to be 'properly guarded,' and by 'machinery of every description' the Legislature undoubtedly intended machinery not specifically enumerated, but which might reasonably be anticipated to cause injury unless provided with appropriate guards. See *Kimmerle v. Dubuque Altar Mfg. Co.* [154 Iowa, 42], 134 N. W. 434: As everyone knows, a large percentage of machinery requires no shield against danger to workmen operating or near it, and this, as plainly appears from the statute when construed as a whole, was not contemplated by the Legislature. When a machine, or machinery, however, is proven to be of a character such that injury therefrom to employes operating or near it is reasonably to be apprehended, then the statute exacting proper guards is as mandatory as though it had been particularly mentioned therein."

The court in the above case cited with approval the case of *U. S. Cement Co. v. Cooper*, 172 Ind. 599, 88 N. E. 69. The Indiana statute reads:

"All vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws and machinery of every description therein shall be properly guarded."

The Supreme Court of Indiana in construing this statute said:

"Considering the general purpose of the legislation, as distinctly shown by the various provisions of the act, it becomes plain that the design of the law-makers was the selection of certain manufacturing instrumentalities, generally known to be dangerous, and susceptible of being guarded without impairing their usefulness, and the imposition upon masters of the general duty of properly guarding all such instrumentalities, on the penalty that failure to do so should be accounted negligence per se. While the great body or mass of machinery usually assembled in important manufacturing establishments—too multiform and diversified for classification or just control by fixed rules of law—should be understood as being within the scope and meaning of the general words, 'and machinery of every description therein' shall be guarded, this distinction, however, in the rules applicable to objects within the purview of the general words, is manifest. The failure to guard all machinery is not negligence per se. When a machine, or some part of a machine, is not of a dangerous character, or is so located as not to imperil workmen when in the place, or places, to which their duties call them, or where guarding or fencing is impracticable without materially impairing the use, the same need not be guarded."

The trial court in the case at bar told the jury that the statute of Iowa required the revolving screw which injured Karnaca to be guarded. Whether it appeared that the machinery was so clearly dangerous as to allow the court to say that it was within the statute (*Kimmerle v. Dubuque Altar Mfg. Co.*, 154 Iowa, 42, 134 N. W. 434), we may not consider, as there was no exception or complaint made when the court so charged.

Chapter 219, Acts 33d General Assembly of Iowa, provides:

"That in all cases where the property, works, machinery, or appliances of an employer are defective or out of repair, and where it is the duty of the employer from the character of the place, work, machinery or appliances to furnish reasonably safe machinery, appliances or place to work, the employé shall not be deemed to have assumed the risk by continuing in the prosecution of the work, growing out of any defect as aforesaid, of which the employé may have had knowledge when the employer had knowledge of such defect, except when in the usual and ordinary course of his employment it is the duty of such employé to make the repairs, or remedy the defects. Nor shall the employé under such conditions be deemed to have waived the negligence, if any, unless the danger be imminent and to such extent that a reasonably prudent person would not have continued in the prosecution of the work; but this statute shall not be construed so as to include such risks as are incident to the employment."

The law and the issues being as stated, it simply remains to consider whether there was evidence to sustain a verdict for Karnaca in the particulars specified. We are justified in saying that there was no evidence to sustain a recovery on the ground that the company had not used ordinary care in providing Karnaca with reasonably safe tools and appliances with which to perform his work. Counsel for Karnaca practically concede this in their brief. The question was submitted to the jury, however, by the court, but no complaint is made of this anywhere. If there was evidence to go to the jury on any alleged act of negligence, it was not error to overrule the motion for a directed verdict. In order to have brought this question before us for review, there ought to have been a motion to direct a verdict upon this particular cause of action—none such was made. There was conflicting evidence as to what the company did in warning Karnaca of the dangers of his

service. Beside stating that this was one of Karnaca's alleged acts of negligence on the part of the company the court said nothing about it to the jury. No complaint, however, of this is made. There was evidence to go to the jury that the screw conveyer was of such a character that injury therefrom to employes near it would be reasonably apprehended. As before stated, the court decided this question, and no complaint of that decision is made. The claim that there was no evidence that it was practicable to guard the conveyer without interfering with the operation thereof is not sustained by the record. Mr. Butler, superintendent of the Gypsum Company, called by Karnaca, testified upon this subject as follows:

"Q. If the men properly regulated the flow of the gypsum by means of these slides, as they do now, the presence of the screen over the conveyer would not in any way tend to retard the flow of the gypsum, would it? A. Some kind of a screen would; a real fine screen would. Q. Will a coarse screen? A. It wouldn't; no, sir.

"By the Court: Q. A coarse screen would not? A. No, sir."

[2] It necessarily results from what we have said that there was evidence that the defendant was negligent. There was no pretense that any guard had been placed over the conveyer screw for the purpose of protecting employes. It only remains to consider the question as to whether the testimony so clearly showed that Karnaca was guilty of contributory negligence that a verdict for him could not be sustained. The burden of showing that Karnaca was negligent was upon the company, unless it appeared from Karnaca's own evidence, and the court in order to have directed a verdict for the company on that ground, as matter of law, would have had to decide that all reasonable men upon the facts shown would say that Karnaca was negligent. It now appears that 12 men, presumably reasonable, united in finding to the contrary. In order to discuss this question a short statement of the case is necessary.

The Gypsum Company is engaged in the manufacturing of gypsum products near Ft. Dodge, Iowa. Karnaca was employed by it about July, 1912, and on September 11th of the same year received the injury of which he complains, in what is known as the Mineral City Mill. In this mill there were six kettles for boiling the moisture out of gypsum plaster. When the plaster is boiled sufficiently it is dumped into bins. This is done by opening a gate that is on a level with the bottom of the kettle. The bins are shaped like an inverted "A." They were of about 18 tons capacity. When the plaster is first dumped from the kettle to the bin, it has a temperature of about 330 degrees Fahrenheit, and is of the consistency of hot water. The plaster passes from the bins to a conveyer box through doors located at the bottom of the bins, and then is conveyed by the operation of a screw conveyer to an elevator. The conveyer box is 16 inches wide and 24 inches deep, with flat bottom and no cover or top. Inside of the conveyer box is a conveyer screw 9 inches in diameter and 28 inches in circumference. The screw is about six inches from the bottom of the conveyer box and the box is about 60 feet in length. The screw revolves at the rate of 80 revolutions per minute. The doors or gates at the bottom of the bin through which the gypsum passes are about 6 inches by 12 inches. The top of the

outside of the conveyer box is about $4\frac{1}{2}$ feet from the floor and came up to about the shoulders of Karnaca. The doors in the bins are opened and closed by a sliding door, raised or lowered by the men operating same, either with their hands or by means of an iron bar. In drawing a line from the top of the conveyer box straight across horizontally to the bin, it would strike a little below the top of the door. There is a tendency for the hot fluid gypsum to cake or bake when dropped into these bins after it becomes cool. If the gypsum clogged in front of any one of the doors in the bins, the elevator man's duty was to loosen it up with the bar, which was furnished by the Gypsum Company. Karnaca was an elevator man, and this was a part of his duty at the time of the accident. This iron bar was about 5 or 6 feet in length and of half-inch pipe. The end that went into the bin was crimped shut. The bar was curved, but was made of light material so that you could straighten it if desired. As a general thing it would be curved. If the gypsum clogged it was easier and safer to get at it with a curved bar than with a straight bar. The bar would be inserted in the sliding door. The clogs or jams of the gypsum would sometimes be three or four feet up in the bins from the door. The colder the gypsum became the harder it packed. The conveyer screw runs all the time when the mill runs, so that whenever a person would be poking these clogs the conveyer screw would be in motion in front of him all the time. Some time before the day of the accident, the company had attempted to have the gypsum pass automatically from the bins into the conveyer box, and to that end had covered the conveyer box, and as a part of this scheme there was a plate placed in front of the bin door. It covered up part of the opening. The object of this experiment as claimed by the company was to save the expense of elevator men, but it was found impracticable, and the cover was taken off the conveyer box, but on some of the doors of the bins the plates remained. The plate remained at bin No. 5 where Karnaca was injured. There were holes in the plate top and bottom for inserting the iron bar to loosen the gypsum when it became clogged. It is the claim of the company that the length of the bar with which Karnaca was furnished permitted him, at all times, to poke the clogged gypsum without having his hands over the conveyer box or near the conveyer screw. Karnaca was not attempting to raise or lower any bin door with his hand when he was injured. He testified:

"I put the bar in as far as I could put it, and at those doors where there was no plate my hand would come right over the conveyer. At the time I was hurt I was using that pipe, cleaning with it. I was working on the third hole in bin No. 5. I put the bar in from the bottom underneath the plate, because the gypsum was stuck on the bottom. It was stuck or clogged at a point below the hole in the top of the plate. When it didn't block on the bottom, I used it on top. I took hold of the bar with my right hand in front and the left hand behind. I started to poke from the bottom and the conveyer caught my glove or the sleeve and just took my hand in there and then it cut my fingers off."

It is plain that the farther the iron bar was inserted in the bin for the purpose of breaking up the gypsum, the nearer the elevator man's hands would come to the conveyer screw, that is, they would be over the conveyer screw. The conveyer box was 24 inches deep, the diameter of the screw was 9 inches, and the distance from the bottom of

the screw to the bottom of the conveyer box was 6 inches. This would leave a space of 9 inches above the screw to the level of the top of the conveyer box. The side of the bin next to the conveyer box constituted the inside of the conveyer box, so that there was nothing to prevent the iron bar if it was inserted in the bin so as to come within the top opening of the conveyer box from getting down into the conveyer screw, which might have been possible if the elevator man was trying to reach clogged gypsum three or four feet up in the bin, and the testimony shows that it sometimes clogged as high as that.

There may be evidence appearing in this statement of the case which would sustain a verdict that Karnaca was negligent, but it does not present a case where the court can say as matter of law that he was. In order to do so we should have to decide that all reasonable men would say upon the facts stated that Karnaca could not have received his injury without he either deliberately or carelessly placed his hand so as to be caught by the conveyer screw. We think it was a question for the jury, and that their verdict must stand.

Judgment affirmed.

STERNE v. MERCHANTS' NAT. BANK.

In re TAYLOR GRAIN CO.

(Circuit Court of Appeals, Eighth Circuit. August 20, 1914.)

No. 3949

1. BANKRUPTCY (§ 345*)—LIENS—CONFLICTING CLAIMS UNDER MORTGAGE.

Bankrupt corporation made an issue of \$75,000 of bonds secured by mortgage on its property, all of which it delivered to a bank as security for present and future indebtedness. Later it made a new issue of \$125,000 to take up the first and other indebtedness, and its president took them to New York to negotiate. It then owed the bank \$55,000, and with the bank's consent one of the first bonds of \$15,000 was canceled and an indorsement of \$5,000 made on another to show the true amount due thereon, and also, with the bank's consent, the president took such bonds with him; the uncanceled portion to be paid from the proceeds of the new issue. Having failed to effect a sale of the latter, the old bonds were returned to the bank, except the canceled one, which, without the first bank's knowledge, was pledged to intervener bank in lieu of other security which it then held, with the explanation that it had been canceled without authority. After the bankruptcy the mortgaged property was sold, and did not realize enough, after satisfying prior incumbrances, to pay the claim of the first bank. *Held*, that such bank was entitled to the entire security of the mortgage, and had not intentionally relinquished its right thereto; that intervener, which was put on notice by the condition of the canceled bond when it took the same and made no inquiries, was not an innocent purchaser, nor entitled to share in the proceeds of the mortgaged property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. § 345.*]

2. BANKRUPTCY (§ 455*)—APPELLATE PROCEEDINGS—MODE OF REVIEW.

An order of a court of bankruptcy allowing a claim of \$500 or more as a secured claim, although it incidentally affects other liens on the same

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

property, is reviewable by appeal under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 916; Dec. Dig. § 455.*

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

In the matter of the Taylor Grain Company, bankrupt. Appeal by W. E. Sterne, trustee, from an order allowing the claim of the Merchants' National Bank, intervener, as a preferred claim. Reversed.

The Merchants' National Bank of Topeka, Kan., presented a demand for an allowance as a secured claim against the estate of the Taylor Grain Company, in bankruptcy, praying that the same be paid in full out of the proceeds of sale of certain mortgaged property. The court had before that time made an order requiring the bank to present its claim within the time prescribed by law, and, because of its failure to do so, the referee refused to allow it at all, and, on a petition for review, the District Judge set aside the order of the referee and directed him to proceed to hear the claim of the bank on its merits. After a full hearing the referee disallowed the claim as a secured claim, and the District Judge, on another petition for review, reversed the judgment of the referee and ordered him to allow the demand of the bank as a secured claim, and directed its payment in full out of the fund in the possession of the trustee arising from the sale of the mortgaged property. From this last-mentioned order the trustee of the estate in bankruptcy prosecutes an appeal to this court.

The record before us consists of the final report of the referee disallowing the claim of the bank, the petition for review of that action, the order of the District Judge sustaining that petition and directing the referee to allow the claim, together with the opinion of the District Judge. Much evidence appears to have been taken by the referee, but none of it is brought here for our consideration. We must therefore determine the case on the facts found and stated by the referee. They are as follows:

Prior to November 1, 1904, the Taylor Grain Company had executed two mortgages conveying its real estate to secure the payment of (1) an indebtedness of \$12,000, due to one French, and (2) an indebtedness of \$10,000, due to the bank of Topeka, and on that day it executed another or third mortgage conveying the same property to a trustee to secure the payment of an issue of bonds aggregating the sum of \$75,000, then executed by it, payable to the order of Davis, Welcome & Co., and by the latter indorsed in blank. All of these last-mentioned bonds were delivered to the Bank of Topeka as security for the payment of money then due or thereafter to become due from the grain company to that bank. In the summer of 1905 the total amount of that indebtedness was found to be \$55,000. The grain company then executed another or fourth mortgage conveying the same real estate to a trustee to secure the payment of an issue of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

\$125,000 in bonds. Soon afterwards the grain company borrowed \$2,100 from the Merchants' National Bank, appellee herein, pledging, as security for its payment, some of the bonds of the last-mentioned, or \$125,000, issue. The purpose of the grain company was to sell this issue of bonds, and with the proceeds pay off all prior mortgage indebtedness, and thereby constitute that issue a first lien upon its property. This purpose was made known to the president of the Merchants' National Bank, and he was also advised by the officers of the grain company that they hoped to sell the bonds in New York, and, as soon as they could do so, that bank could forward its bonds to New York and receive the \$2,100 so borrowed. The president of the grain company went to New York for the purpose of negotiating a sale of the bonds. In order to do so it became necessary to make a showing that that issue constituted a first lien upon the property. He accordingly took with him an abstract and proper receipts and releases of the debts secured by the two first-mentioned mortgages, and also the entire issue of \$75,000 of bonds, so that they might be canceled in partial satisfaction of the purchase price of the new issue. One of these bonds for \$15,000, known as bond No. 7, had been canceled while in the possession of the Bank of Topeka, and had been so marked on its face, and on another of the bonds payment of \$5,000 had been indorsed, thereby reducing the amount secured by the mortgage of November 1, 1904, to \$55,000, the exact amount of the then existing debt of the bankrupt company to the Bank of Topeka. That bank had consented to this cancellation and indorsement for the purpose of enabling the officers of the grain company to make a showing that the proceeds of sale of the bonds would be sufficient to pay off its indebtedness and secure a release of all prior incumbrances. Some objection was found to the terms and provisions of the mortgage, and for that reason the grain company was unable to make the sale, and concluded to make another mortgage containing satisfactory terms and provisions, to secure another issue of bonds and make another attempt to sell that issue. To accomplish this it became necessary to take up the few outstanding bonds of the prior issue pledged to the Merchants' National Bank. The president of the grain company, who then had in his possession bond No. 7, canceled for the purposes above specified, took it to the Merchants' National Bank and explained to its officers that, by reason of some dissatisfaction with the provisions of the mortgage, the \$125,000 issue of bonds could not be sold, and that a new issue and a new mortgage were necessary, and that, in order to cancel the old issue, it became necessary to get possession of the few bonds held by their bank, and offered to deliver to the latter bank bond No. 7 as a substitute for the bonds then held by it as security for its debt of \$2,100. The officers of the bank, upon inspection of that bond, called attention to its mutilated appearance, and were told by the president of the grain company that it had been canceled without authority of the board of directors, and that the officers of the company had re-signed it. The officers of the bank made no further inquiry, either of the officers of the grain company or of the Bank of Topeka, as to the circumstances under which the cancella-

tion of bond No. 7 had occurred, but took it and surrendered the bonds then held by them.

The grain company, having failed in its effort to negotiate a sale of its bonds, was, on the petition of its creditors, adjudged a bankrupt. Afterwards the Bank of Topeka made proof of its claim as secured by the mortgage of November 1, 1904, and the same was allowed in the sum of \$57,125, which, with taxes and insurance paid, pursuant to the terms of the mortgage, amounted to \$61,106. The mortgaged property was afterwards sold for \$93,750. This amount was not sufficient to pay the claims amounting to \$22,000 secured by the first and second mortgages and the claim of the Bank of Topeka of \$55,000 secured by the third mortgage.

On this state of facts the Merchants' National Bank claims it is entitled to that portion of the proceeds of the sale of the mortgaged premises properly applicable to bond No. 7. In other words, that it is entitled to fifteen seventy-fifths of such proceeds because of its ownership of that bond. The trustee, acting on behalf of all parties interested, and particularly the Bank of Topeka, disputes this claim and contends that as the debt of \$55,000 owed by the bankrupt company to the Bank of Topeka was secured by the entire issue of \$75,000 of bonds, and as the entire proceeds of sale of the mortgaged property was not sufficient, after satisfying the two prior liens, to fully pay the debt of the Bank of Topeka, the latter was entitled to all such proceeds. The question thus presented is: Which bank, under the facts of this case, is entitled to the security which bond No. 7 afforded.

Mulvane & Gault and D. R. Hite, all of Topeka, Kan., for appellant.

Charles Blood Smith and Samuel Barnum, both of Topeka, Kan., for appellee.

Before HOOK, ADAMS, and SMITH, Circuit Judges.

ADAMS, Circuit Judge (after stating the facts as above). We are of opinion that the learned trial judge was right in ordering the referee to hear the case on its merits, notwithstanding the claim was not presented in time, but, in the view we take of the merits of the case, it is unnecessary to elaborate our views on this feature, and proceed at once to a consideration of the merits.

[1] The amount of the debt of the Bank of Topeka is not disputed. It was \$55,000. Neither is there any dispute that this entire debt was intended to be secured by the mortgage of November 1, 1904. For that purpose, and that purpose only, was the entire issue of \$75,000 of bonds, secured by that mortgage, turned over to the Bank of Topeka. That bank was thus vested with title to each and all of the bonds. Has it ever transferred that title to bond No. 7 to the Merchants' National Bank? This is the question.

The facts show that it parted with the possession of the bond for a particular purpose only: To enable the bankrupt company to negotiate a sale of a proposed new issue of \$125,000 of bonds, and by so doing to raise money with which to pay all its debts, including, of course, the full amount of \$55,000 due to the Bank of Topeka. That bank, to

facilitate the transaction, turned over the possession of all the bonds held by it (\$75,000), including the canceled bond No. 7, to the president of the bankrupt company, to be used by him in the way and for the purposes stated, namely, to make a demonstration that upon the payment of \$55,000, in addition to \$22,000 secured by the first two mortgages, all prior liens would be discharged, and the contemplated mortgage would stand as the first and only incumbrance upon the property.

We fail to discover any act done or left undone by the Bank of Topeka disclosing an intention to surrender its claim to bond No. 7 or to transfer title thereto to the Merchants' National Bank. The worst that can be said is: That it delivered evidence of its security into the possession of the mortgagor, thereby empowering the latter to perpetrate a fraud upon the unwary. If this was done, equitable considerations might estop the Bank of Topeka from now claiming the benefit of that security as against any one innocently defrauded by any use the mortgagor might make of it. But the facts do not make a case of this kind. The last-named bank did a friendly act only. It delivered bond No. 7 to the mortgagor for a use, lawful in itself, and entirely consistent with the retention of its full security. That bond bore evidence on its face of its infirmity as a negotiable or transferable security. The facts reported by the referee do not disclose how or in what way the cancellation of the bond was made, but he states that, when the president of the mortgagor company took the bonds to New York, bond No. 7 "was canceled," and in several places in his report he states that it was marked "canceled," and he further states that the Merchants' National Bank knew of such cancellation, and that, when it was offered to its president as a substitute for the bonds desired to be taken up, he "called attention to the mutilated appearance of the bond," and was given some explanation of it, which will hereafter be referred to.

It seems quite clear that the Bank of Topeka never intended to surrender the security partially evidenced by bond No. 7 without simultaneously securing payment of its entire debt of \$55,000. The bond was canceled and surrendered as a step in the progress of a legitimate negotiation to accomplish that purpose, and for no other purpose. There is no showing that it came into the hands of the Merchants' National Bank with the knowledge or consent of the Bank of Topeka. The intent, therefore, on the part of that bank to transfer title to the Merchants' National Bank does not appear. The only intent manifested was to facilitate the bankrupt company in negotiating a new issue of bonds for refunding purposes. The bankrupt company, after securing the cancellation of bond No. 7, did an unauthorized act when it delivered it to the Merchants' National Bank as security for the payment of its debt. It was guilty of an unwarrantable conversion, and by so doing did not destroy or impair the security originally taken and held by the bank of Topeka for the payment of its entire debt, unless it in some manner is estopped from asserting its claim to such security; but nothing of that kind appears.

The Merchants' National Bank took the bond which had not only been canceled but which bore evidence of mutilation on its face. It knew exactly what it was taking, and could not have been misled or defrauded. "*Volenti non fit injuria.*"

But it is argued that the transaction amounted to a reissue by the mortgagor of a security once paid and satisfied. We are unable to give our assent to this contention. The case of *Clafin v. South Carolina R. Co.* (C. C.) 8 Fed. 118, is relied on by counsel for the appellee to sustain this contention. In that case Chief Justice Waite, presiding in the Circuit Court, had occasion to consider the subject of the satisfaction of a mortgage debt and the reissue of bonds once secured by the mortgage. We are unable to find in it, when properly understood, any warrant for the contention of counsel for appellee. It is true the Chief Justice said he could not doubt the power of the mortgagor to put out and keep out the entire issue up to the time the bonds became due; but he also said, in discussing the subject, that it was "a question of intention to be gathered from the language of the instrument, considered with reference to the surrounding circumstances and the subject-matter of the contract." In other words, the familiar rule of law that the intention of the parties must prevail applies to the reissue of negotiable securities. Applying this test to the present contention, the solution is clear. The bond was canceled, not with the intention of showing payment of any part of the debt due to the bank of Topeka, nor for the purpose of surrendering any part of its security. On the contrary, it was done as a step in the progress of negotiating a new issue of bonds, and at the same time securing payment of the entire debt of the Bank of Topeka. This intention would be thwarted if a reissue of one or more of the bonds could have been made without the knowledge or consent of the pledgee and its security, which, as the sequel shows, proved inadequate, be thereby impaired. There certainly was no intention on the part of the parties interested to reissue this bond as an obligation secured by the mortgage of November 1, 1904.

The referee found that the president of the bankrupt company stated to the officers of the Merchants' National Bank, in answer to a request for an explanation of the mutilated appearance of the bond, that it was canceled without authority of the board of directors of the grain company, and that the officers had re-signed it. The referee also found that the president of the grain company was the only officer who knew or assented to a cancellation of the bond. He does not find or state that the bond was ever in fact re-signed by any officers of the grain company, and we have no reason to know, from what appears in this record, that such was the fact. Upon this somewhat contradictory and unsatisfactory explanation the referee found that the Merchants' National Bank accepted the bond without making any inquiry at sources of information readily available to its officers, as to the circumstances under which the alleged cancellation was made. It took the bond with full knowledge of facts which discredited it as an existing or valid obligation of the bankrupt company. If the officers had exercised reasonable care and caution in the light of facts actually made known to them, they would have been led to accurate information concerning the rights of the Bank of Topeka in and to the bond. Such being the facts, the Merchants' National Bank does not occupy the position of a holder in good faith of a security such as entitles it to hold it as against the real owner.

[2] There is a motion to dismiss the appeal in this case which requires attention. Counsel for appellee argue that the judgment appealed from presents a matter of law reviewable, according to the provisions of section 24b of the Bankruptcy Act, only by an original petition to revise, and does not present "a controversy arising in bankruptcy proceedings" reviewable, according to the provisions of section 24a of the act, by appeal. In making this contention we think counsel fail to give sufficient consideration to the provisions of section 25 of the act, which provides among other things:

"That appeals as in equity cases may be taken * * * from a judgment allowing or rejecting a debt or claim of \$500 or over."

What has already been said discloses that the decree appealed from is one allowing a claim to the Merchants' National Bank. It so states. It reads, after reciting the submission, as follows:

"It is therefore ordered that the decision of the referee herein finding against the said claim of the Merchants' National Bank be, and the same is hereby, reversed, and the said referee is directed to allow said claim of said the Merchants' National Bank against the fund in the possession of the trustee, arising from the sale of the property of said bankrupt."

The fact that the decree incidentally established a lien and affected the interests of the Bank of Topeka does not destroy the essential character of the proceeding, to establish a preferential claim against certain assets of the bankrupt. *Century Savings Bank v. Robert Moody & Son*, 126 C. C. A. 499, 209 Fed. 775. The case just cited is also authority for the proposition that the matter in judgment in this case is a "controversy arising in bankruptcy proceedings," and reviewable by appeal under the provisions of section 24a also.

The motion to dismiss the appeal must be denied, and the decree of the District Court allowing the claim of the Merchants' National Bank, and directing its payment in full, is reversed, and the cause remanded, with directions to take further proceedings not inconsistent with this opinion.

DENVER CHEMICAL MFG. CO. v. LILLEY et al.

(Circuit Court of Appeals, Eighth Circuit. July 29, 1914. Rehearing Denied November 2, 1914.)

No. 4140.

TRADE-MARKS AND TRADE-NAMES (§ 93*)—SUIT FOR UNFAIR COMPETITION—SUFFICIENCY OF EVIDENCE.

Findings of fact by a special master, concurred in by the trial court, that a trade-name, adopted by defendant for its product and used on its containers, was not one originally given by the general public to complainant's product, but was so applied generally to all similar products, *held* sustained by the evidence, and to warrant a decree dismissing complainant's bill for unfair competition by reason of its use by defendant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104-106; Dec. Dig. § 93.*]

Unfair competition in use of trade-mark or trade-name, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. A. 376.]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit in equity by the Denver Chemical Manufacturing Company against Thomas Lilley and the Germicide Company. Decree for defendants, and complainant appeals. Affirmed.

Henry D. Estabrook, of New York City (Edmund Wetmore and William A. Jenner, both of New York City, and S. W. Sawyer and Lathrop, Morrow, Fox & Moore, all of Kansas City, Mo., on the brief), for appellant.

Eugene S. Quinton, of Topeka, Kan. (Cranston, Pitkin & Moore, of Denver, Colo., on the brief), for appellees.

Before HOOK and CARLAND, Circuit Judges, and REED, District Judge.

CARLAND, Circuit Judge. This action was originally instituted by appellant against appellee Thomas Lilley, for the purpose of restraining him from unfair business competition. On application the Germicide Company, which manufactures the product alleged to have been sold by Lilley, was allowed to intervene. Issues having been joined and proofs taken, the case came on for hearing on pleadings, proofs, and master's report. As a result of the hearing the action was dismissed for want of equity.

The appellant manufactures a plastic compound called "Antiphlogistine." It began the manufacture of this medicament in Denver, Colo., in 1893. Its business grew very rapidly, until in 1900 the company for business reasons removed its plant from Denver, Colo., to the city of New York. Its sales at the time of the commencement of this action were upward of 2,000,000 pounds yearly, and its expenditures for advertising \$100,000 yearly. Shortly after its product was first placed on the market, the general public gave to "Antiphlogistine" the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

nickname "Denver Mud." Appellant itself has never adopted the name "Denver Mud" as a label, or registered, advertised, or encouraged its use by the public or the trade. It is claimed, however, by appellant, that a customer may go into almost any drug store in almost any part of the globe—New York, London, Berlin, Paris, Omaha, Kansas City, Peoria, Pleasantville, Peaceful Valley, Bird Center—and ask for "Denver Mud," and he will be handed a can of "Antiphlogistine." This medicament is sold by appellant in tin containers bearing the following label:



COMPOSITION.
ANTIPHLOGISTINE IS A MIXTURE COMPOSED OF THE FINEST ANHYDROUS AND LEVIGATED ARGILLACEOUS MINERAL, CHEMICALLY PURE GLYCERINE, COMPOUNDS OF IODINE, REPRESENTING A SMALL PERCENTAGE OF ELEMENTARY IODINE, MINUTE QUANTITIES OF BORIC AND SALICYLIC ACIDS AND THE OILS OF PEPPERMINT GAULTHERIA AND EUCALYPTUS.

The Germicide Company, which has become the principal defendant, manufactures at Denver, Colo., a plastic compound called "Denver Mud." It is sold in tin containers and bears the following label:



GUARANTEED BY THE GERMICIDE CO., UNDER THE PURE FOOD AND DRUG LAW OF JUNE 30th 1906 SERIAL NO. 7022

There are no disputed questions of law. It being conceded, as it must be, that while appellant adopted the name "Antiphlogistine" for its product, still if for some reason the general public has given to the product another and different name, by which it alone is known

to the trade, the appellant becomes entitled to protection by injunction against one who thereafter endeavors through the adoption of such term as the public employs as synonymous for or as a secondary designation of such product, for in so doing the purchasing public may be deceived as to the article purchased, and the appellant is deprived of that trade which its industry and money have built up. The question to be decided is entirely one of fact. The questions of fact are: Had the name "Denver Mud," prior to the use thereof by the Germicide Company, come to indicate and designate in the public mind the appellant's medicament alone? Is the Germicide Company, by the use of the label above described, endeavoring to pass off to the public its plastic compound as that of the appellant?

The intention of the Germicide Company must be found from what it does. It may be said that the labels above described are both printed upon yellow brown paper. They have been compared by this court from original exhibits, and outside of the words "Denver Mud" there can be found no intention to deceive from the labels themselves. So the question is narrowed to the use of the words "Denver Mud" upon the label of the Germicide Company. The Germicide Company claims that the term "Denver Mud" is a popular name for all preparations similar to those of appellant and appellees; that it was the proprietor's name for none, prior to the adoption thereof by the Germicide Company; that no product was labeled "Denver Mud," or advertised as "Denver Mud," by any owner, manufacturer, or dealer prior to the adoption thereof by the Germicide Company—"Denver Mud" simply being a popular term for the genus, plastic dressing; that, such being the case, the popular generic term was open for adoption as a specific and distinctive trade-name by any one.

After the evidence was taken, the case was referred by consent of parties to a special master to examine and consider the proofs and return answers to the following questions of fact:

"(1) At or about what date was the term 'Denver Mud' first commonly applied by the public to a plastic dressing or plastic dressings?

"(2) Out of what fact or circumstances did the name 'Denver Mud' arise? Was it from the fact that complainant commenced the manufacture and sale of its preparation, Antiphlogistine, and was the term 'Denver Mud' first commonly applied to such plastic dressing, or was its origin due to some other cause? If so, what?

"(3) Was the term 'Denver Mud' first commonly applied to Antiphlogistine, or was that name, when first coined and commonly applied to plastic dressing, employed by the public to designate other plastic dressings as well as Antiphlogistine? If so, what other dressing?"

To which the master returned answers from the proofs as follows:

"(1) The term 'Denver Mud' was first commonly applied by the public to plastic dressings about 1891."

"(2) The earlier products in plastic dressings were manufactured at Denver, Colo., from clay found in that vicinity forming their base; and from that fact or circumstance the name 'Denver Mud' arose and was applied to such dressings."

"(3) The name 'Denver Mud,' as applied to plastic dressings, did not arise from the fact that complainant commenced the manufacture and sale of its preparation, Antiphlogistine, and such term was not first commonly applied

to such plastic dressing, but its origin was due to the cause stated in finding No. 2."

"(4) The term 'Denver Mud' was not first commonly applied to Antiphlogistine, but that name, when first coined and commonly applied to plastic dressings, was employed by the public to designate other plastic dressings as well as Antiphlogistine, to wit, Althio, Glycol, Marach, and Anhydrocine, and afterwards was applied to all plastic dressings as they were produced and placed upon the market."

Exceptions were taken to this report of the special master, which upon a full consideration by the District Court were overruled, and the master's report confirmed. It is claimed by appellant that the questions submitted to the special master restricted the case to a too narrow compass; that there were other facts shown by an examination of all the testimony, which had an important bearing upon the general question of whether there was on the part of the Germicide Company unfair business competition as known to the law. But we think, after a careful examination of all the evidence, that there is no case whatever presented on the part of the appellant, when the words "Denver Mud" are eliminated from the label of the Germicide Company, and that the case must turn wholly upon the use of those words. The evidence has been examined by the special master and by the trial judge. They unite in answering certain questions from the evidence as detailed in the record. While we would not disturb the finding of fact, when concurred in by the master and the trial judge, unless there was a serious mistake, we do not in this case desire to place our judgment entirely upon that ground. An examination of the evidence has convinced us that the conclusions arrived at by the master and the judge are reasonable and sustained by the evidence.

It results that the decree appealed from must be affirmed; and it is so ordered.

St. AVIT et al. v. KETTLE RIVER CO.

(Circuit Court of Appeals, Eighth Circuit. August 25, 1914.)

No. 3954.

1. MUNICIPAL CORPORATIONS (§ 535*)—SPECIAL ASSESSMENTS FOR IMPROVEMENTS—GROUNDS FOR RESTRAINING ENFORCEMENT—"ANY."

Rev. St. Mo. 1899, § 5859, as amended by Laws Mo. 1901, p. 65, provides that, when a city council shall deem it necessary to pave, etc., "the roadway of any street," it shall so declare by resolution, and cause the resolution to be published as therein prescribed, and that if a protest is not filed within 10 days by a majority of the resident owners of the property liable to taxation therefor, who shall own a majority of the front feet, owned by residents of the city on the street to be improved, the council shall have power to contract for the improvement. It further provides that, when the council shall by ordinance find and declare that such a protest has not been filed, such finding and declaration shall be conclusive after the execution of the contract for the improvement. *Held* that, where such an ordinance was passed, a contract let, and the improvement made, property owners, who joined in a protest, could not thereafter enjoin the collection of the tax bills issued therefor against their property on the ground of the invalidity of the original resolution under which the work was ordered and done, because instead of being

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

limited to "any street," as they contended was required by the statute, it embraced parts of three different streets; no such objection having been made in their protest.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1253; Dec. Dig. § 535.*

For other definitions, see *Words and Phrases*, First and Second Series, Any.]

2. CORPORATIONS (§ 487*)—CONTRACTS—RIGHTS ON CONTRACTS ULTRA VIRES.

Even though a contract by a corporation was ultra vires, such fact will not defeat its right to compensation for work done thereunder, where the contract has been fully executed on its part.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1893-1898; Dec. Dig. § 487.*]

3. CORPORATIONS (§ 657*)—FOREIGN CORPORATIONS—CONTRACTS—PENALTIES FOR VIOLATION OF STATUTE.

Under Rev. St. Mo. 1899, § 1026, which makes it a penal offense for a foreign corporation to do business in the state without first procuring a license as required by the preceding section, and further provides that no foreign corporation, which fails to comply with such requirement, can maintain any suit or action in any court of the state, the civil consequence thus prescribed for a violation of the statute is exclusive, and persons affected by a contract made by a corporation, which has not complied with its requirements, cannot maintain an affirmation suit to enjoin its enforcement.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2536-2541, 2550, 2552-2554; Dec. Dig. § 657.*

Foreign corporations doing business in state, see notes to *Wagner v. J. & G. Meakin*, 33 C. C. A. 585; *Ammons v. Brunswick-Balke-Collender Co.*, 72 C. C. A. 622.]

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit in equity by John St. Avit and others against the Kettle River Company. Decree for defendant, and complainants appeal. Affirmed.

Wilson Cramer, of Jackson, Mo., for appellants.

I. R. Kelso, of Cape Girardeau, Mo. (J. G. Miller, of Cape Girardeau, Mo., on the brief), for appellee.

Before HOOK, ADAMS, and SMITH, Circuit Judges.

SMITH, Circuit Judge. [1] The complainants seek to cancel, as clouds upon their title, certain tax bills issued against their property by the city of Cape Girardeau to the Kettle River Company for grading, paving, and improving certain streets in said city. The improvements here in question were made in 1909, and before the revision of the statutes of Missouri for that year, and reference will therefore be made to the Revised Statutes of 1899 and subsequent amendments thereto. Among the laws of Missouri, as they existed at the time of the improvement, was the following substitute for section 5859 of the Revised Statutes of Missouri of 1899, as amended Laws 1901, p. 65:

"Sec. 5859. When the council shall deem it necessary to pave, macadamize, gutter, curb, grade or otherwise improve the roadway of any street, avenue or alley, or other highway, or any part thereof, within the limits of the city for which a special tax is to be levied as herein provided, the council shall, by resolution, declare such work or improvement necessary to be done, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cause such resolution to be published in some newspaper printed in the city for two consecutive insertions in a weekly paper, or seven consecutive insertions in a daily paper, and if a majority of the resident owners of the property liable to taxation therefor, at the date of the passage of such resolution, who shall own a majority of the front feet owned by residents of the city abutting on the street, avenue or alley proposed to be improved, shall not, within ten days thereafter, file with the clerk of the city their protest against such improvements, then the council shall have power to cause a contract for said work to be let to the lowest and best bidder on plans and specifications filed therefor with the city clerk by the engineer or other proper officer, not less than one week's advertisement for bids thereon being made in some newspaper published in the city. Where the bids for said work are above the estimates, or no bids are presented, the council may readvertise for bids. When the council shall by ordinance find and declare that a majority of the resident owners of the property liable to taxation therefor who shall also own a majority of the front feet owned by residents of the city abutting on the street or alley proposed to be improved, have not filed with the city clerk a protest against such improvement such finding and declaration shall be conclusive after the execution of the contract for said improvement, and no special tax bill shall be held invalid for the reason that a protest sufficiently signed was filed with the city clerk. All county or other public property," etc., etc.

The city council adopted a single resolution declaring it necessary to improve two blocks of Main street and two blocks of Themis street crossing the part of Main street ordered improved about the center and one block of Independence street extending that distance from Main street. In other words, the improvements ordered were of contiguous streets but not all on one street.

It is claimed that the statute quoted required a separate resolution for each named street. It will not be necessary to determine whether the expression used, "improve the roadway of any street," is of such a character as to limit the power of the city by a single resolution to determine the necessity for the improvement of a single named street. Webster's International Dictionary gives the word "any" as having the same derivation as the word "one," but states that "it is often used, either in the singular or the plural, as a pronoun." It is frequently used as synonymous with "every" or "all." Bouvier's Law Dictionary; Rapalje & Lawrence Law Dictionary; volume 1, Words and Phrases, 412 to 433.

The city council adopted the resolution, and it was duly published, and these complainants came in and objected to the contemplated improvements, but made no objection on the ground that three streets were included in the resolution or that more than one street was included therein. The first time this question was ever raised was in the hearing before the referee in this case. The bill of complaint in no way made the combining of the streets in one resolution or ordinance a ground for relief.

But the statute (section 5859, Revised Statutes of 1899), as amended, expressly provided that if the council by order found and declared that a majority of the resident owners of the property liable to taxation, who also owned a majority of the front feet owned by residents of the city abutting on the street proposed to be improved, had not filed with the city clerk a protest against such improvement, such finding and declaration should be conclusive after the execution of a contract for said

improvement, and no special tax bills should be held invalid, for the reason that a protest sufficiently signed was filed with the city clerk. Prior to the enactment of this amended statute it had been held that, in an action on the tax bills, the courts would revise the action of the city council in this regard. *City of Sedalia v. Montgomery*, 227 Mo. 1, 127 S. W. 50. But, since the enactment of this amendment to the statute, we have no doubt that the decision of the city council, which in this case was expressly made, was conclusive upon this question, as well as all others concerning the protest of adjacent property owners, and that, having failed to suggest the combining of three streets in one resolution until the hearing before the referee, nothing arising out of that fact can now avail the complainants.

[2] At the time it took the contract, the defendant was a corporation organized under the laws of Minnesota. The articles of incorporation contained the following:

"Know all men by these presents that we, the undersigned, do hereby associate ourselves together for the purpose of carrying on a manufacturing and mechanical business, and we do hereby form and organize a corporation under and pursuant to the provisions of chapter eleven (11) of the General Laws of the state of Minnesota for the year 1873, General Statutes of said state of Minnesota 1894, sections 2805 to 2826, inclusive, and all laws of said state amendatory thereof and applicable thereto, and to that end do hereby make, adopt and sign the following articles of incorporation:

"Article 1. The name of the corporation shall be 'Kettle River Quarries Company.' The general nature of its business shall be the manufacturing and quarrying of stone of any kind or description and the selling and disposing of the same, and the doing of anything and transaction of any business that is properly incidental to or necessarily connected with a general stone manufacturing business. The principal place of business of said corporation shall be at the city of Minneapolis in the county of Hennepin and state of Minnesota."

The Constitution of Missouri, art. 12, § 7, provides:

"No corporation shall engage in business other than that expressly authorized in its charter or the law under which it may have been or hereafter may be organized."

And the same provision was made by statute (section 971, R. S. Mo. 1899).

It must be borne in mind that this corporation has fully performed the contract upon its part. It is not claimed that the defendants are expressly prohibited by the law of the state of its origin to take the contract, nor is it claimed these laws did not authorize the formation of companies for the purpose of taking paving contracts like that in question. It is simply claimed there was an absence of the assumption of such power in the articles of incorporation of the defendant company, but it is claimed that the action of the company in taking the contract was *ultra vires*.

The Supreme Court of the United States has said:

"The doctrine of *ultra vires*, whether invoked for or against a corporation, is not favored in the law. It should never be applied where it will defeat the ends of justice, if such a result can be avoided." *San Antonio v. Mehafty*, 96 U. S. 312, 315 (24 L. Ed. 816); *Railway Co. v. McCarthy*, 96 U. S. 258, 267 (24 L. Ed. 693).

In *Sedgwick on the Construction of Statutory and Constitutional Law*, 73, it is said:

"It must be further borne in mind that the invalidity of contracts made in violation of statutes is subject to the equitable exception that although a corporation, in making a contract, acts in disagreement with its charter, where it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded on it, to question its validity. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract, the fruits of which he retains. And the principle of this exception has been extended to other cases. So a person who has borrowed money of a savings institution upon his promissory note, secured by a pledge of bank stock, is not entitled to an injunction to prevent the prosecution of the note, upon the ground that the savings bank was prohibited by its charter from making loans of that description."

In *Thompson on Corporations* (2d Ed.) § 2789, it is said:

"Thus an executed contract for the purchase by a corporation of a claim for damages, though ultra vires the charter of the corporation, has been held binding on the seller, and he could not raise the question of a lack of power to purchase the claim in an action thereon by the corporation. So one purchasing articles from a corporation and retaining the same will not be heard to object that the corporation was prohibited by law from trading in the specified articles. So the lessee of a corporation will not be allowed to escape the payment of rent for the time of his occupancy merely because the corporation had no power to execute the lease. On this point it has been said: 'Public policy is promoted by the discouragement of fraud and the maintenance of the obligation of contracts, and to permit a lessee of a corporation to escape the payment of rent by pleading the incapacity of the corporation to make the lease, although he has had the undisturbed enjoyment of the property, would be, we think, most inequitable and unjust.' So the maker of a note will not be allowed to defend an action thereon by the payee or its assignee on the ground that the corporation payee had no power to take it. So, in an action by a building association on a note given by one of its members and secured by his stock as collateral, he will not be permitted to defend on the ground that the association had no power to loan money, except on real estate. So where a contract with a corporation was one of partnership between the parties, and therefore ultra vires as to the plaintiff corporation under its charter, that fact, while it would justify a court in refusing to aid in the enforcement of the contract, so far as it remained executory, could not be urged as a defense to an action by the corporation for an accounting as to the part of the contract that had been executed. The rule is the same where the executed contract takes the form of a subscription to the stock of another corporation."

In *Thomas v. Railroad Co.*, 101 U. S. 71, 86 (25 L. Ed. 950), it is said:

"In regard to corporations, the rule has been well laid down by Comstock, C. J., in *Parish v. Wheeler*, 22 N. Y. 494, that the executed dealings of corporations must be allowed to stand for and against both parties, when the plainest rules of good faith require it."

In *Ellett-Kendall Shoe Co. v. Western Stores Co.*, 132 Mo. App. 513, 112 S. W. 4, it is said:

"The defense of ultra vires is not open to a corporation where the contract has been fully executed on the part of the other contracting party and is not expressly prohibited by law"—citing *Grohmann v. Brown*, 68 Mo. App. 630; *City of Goodland v. Bank*, 74 Mo. App. 365; *Winscott v. Investment Co.*, 63 Mo. App. 367.

See, also, *First National Bank v. Guardian Trust Co.*, 187 Mo. 495, 86 S. W. 109, 70 L. R. A. 79.

We conclude that this defense is not available to the complainants.

[3] Under the laws of Missouri at the time in question, a foreign corporation could not, with certain exceptions mentioned in the statute, do business in the state without first obtaining a license from the Secretary of State granted upon conditions specified in the statute. Section 1025, R. S. Mo. 1899. It was further provided:

"Sec. 1026. Penalty for Violation of Two Preceding Sections—Duties of Secretary of State and Prosecuting Attorneys—Penalties to Go Where.—Every corporation for pecuniary profit, formed in any other state, territory or country, now doing business in or which may hereafter do business in this state, which shall neglect or fail to comply with the conditions of this law, shall be subject to a fine of not less than \$1,000, to be recovered before any court of competent jurisdiction; and it is hereby made the duty of the Secretary of State, immediately after August 1, of the year 1891, and as often thereafter as he may be advised that corporations are doing business in contravention to this act, to report the fact to the prosecuting attorney of the county in which the business of such corporation is located, and the prosecuting attorney shall, as soon thereafter as is practicable, institute proceedings to recover the fine herein provided for, which shall go into the revenue fund of the county in which the cause shall accrue; in addition to which penalty, on and after the going into effect of this act, no foreign corporation, as above defined, which shall fail to comply with this act, can maintain any suit or action, either legal or equitable, in any of the courts of this state, upon any demand, whether arising out of contract or tort: Provided, that the provisions of this section shall not apply to railroad companies which have heretofore built their lines of railway into or through this state; nor to 'drummers' or traveling salesmen soliciting business in this state for foreign corporations which are entirely nonresident."

The defendant was a foreign corporation, took the contract, and performed the work without complying with the Missouri statutes. It will be observed that this statute first makes it a penal offense to do business without complying with the laws of Missouri, and it is probable that this action could be maintained if the statute went no further, because it has been expressly held by the Supreme Court of Missouri that the doing of business in the state without complying with the Missouri law is illegal. *Amalgamated Co. v. Mining Co.*, 221 Mo. 7, 120 S. W. 31, 23 L. R. A. (N. S.) 492; *Chicago Co. v. Sims*, 197 Mo. 507, 95 S. W. 344; *Tri-State Amusement Co. v. Amusement Co.*, 192 Mo. 404, 90 S. W. 1020, 4 L. R. A. (N. S.) 688, 111 Am. St. Rep. 511, 4 Ann. Cas. 808. But, not satisfied with making it a penal offense, the Legislature by the same act took up the question of civil liability and the jurisdiction, legal and equitable, of the civil courts, and expressly provided that:

"On and after the going into effect of this act, no foreign corporation, as above defined, which shall fail to comply with this act, can maintain any suit or action, either legal or equitable, in any of the courts of this state, upon any demand whether arising out of contract or tort."

This statute is highly penal and must be strictly construed. *Bolles v. Outing Co.*, 175 U. S. 262, 20 Sup. Ct. 94, 44 L. Ed. 156; *Erbaugh v. United States*, 173 Fed. 433, 97 C. C. A. 663; *Martin v. United States*, 168 Fed. 198, 93 C. C. A. 484; *Johnson v. S. P. Co.*, 117 Fed. 462, 54 C. C. A. 508.

A penal statute, plain in its terms, which creates and denounces a new offense, should be strictly construed. *St. Louis Merchants' Bridge*

T. Ry. Co. v. United States, 188 Fed. 191, 110 C. C. A. 63; Sedgwick on the Construction of Statutory and Constitutional Law (2d Ed.) p. 279 et seq.

In *Parke, Davis & Co. v. Mullett*, 245 Mo. 168, 149 S. W. 461, where the suit was brought by the corporation, the court said that:

"It was not for defendants' sake, therefore, that the provision was made, but it is a rule of state policy of which the defendants may incidentally take advantage."

If this suit had been brought by the city of Cape Girardeau, it would therefore have been true that the provision of the statute was not made for it, and this is all the more true of the appellants. It is a maxim especially applicable to statutory construction. "*Expressio unius est exclusio alterius*," and where, under the decision of the Supreme Court of Missouri, the rights, if any, of the appellants are not granted directly to it or to the one through whom it claims this is especially applicable. The Legislature having entered upon the determination in this penal statute of what suits could or could not be maintained in the courts of Missouri, it cannot, from any general rule of the law, be inferred that different proceedings were authorized by the fact that the contract was made illegal. True, if the statute made the contract illegal and stopped there, this suit could be maintained, but it did more, and prescribed the civil remedy, and did not include this remedy.

If this statute was applicable, then the complainants had, under the terms of the statute, a complete defense to a suit on the tax bills, and this was the exclusive remedy prescribed by the statute, and the District Court was therefore right in denying the complainants' bill, and its decree is affirmed.

In re BREYER PRINTING CO.

BORLAND v. CENTRAL TRUST CO. OF ILLINOIS.

(Circuit Court of Appeals, Seventh Circuit. August 12, 1914.)

No. 2084

1. BANKRUPTCY (§ 440*)—REVIEW—"PROCEEDINGS IN BANKRUPTCY"—"CONTROVERSIES AT LAW AND IN EQUITY IN COURSE OF BANKRUPTCY PROCEEDINGS."

Bankr. Act July 1, 1898, c. 541, §§ 23-25, 30 Stat. 552, 553 (U. S. Comp. St. 1901, pp. 3431, 3432), relating to review of orders and judgments arising in the administration of a bankrupt's estate, create a clear distinction between "proceedings in bankruptcy," reviewable by petition to review and revise and "controversies at law and in equity arising in the course of bankruptcy proceedings," reviewable by appeal; proceedings in bankruptcy covering questions between the alleged bankrupt or the receiver or trustee on the one hand and the general creditors as such on the other, commencing with the petition for adjudication and ending with the discharge, including matters of administration generally, while controversies at law and in equity arising in the course of bankruptcy proceedings involve questions between the receiver or trustee, representing the bankrupt and his general creditors as such, on the one hand, and adverse claimants, on the other, concerning property in the possession of the receiver or trustee or of the claimants, to be litigated in appropriate plenary

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

suits, and not affecting directly administrative orders and judgments, but only the extent of the estate to be distributed ultimately among general creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 440.*]

For other definitions, see Words and Phrases, Second Series, Controversy Arising in Bankruptcy Proceedings; Proceeding in Bankruptcy.

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2 BANKRUPTCY (§ 440*)—LIENS—VALIDITY—DETERMINATION—PROCEEDINGS IN BANKRUPTCY—CONTROVERSY ARISING IN BANKRUPTCY PROCEEDINGS.

Petitioner, who was a bankrupt's landlord, having seized certain of the bankrupt's property for rent in arrear, after adjudication placed the property in the possession of the trustee, subject to petitioner's lien, if any, under an agreement that the property might be sold and that petitioner's right should attach to the proceeds, after which petitioner prayed for an order that the trustee be directed to pay the amount of petitioner's claim out of such proceeds. The trustee claimed title and right of possession in and to the distrained chattels superior to that of petitioner, and the referee rejected petitioner's asserted lien and found in favor of the trustee, which determination was confirmed by the district judge. *Held*, that such proceeding was not a proceeding in bankruptcy, reviewable by petition to review, but was rather a controversy arising in the course of bankruptcy proceedings, reviewable by appeal, and this notwithstanding the petition stated the amount of rent due from the bankrupt, and asked that the trustee be ordered to pay the amount thereof, and the referee gratuitously allowed the amount of rent and costs as a general claim against the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 440.*]

Petition to Review and Revise Order of the District Court of the United States for the Eastern Division of the Northern District of Illinois, in Bankruptcy.

In the matter of bankruptcy proceedings of the Breyer Printing Company. An order was entered by the referee rejecting the claim of H. B. Borland to his asserted lien on the proceeds of certain chattels alleged to have been acquired by him under a distress warrant, but in the possession of the Central Trust Company of Illinois as the bankrupt's trustee, which order was affirmed by the District Judge, and petitioner files a petition to review and revise. On motion to dismiss. Granted.

Allen G. Mills, of Chicago, Ill., for petitioner.

Alvin H. Culver, of Chicago, Ill., for respondent.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

BAKER, Circuit Judge. Respondent has interposed a motion to dismiss this petition to review and revise on the ground that the subject-matter is not within our jurisdiction under section 24b. Facts disclosed in the petition are these: On December 26, 1912, the Breyer Printing Company was adjudicated a bankrupt upon a petition of creditors filed on December 24, 1912, and the Central Trust Company was appointed receiver and afterwards was duly elected trustee. Petitioner leased certain premises to the Breyer Printing Company

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

on May 1, 1910, and claims that on December 1, 1912, there was rent due and unpaid to the extent of \$1,666. On December 9, 1912, petitioner caused a distress warrant for that sum to be levied on certain chattels. From December 9 to December 27, 1912, these chattels were in the actual possession of petitioner under and by virtue of the distress warrant. On December 27, 1912, petitioner and the Central Trust Company entered into an agreement whereby the chattels were placed in the possession of the Central Trust Company subject to the lien and right of possession of petitioner, with the further stipulation that petitioner's right should attach to the proceeds if the chattels should be sold before petitioner's right was adjudicated. On January 10, 1913, petitioner filed in the District Court in bankruptcy his petition, in which he set out the foregoing facts respecting the lease, the seizure of chattels under the distress warrant, his possession thereunder, and his transfer of possession to the Central Trust Company under the recited agreement. The chattels in question were sold by the Central Trust Company for a sum in excess of the rent and costs due petitioner under the distress warrant. The prayer of the petition to the District Court was that the Central Trust Company as receiver and trustee should therefore be directed to pay to the petitioner the amount of her claim for rent and costs. The Central Trust Company answered the petition in the bankruptcy court by neither admitting nor denying the averments of the petition, and by affirmatively claiming title and right of possession in and to the distrained chattels superior to the right of petitioner; and the referee's order rejecting petitioner's asserted lien and finding title and right of possession in the trustee was confirmed by the District Judge.

[1] Sections 23, 24, and 25 of the Bankruptcy Act draw a clear line of demarcation between "proceedings in bankruptcy" and "controversies at law and in equity arising in bankruptcy proceedings." "Proceedings in bankruptcy" cover questions between the alleged bankrupt or the receiver or trustee of the bankrupt estate, on the one hand, and the general creditors, as such, on the other, commencing with the petition for adjudication, ending with the discharge, and including matters of administration generally, such as appointment of receivers and trustees, as well as examinations, exemptions, allowance and disallowance of claims, and the like, all of which naturally occur in the settlement of the estate. "Controversies at law and in equity arising in the course of bankruptcy proceedings" involve questions between the receiver or trustee representing the bankrupt and his general creditors, as such, on the one hand, and adverse claimants on the other, concerning property in the possession of the receiver or trustee or of the claimants, to be litigated in appropriate plenary suits, and not affecting directly administrative orders and judgments, but only the extent of the estate to be distributed ultimately among general creditors. *Matter of Loving*, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725; *United States Fidelity Co. v. Bray*, 225 U. S. 205, 217, 32 Sup. Ct. 620, 56 L. Ed. 1055; *In re Mueller*, 135 Fed. 711, 68 C. C. A. 349; *In re Friend*, 134 Fed. 778, 67 C. C. A. 500.

[2] Did the landlord's petition in the bankruptcy court institute a

"proceeding in bankruptcy" of an administrative character, or did it present a "controversy arising in the course of bankruptcy proceedings" in the nature of a suit in equity? If of the former class, our jurisdiction to review would attach under section 24b or 25a as might be appropriate to the particular proceeding in bankruptcy. If of the latter class, our jurisdiction could be invoked only under section 24a. For a defeated party is not at liberty to disregard the appropriate appellate remedy provided for his case and choose some other that may better suit his inclination or convenience. *Matter of Loving*, 224 U. S. 187, 32 Sup. Ct. 446, 56 L. Ed. 725; *United States v. Beatty*, 232 U. S. 463, 34 Sup. Ct. 392, 58 L. Ed. 686; *In re Friend*, 134 Fed. 778, 780, 67 C. C. A. 500. And this remains true although the appellate court may allow a writ of error which is addressed to questions of law involved in a "proceeding in bankruptcy" to stand as a petition to review and revise, since both are ranged on the same side of the demarcating line and the methods are substantially alike. *Freed v. Central Trust Co.*, 215 Fed. 873, 132 C. C. A. 7.

If a creditor files and asks the allowance of a claim as an unsecured creditor, he plainly institutes a "proceeding in bankruptcy." And if in connection with the presentation of such a claim he asserts grounds why in the distribution of the proceeds of the estate he should be given priority over other general creditors (as in *Coder v. Arts*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008; *Matter of Loving*, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725; *In re Streater Metal Stamping Co.*, 205 Fed. 280, 123 C. C. A. 444), the matter so presented nevertheless remains a "proceeding in bankruptcy." And even if the trustee in his answer admits and allows the general claim and contests only the creditor's right to priority, the nature of the proceeding is not affected. *Loving and Streater Cases*, *supra*. On the other hand, it is clear that if a claimant is in possession of chattels under a bill of sale or mortgage, and if subsequent to his possession a petition in bankruptcy is filed and an adjudication in bankruptcy had against his grantor or mortgagor, and if thereafter the receiver or trustee of the bankrupt estate disputes the holder's right of possession, a controversy arises which is outside of the matter of the administration of the bankrupt estate. The property in question has not come into the custody of the bankruptcy court or of the receiver or trustee under and by virtue of the adjudication. If the holder maintains his possession and the trustee is compelled to bring a suit against him either in the bankruptcy court or some other court to cancel the alleged title or lien and to recover the property, the resulting order or decree could not be reviewed under 24b or 25a for the reason that the proceeding resulting in such order or decree was not a "proceeding in bankruptcy" within the administration of the estate. And the essential nature of the controversy respecting the holder's title or lien cannot, in our opinion, be affected by the question whether the suit to determine the validity of the alleged title or lien is begun by the petition or bill of the trustee or of the adverse claimant. Where the adverse claimant in possession of chattels turns them over to the trustee subject to his rights, for the purpose of having the

bankruptcy court adjudicate his rights upon his petition, the property, though then in the possession of the trustee, has not come into the hands of the trustee under and by virtue of the adjudication, and the controversy is no less a controversy between the trustee and an adverse claimant than it would be if the claimant had retained possession and compelled the trustee to take the initiative. This must be so, because even where the property has been received by the trustee directly from the bankrupt under and by virtue of the adjudication, it is authoritatively held that the petition of one who asserts a right of possession, either by virtue of a title or by virtue of a lien, presents a "controversy" as distinguished from a "proceeding in bankruptcy." *Hewit v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; *Whitney v. Wenman*, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157; *Knapp v. Milwaukee Trust Co.*, 216 U. S. 553, 30 Sup. Ct. 412, 54 L. Ed. 610.

Against the conclusion that the order or decree of the bankruptcy court was made in the settlement of a "controversy" between the trustee and an adversary who claimed a lien upon and right of possession of specific chattels, it is urged that the claimant's pleading should be construed as a presentation of a claim of a general creditor for allowance, accompanied by a statement of grounds why he should be given priority in the ultimate distribution of assets over other general creditors. Counsel insist that this construction of the pleading is permissible because it contains a statement of the amount of rent due from the bankrupt and asks that the trustee be ordered to pay the amount thereof. But no adverse claimant could set up his right in and to certain specific chattels under his lien without disclosing the fact and amount of the debt secured by the lien. And the petition in this case, as in every such case, asks a mandate upon the trustee to pay money only in the event that the specific chattels have been sold pending the determination of the adverse claimant's rights.

Inasmuch as the adverse claimant's petition and the trustee's answer formulated only an issue concerning the title and right of possession of certain chattels (or the proceeds of sale in lieu thereof), the fact that the referee gratuitously allowed the amount of rent and costs as a general claim cannot convert the "controversy" into a "proceeding in bankruptcy." The only matter taken from the referee to the District Judge was the issue in the equitable controversy; and the correctness of the decree on that issue is not determinable by us under section 24b.

The petition to review and revise is therefore dismissed for lack of jurisdiction.

In re ORR et al.

AUSTRIAN v. CENTRAL TRUST CO. OF ILLINOIS.

(Circuit Court of Appeals, Seventh Circuit. August 12, 1914.)

No. 2086.

Petition to Review and Revise Order of the District Court of the United States for the Eastern Division of the Northern District of Illinois, in Bankruptcy.

In the matter of bankruptcy proceedings of Bertha S. Orr and Hannah Store, doing business as the Lake Shore Catering Company. Mamie R. Austrian filed an adverse claim to certain chattels in the possession of the Central Trust Company of Illinois as the bankrupts' trustee, and, such claim being denied, filed a petition to review and revise. Dismissed.

Carl Meyer, of Chicago, Ill., for petitioner.

Fred D. Silber and Clarence J. Silber, both of Chicago, Ill., for respondent.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

BAKER, Circuit Judge. This petition to review and revise presents a situation in all material respects exactly the same as that considered in the Case of the Breyer Printing Co. (No. 2084) 216 Fed. 878, herewith decided. For the reasons therein set forth, we are constrained to hold that the matter before the District Court in bankruptcy was a "controversy arising in the course of bankruptcy proceedings," and not a "proceeding in bankruptcy."

The petition to review and revise is therefore dismissed for lack of jurisdiction.

UNITED STATES v. BOARD OF COM'RS OF OSAGE COUNTY,
OKL., et al.

BOARD OF COM'RS OF OSAGE COUNTY, OKL., et al. v. UNITED
STATES.

(Circuit Court of Appeals, Eighth Circuit. August 20, 1914.)

Nos. 4073, 4074.

TAXATION (§ 181*)—LANDS OF OSAGE INDIAN ALLOTTEES—HOMESTEAD AND SURPLUS LANDS.

Act June 28, 1906, c. 3572, § 2, par. 4, 34 Stat. 541, provides that homestead lands of Osage Indian allottees "shall be inalienable and nontaxable until otherwise provided by act of Congress," and that their surplus lands "shall be inalienable for 25 years except as hereinafter provided." Paragraph 7 authorizes the Secretary of the Interior in his discretion to issue a certificate of competency to any adult member of the tribe authorizing him to sell and convey any of his lands "except his homestead, which shall remain inalienable and nontaxable for a period of 25 years or during the life of the homestead allottee." It further provides that on the issuance of such certificate the surplus lands of the allottee "shall become subject to taxation," but that in cases where no such certificate is issued they "shall be nontaxable for the period of three years from the approval of this act," except in case of the death of the allottee. *Held*, that as to homesteads the restrictions against taxation were coextensive with those against alienation, and that in any case such lands were not taxable for 25 years, or until after the death of the allottee in case he had received a certificate of competency; that the surplus lands remained nontaxable for a period of three years, unless a certificate of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

competency was issued to the allottee or in case of his death, in either of which cases they became taxable at once.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 45; Dec. Dig. § 181.*]

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Suit in equity by the United States against the Board of County Commissioners of Osage County, Okl., and others. From the decree, both parties appeal. Affirmed.

See, also, 193 Fed. 485.

Preston A. Shinn and Isaac D. Taylor, both of Pawhuska, Okl. (Charles J. Kappler, of Washington, D. C., on the brief), for the United States.

Charles M. Cope, Co. Atty., of Pawhuska, Okl., and Charles L. Moore, Asst. Atty. Gen., of Oklahoma (Charles West, Atty. Gen., of Oklahoma, on the brief), for Board of Com'rs of Osage County, Okl., and others.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. The government brought this suit to restrain the collection of taxes levied upon allotments of Osage Indians. Two classes of allotments are involved, homesteads and surplus lands. Each of these is subdivided in the bill, but in the disposition which we make of the case those differences become unimportant. The trial court held the homesteads to be nontaxable, and issued the injunction prayed, and canceled the levy as a cloud upon the title. It held surplus lands to be taxable, and denied any relief as to them. Defendants appealed from the first part of the decree, and the government from the last part.

The Osage allotments were made under the act of June 28, 1906, 34 Stat. at Large, 539. Each Indian is given three tracts of 160 acres each. Subdivision 4 of section 2 of the act then proceeds as follows:

"Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and the same shall be inalienable and nontaxable until otherwise provided by act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus lands, and shall be inalienable for twenty-five years, except as hereinafter provided."

The seventh subdivision of the same section empowers the Secretary of the Interior, upon petition of any adult member of the tribe, to issue to such member a certificate of competency—

"authorizing him to sell and convey any of the lands deeded him by reason of this act, except his homestead, which shall remain inalienable and nontaxable for a period of twenty-five years, or during the life of the homestead allottee; provided, that upon the issuance of such certificates of competency, the lands of such member, (except his or her homestead), shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control and dispose of his or her lands, the same as any

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexe.

citizen of the United States; provided, that the surplus lands shall be nontaxable for the period of three years from the approval of this act, except where certificates of competency are issued, or in case of the death of the allottee, unless otherwise provided by Congress."

We had the foregoing provisions of section 2 before us in the case of *Aaron v. United States*, 204 Fed. 943, 123 C. C. A. 265. We there held that the homesteads of Osage Indians, to whom certificates of competency had not been issued, were inalienable "until otherwise provided by act of Congress," and that the homesteads of such Indians holding certificates of competency were inalienable "for a period of twenty-five years, or during the life of the homestead allottee." We also held that this restriction was not personal to the allottee, but ran with the land. All that is said in that opinion as to the restriction against alienation applies equally to the restriction against taxation. The statute makes no distinction between the two classes of restrictions, and none can properly be made by the court. The decision of the trial court, therefore, as to homesteads, was clearly right.

Except as to Indians holding certificates of competency, as provided in subdivision 7, the last sentence of subdivision 4 makes all surplus lands allotted to Osage Indians "inalienable for twenty-five years." Because of this restriction the government urges that we should, by implication, hold the lands to be nontaxable pursuant to the doctrines declared in *United States v. Rickert*, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532. But we cannot be governed by implications against the express language of the statute. The act shows plainly that Congress had in mind the distinction between nontaxability and nonalienability. It expressly provided that the homesteads should be inalienable and nontaxable, but as to surplus lands it is provided, in the next sentence, that they shall be "inalienable" only. The same distinction is made in subdivision 7. Not only did Congress have this distinction clearly in mind, but in the second proviso of paragraph 7 it enacted that the surplus lands shall be nontaxable *for the period of three years from the approval of this act*. The irresistible import of this language is that after the expiration of the three-year period surplus lands should be taxable; also that they would have been taxable during the three-year period had it not been for the proviso. Exceptions from a power establish the power as well as define its limits. *Gibbons v. Ogden*, 9 Wheat. 1, 190, 6 L. Ed. 23.

This clear import of the language of the statute is reinforced by its history. As originally introduced in the House, subdivision 4 provided that surplus lands should be "nontaxable and inalienable for twenty-five years." In the Senate numerous amendments to the statute were proposed. The Secretary of the Interior addressed a letter to C. F. Larrabee, the acting Commissioner of Indian Affairs, requesting his views upon these amendments. One of the amendments proposed to strike out the words "nontaxable and" in the last clause of subdivision 4, relating to the surplus lands. Speaking of this amendment as one which would make the "surplus lands subject to taxation," Mr. Larrabee said: "This office sees no special objection to this provision." There was also an amendment which, in the judgment of

the commissioner, would have made homesteads taxable. Speaking of both of these subjects he proceeds in his letter as follows:

"The office strongly opposes the first proposed amendment providing for the collection of taxes on the homesteads. This is in direct conflict with the provision in lines 8 and 9 on page 6, which declares that the homestead shall be inalienable and nontaxable, until otherwise provided by act of Congress. Certainly the homesteads of the Indians should be free from taxation as long as they are held in trust for the benefit of the allottees. Such has been the invariable policy of the government from the time the Indian allotments were made, and it is thought that an exception should not be made in the case of the Osages. But I see no special objection to the alternative amendment which provides merely for the payment of taxes on the surplus lands. It is believed that the Osage Indians should be required to pay taxes on their surplus lands, the same as citizens of Oklahoma Territory. There occurs to me no valid reason why the Indians should not be required to bear their share of the burden of the state and county maintenance through taxation on their surplus lands."

This letter was submitted to the Senate by the Committee on Indian Affairs in support of its proposed amendment striking out the words "nontaxable and." The amendment was agreed to, and was afterwards concurred in by the House. This seems to leave no doubt of the intent of Congress to make surplus lands taxable.

We are unable to find in the records of Congress the origin of the second proviso of the seventh subdivision, which reads as follows:

"Provided that the surplus lands shall be nontaxable for the period of three years from the approval of this act, except where certificates of competency are issued or in case of the death of the allottee."

Its purpose, however, seems to us reasonably plain. Congress first intended to suspend the taxability of surplus lands for the period of three years. From this exemption it excepted the surplus lands of Indians who died during the three-year period, or who should receive certificates of competency during that time.

We agree with the views expressed by the trial court that oil, gas, coal, and other minerals contained in allotments to Osage Indians, do not pass by the allotment or become subject to taxation. They are expressly reserved to the tribe. This restriction is imposed by the nation. No act or omission of the Indians or of state authorities can impair it. *Bowling v. United States*, 233 U. S. 528, 34 Sup. Ct. 659, 58 L. Ed. 1080.

The decree of the trial court is affirmed.

In re GOLDSTEIN et al.

BENJAMIN et al. v. CENTRAL TRUST CO.

(Circuit Court of Appeals, Seventh Circuit. August 12, 1914.)

No. 2016.

1. BANKRUPTCY (§ 439*)—ADMINISTRATION OF ESTATES—SUMMARY ORDERS—REVIEW.

Jurisdiction to review a summary order in bankruptcy proceedings is by original petition under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 439.*]

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. BANKRUPTCY (§ 209*)—ADMINISTRATION—OBTAINING ASSETS—ADVERSE TITLE—POSSESSION AS AGENT OR BAILEE—SUMMARY PROCEEDINGS.

Where there is a claim of adverse title to property of bankrupts, based on a transfer antedating bankruptcy, a plenary suit must be brought by the trustee, in which the adverse claim may be tried and adjudicated; but where the property is in the physical possession of a third person, or of an agent of the bankrupts, or of an officer of a bankrupt corporation, who refuses to deliver the property to the bankrupts' trustee, he may recover it by means of a summary order in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 318; Dec. Dig. § 209.*]

3. BANKRUPTCY (§ 212*)—RECOVERY OF ASSETS—NONCOLORABLE CLAIM.

Where a bankrupt's trustee institutes summary proceedings to recover property in the hands of a third person, a noncolorable claim, requiring dismissal of the proceedings at the claimant's instance, substantially appears as soon as the claimant presents his verified answer, which is unmet by the trustee, or which, if met by a replication, is supported by sworn testimony of facts which, if true, would show title and possession antedating the petition in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 236; Dec. Dig. § 212.*]

Petition to Review and Revise Order of the District Court of the United States for the Eastern Division of the Northern District of Illinois, in bankruptcy.

In the matter of bankruptcy proceedings of Morris Goldstein and Benjamin Moseson. Petition to review a summary order directing Benjamin Bros. to pay the Central Trust Company, as the bankrupts' trustee, \$8,375 for goods alleged to have been fraudulently transferred by the bankrupts. Reversed, with directions.

This is an original petition to review and revise a summary order of the District Court directing Benjamin Bros. to pay to the trustee in bankruptcy the sum of \$8,375.

On December 30, 1912, an involuntary petition in bankruptcy was filed against Goldstein and Moseson. Adjudication was entered February 10, 1913. Later the Central Trust Company was elected trustee.

Prior to May 10, 1913, the judge of the District Court conducted an investigation to discover assets of the bankrupts. During this investigation Benjamin Bros. were brought into court and gave their testimony. At this time no issue of law or fact had been formed for the adjudication of any rights of Benjamin Bros.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On May 10, 1913, the trustee filed its petition, alleging that on December 24, 1912, six days before the involuntary petition in bankruptcy was filed, Goldstein and Moseson had transferred goods amounting to \$8,375 to Benjamin Bros.; that Benjamin Bros. caused Goldstein and Moseson to issue to them fictitious bills of sale, for which Goldstein and Moseson received no consideration; that Benjamin Bros. sold a large part of the property and commingled the remainder with their own, so that the trustee could not identify them. Wherefore the trustee prayed for an order on Benjamin Bros. to show cause why they should not pay \$8,375 to the trustee.

Benjamin Bros. filed their verified answers, objecting to the summary proceeding, denying that they had received any of the goods as agents or bailees of Goldstein and Moseson, and averring that prior to the institution of bankruptcy proceedings they had bought and paid for the goods, and had taken possession and were retaining possession of them and of the proceeds of sale as their own.

No replication was filed. A hearing was had by submitting to the court a transcript of the testimony given by witnesses at the court's investigation to discover assets. In their testimony Benjamin Bros. detailed on oath their purchase and taking possession of the goods on December 24, 1912.

E. N. Zoline, of Chicago, Ill., for petitioner.

Martin J. Isaacs, of Chicago, Ill., for respondent.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). [1] Jurisdiction to review a summary order in bankruptcy proceedings is by original petition under section 24b. *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; *In re Blum*, 202 Fed. 883, 121 C. C. A. 241; *Shea v. Lewis*, 206 Fed. 877, 124 C. C. A. 537; *In re Yorkville Coal Co.* (C. C. A.) 211 Fed. 619.

[2] "There are two classes of cases arising under the act of 1898 and controlled by different principles. The first class is where there is a claim of adverse title to property of the bankrupt, based upon a transfer antedating the bankruptcy. The other class is where there is no claim of adverse title based on any transfer prior to the bankruptcy, but where the property is in the physical possession of a third party, or of an agent of the bankrupt, or of an officer of a bankrupt corporation, who refuses to deliver it to the trustee in bankruptcy. In the former class of cases a plenary suit must be brought, either at law or in equity, by the trustee, in which the adverse claim of title can be tried and adjudicated. In the latter class it is not necessary to bring a plenary suit, but the bankruptcy court may act summarily and may make an order in a summary proceeding for the delivery of the property to the trustee, without the formality of a formal litigation." *Babbitt v. Dutcher*, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969.

As the claim of Benjamin Bros. was "based upon a transfer antedating the bankruptcy," it belonged to the class requiring a plenary suit, unless the claim was merely "colorable."

[3] The District Court may pursue the summary method to the point of ascertaining that the alleged adverse claim is substantial and not merely colorable. But substantiality appears as soon as the claimant, in response to the rule to show cause, presents his verified answer, which is unmet by the trustee, or which, if met by a replication, is

supported by sworn testimony of facts which, if true, would show title and possession antedating the petition in bankruptcy. A conclusion that the alleged adverse claim is a cover for the claimant's possession as agent or bailee of the bankrupt cannot be permitted to be reached by the District Court's rejection of the sworn answer and testimony, and thereupon finding that the alleged adverse claim is fraudulent. That end can only be attained if it is the just conclusion of a due trial of a plenary suit. Cases *supra*.

The order is reversed, with the direction to dismiss the summary proceeding.

In re GOLDSTEIN et al. PELLER v. CENTRAL TRUST CO.

MOSESON v. SAME.

(Circuit Court of Appeals, Seventh Circuit. August 12, 1914.)

Nos. 2018 and 2019.

BANKRUPTCY (§ 288*)—ASSETS—OWNERSHIP—TRANSFER—SUMMARY PROCEEDINGS.

Where, in a proceeding by a bankrupt's trustee to recover assets transferred by the bankrupts to the claimants, they appeared and objected to summary disposition of their rights, denied that they had obtained or held possession as the bankrupts' agent or bailee, and filed answers and gave testimony of facts which, if true, showed title and possession in themselves prior to the institution of bankruptcy proceedings, it was the duty of the court to dismiss the proceeding and remit the trustee to its remedy by plenary action.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

Petitions to Review and Revise Order of the District Court of the United States for the Eastern Division of the Northern District of Illinois, in Bankruptcy.

In the matter of bankruptcy proceedings of Morris Goldstein and Benjamin Moseson. Separate proceedings by the Central Trust Company against Sam Peller and against Ida Moseson to recover possession of assets alleged to be in the possession of the defendants. On petitions to review and revise orders overruling objections to the trial of the issue by summary proceedings in bankruptcy. Reversed.

B. M. Shaffner, of Chicago, Ill., for petitioner Peller.

Bernard J. Brown, of Chicago, Ill., for petitioner Moseson.

Martin J. Isaacs, of Chicago, Ill., for respondent.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

BAKER, Circuit Judge. Peller in one case and Ida Moseson in the other were in possession of property which they respectively had obtained from Goldstein and Moseson before the involuntary petition in bankruptcy was filed. Each objected to a summary disposition of his rights, denied that he obtained or held possession as agent or bailee of Goldstein and Moseson, and filed answers and gave testimony of facts which, if true, showed title and possession in himself prior to the institution of the bankruptcy proceeding.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

For the reasons given in cause No. 2016, 216 Fed. 887, 133 C. C. A. 91, herewith decided, the order in each of these cases is reversed, with the direction to dismiss the summary proceeding.

In re LUKEN.

McKEY v. STEGER.

(Circuit Court of Appeals, Seventh Circuit. August 12, 1914.)

No. 2062.

BANKRUPTCY (§ 288*)—LIENS—TRIAL—SUMMARY PROCEEDINGS.

Where a claimant's right to hold certain cloth seized under a distress warrant against a bankrupt prior to the institution of bankruptcy proceedings depended on the determination of the legal question whether the lien was indisputably obtained through legal proceedings within four months prior to the filing of the petition, as provided by Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3450), the claim of the validity of such lien on undisputed facts was not so void of color as to authorize the bankruptcy court to determine it by summary proceedings over claimant's protest.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

Petition to Review and Revise Order of the District Court of the United States for the Eastern Division of the Northern District of Illinois, in Bankruptcy; George A. Carpenter, Judge.

In the matter of bankruptcy proceedings of William M. Luken. Proceeding by Frank M. McKey, as the bankrupt's trustee, to recover 100 bolts of cloth seized by John V. Steger under a distress warrant prior to bankruptcy. Claimant objected to the maintenance of summary proceedings, which were thereupon dismissed, whereupon the trustee filed a petition to review and revise. Affirmed, and petition dismissed on its merits.

Harry L. Shaver, of Chicago, Ill., for petitioner.

Allen G. Mills, of Chicago, Ill., for respondent.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

BAKER, Circuit Judge. On July 24, 1913, an involuntary petition in bankruptcy was filed against Luken. Shortly afterwards he was adjudicated a bankrupt and McKey was elected trustee. About three weeks before the institution of the bankruptcy proceedings respondent Steger had caused a distress warrant to be served upon Luken, and had seized 100 bolts of cloth then belonging to Luken. The following October the trustee filed a petition in the bankruptcy court praying for a summary order upon Steger to turn over to the trustee the 100 bolts of cloth seized by Steger under the distress warrant. Steger entered his special appearance to contest the summary jurisdiction of the bankruptcy court, and alleged that prior to the institution of the bankruptcy proceedings he was in the actual possession of the 100 bolts of cloth and was asserting his right to retain possession by virtue of the distress warrant. On a hearing of the summary petition and the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plea to the jurisdiction, the referee found that Steger at and before the filing of the petition in bankruptcy was in possession of the property in question, claiming a lien thereon adversely to the bankrupt, and thereupon dismissed the petition for want of summary jurisdiction. This order of dismissal was confirmed by the bankruptcy court, and the correctness thereof is presented to us by this original petition to review and revise.

In the Case of Goldstein and Moseson, 216 Fed. 887, 133 C. C. A. 91, No. 2016, herewith decided, we held that a controversy between the trustee and a person who prior to the bankruptcy proceedings was in the actual possession of property under a claim of right should not be determined by the bankruptcy court under its summary jurisdiction against the protest of the adverse holder unless the adverse claim was without color. We found the adverse claim in that case to be substantial because in respect to the facts there was a conflict which, over the adverse claimant's protest against summary process, could only be settled properly in a plenary suit. In the present proceeding there is no conflict about the facts, and the trustee therefore contends that the bankruptcy court had summary jurisdiction to compel Steger to surrender possession by the summary process of a contempt order or other summary means. His argument is that, inasmuch as the distress warrant was served within four months prior to the filing of the petition in bankruptcy, it was therefore a lien through legal proceedings which was rendered null and void by section 67f of the Bankruptcy Act. In the case of a judgment or an attachment or other lien which was indisputably "obtained through legal proceedings" within four months prior to the filing of the petition in bankruptcy, the legal proceedings being taken against the defendant therein while the defendant was insolvent, we might have no difficulty, the facts being undisputed, in determining that the adverse holder's claim of legal right to retain possession was so clearly without substance, so void of color, as to bring him within the summary jurisdiction of the bankruptcy court. But it seems to us that a controversy may be as substantial in regard to the legal rights of a party on undisputed facts as is a controversy wherein the only conflict is on the facts. Our observation and experience is that there are fully as many controversies in plenary suits over the question of legal rights on undisputed facts as there are controversies respecting the facts. Among the bankruptcy cases we have found no precedents wherein this question has been considered; but in our opinion precedents in the Supreme Court concerning its own jurisdiction are so analogous that they are applicable. In determining whether a writ of error from the highest court in a state is entertainable, the Supreme Court considers whether the asserted legal right is substantial or merely colorable. If, on the undisputed facts, the asserted legal right is only a bare assertion, if it has no basis whatever in reason to sustain it, or if it is an assertion in the face of a clear and thoroughly settled line of adjudications in that court, the jurisdiction is denied and the writ is dismissed. *New Orleans Water Works v. Louisiana*, 185 U. S. 336, 22 Sup. Ct. 691, 46 L. Ed. 936; *Equitable Assurance Society v. Brown*, 187 U. S. 308, 314, 23 Sup. Ct. 123, 47

L. Ed. 190; *Deming v. Carlisle Packing Co.*, 226 U. S. 102, 33 Sup. Ct. 80, 57 L. Ed. 140; *Consolidated Turnpike Co. v. Norfolk & Ocean View Railway Co.*, 228 U. S. 596, 600, 33 Sup. Ct. 605, 57 L. Ed. 982; *United States ex rel. Brown v. Lane*, 232 U. S. 598, 34 Sup. Ct. 449, 58 L. Ed. 748. On the other hand, the reports abound in cases where on undisputed facts there have been most substantial controversies respecting legal rights.

In the present case the distress warrant certainly was not a judgment or an attachment. If it comes at all within section 67f, it comes under the heading "Other Liens Obtained through Legal Proceedings." This is a very general expression, and its applicability to the distress warrant can only be determined by solving the problem whether the lien of a distraint in Illinois is obtained through legal proceedings. In support of his contention that the landlord's lien is obtained through legal proceedings, the trustee cites the Illinois statutes and numerous Illinois decisions, and relies particularly on *In re Joslyn*, 2 Biss. 235, Fed. Cas. No. 7,550, and *Morgan v. Campbell*, 22 Wall. 381, 22 L. Ed. 796, both cases under a previous bankruptcy law, while the respondent cites Illinois decisions and federal cases in various circuits, and relies particularly on *Henderson v. Mayer*, 225 U. S. 631, 32 Sup. Ct. 699, 56 L. Ed. 1233, under the present bankruptcy law as applied to provisions of the Georgia Code, which the respondent contends are much less favorable to the landlord's contention that his lien is one not obtained through legal proceedings than are the provisions of the Illinois statutes. We have looked into the question of the merits of respondent's lien to the extent of being satisfied that an answer could be given only after a most careful study and consideration of the numerous cases cited, and after a comparison of the Georgia provisions with those of Illinois in order to determine whether *Henderson v. Mayer* is of controlling effect upon respondent's asserted legal right. In short, we are quite satisfied that the controversy presented by the adverse claimant herein is a very substantial one.

The order of the District Court in dismissing the summary proceeding was correct, and this petition to review and revise that order is therefore dismissed on the merits.

CONLEY CAMERA CO. v. MULTISCOPE & FILM CO.†
(Circuit Court of Appeals, Eighth Circuit. July 27, 1914.)

No. 4172.

1. PLEADING (§ 367*)—INDEFINITENESS OF COMPLAINT—WAIVER OF OBJECTION.

Under Gen. St. Minn. 1913, § 7770, which provides that, "if the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may strike it out on motion or require it to be amended," objection to pleadings for such defects must be taken by motion, and cannot be raised for the first time in an appellate court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 64, 1173-1193; Dec. Dig. § 367.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied October 5, 1914.

2. CONTRACTS (§ 10*)—VALIDITY—MUTUALITY OF OBLIGATION.

A contract by which one party pays a valuable consideration to the other party, who agrees to sell to the first party all of a certain class of goods he may wish to buy, is not invalid, for want of mutuality, because the first party does not obligate himself to purchase.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21-40; Dec. Dig. § 10.*]

3. CONTRACTS (§ 10*)—VALIDITY—MUTUALITY OF OBLIGATION.

A contract by which the sole maker of a patented article agrees to supply such articles to a dealer having an established trade therein is not invalid, for want of mutuality, because the dealer does not expressly obligate himself to buy from the other party.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21-40; Dec. Dig. § 10.*]

Mutuality in contracts, see notes to *American Cotton Oil Co. v. Kirk*, 15 C. C. A. 543; *Oakland Motor Co. v. Indiana Automobile Co.*, 121 C. C. A. 326.]

4. PATENTS (§ 216*)—CONTRACTS—VALIDITY—CERTAINTY—TIME OF PERFORMANCE.

A contract by the owner of a patent, who is the sole manufacturer of the patented article, to supply the same to a dealer as required, is not invalid because no length of time is specified, but will be construed as intended to remain in force during the life of the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 329; Dec. Dig. § 216.*]

5. SALES (§ 416*)—ACTION FOR BREACH OF CONTRACT—EVIDENCE.

In an action for breach of a contract by defendant to supply plaintiff with such quantities of a certain style of patented camera as plaintiff might order, evidence that the cameras designated were imperfect, and not usable or salable without improvement, was not matter of defense, but was immaterial.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1171, 1172; Dec. Dig. § 416.*]

In Error to the District Court of the United States for the District of Minnesota; Charles A. Willard, Judge.

Action at law by the Multiscope & Film Company against the Conley Camera Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Charles Lederer, of Chicago, Ill. (Sidney Adler, of Chicago, Ill., and Tawney, Smith & Tawney, of Winona, Minn., on the brief), for plaintiff in error.

Edward Lees, of Winona, Minn. (M. B. Webber, of Winona, Minn., and Simmons & Walker, of Racine, Wis., on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and TRIEBER and REED, District Judges.

TRIEBER, District Judge. The plaintiff sought to recover damages for the breach of two contracts, one executed on November 20, 1907, and the other on December 2, 1908; but as the court below held that there could be no recovery on the first contract, and the cause was tried solely for the alleged breach of the second contract, the first need not be considered.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The complaint alleges the execution of a contract, which is as follows:

"This agreement witnesseth, that the Multiscope & Film Company, a corporation of Wisconsin, first party, has sold and assigned, and by these presents does grant, bargain, sell and assign, to Conley Camera Company, a corporation of Minnesota, second party, for and in consideration of the sum of five hundred dollars (\$500.00), and an order for not to exceed nine thousand dollars (\$9,000) worth of photographic wooden ware, which second party agrees to pay for within twenty days from date of invoice and acceptance, the receipt of which is hereby acknowledged, all those letters patent of the United States of America, title to which is now in said first party, granted for improvements in panoramic cameras to various parties, being identified as letters patent of the United States of America #567,559, #671,154, #773,348 and #778,394, and all other letters patent or right to letters patent issued or pending for improvements in panoramic cameras to or in which said first party may have any right, title or interest; also all those goods, merchandise, tools, chattels and dies described in a separate invoice of the same bearing even date herewith, hereto attached and marked 'Exhibit A.'

"In consideration of the sale of said goods, merchandise, tools, chattels and dies by first party to second party, second party agrees that it will continue to sell to first party cameras (manufactured) under said letters patent and known as the 'Al-Vista' panoramic film cameras, at the same prices which first party is now paying to second party for such cameras, subject to a pro rata advance in case of an advance in cost of materials or labor over present prices, irrespective of quantities.

"This agreement not to be construed as intending that second party shall sell only to first party, it being the intention that said second party may sell such cameras without restriction, except that it is hereby expressly agreed that, so long as first party shall continue to purchase such cameras from second party, neither first party nor second party shall give or allow in any way greater discounts from the list price of such cameras than the following:

"To the jobbing trade 40 per cent. and 25 per cent., equivalent to 55 per cent.

"To retail dealers 40 per cent.

"To consumer or user 20 per cent.

"Above discounts shall not bind party of the first part on sale of such cameras known as 5-F style which it now has on hand.

"List prices of various styles of said cameras shall from time to time be established by party of second part, not to exceed once each year, by mutual consent. It is further agreed that this agreement as to discount shall not apply to cameras sold to Sears, Roebuck & Co., and that there shall be no restriction as to the prices at which said cameras may be sold to Sears, Roebuck & Co.

"It is further understood and agreed that in case first party shall at any time give or allow, directly or indirectly, to any purchaser from it of cameras sold to it by second party, and discounts, rebates, premiums, bonus or deductions in price which in the aggregate shall reduce the price to such purchaser to a less amount than the amount above agreed upon, or in case first party shall sell its business or shall cease doing business at any time, or in case the holders of a majority of the shares of stock of first party shall sell or dispose of a majority of said stock, then this agreement as to the sale of cameras by second party to first party shall cease and determine.

"Further agreed and understood that this contract is not assignable on party of the first part, but that it shall bind the successor and assigns of the party of the second part.

"Dated this 2d day of December, 1908.

"Multiscope & Film Co.

"By Leonard J. Smith, Pres.

"Conley Camera Company,

"By Kerry Conley."

It is further alleged that after the execution of the contract the plaintiff complied in all respects with the terms thereof, but that the

defendant furnished only a small portion of the cameras, and then refused to ship any more of the cameras, although frequently requested by the plaintiff to do so, and informed that the plaintiff required the cameras mentioned in order to supply its trade and fill orders from its customers; that the plaintiff had a regular and established business in the said "Al-Vista" panoramic cameras, which, by reason of the refusal of the defendant to fill its orders, was destroyed. There are also allegations in the complaint as to the breach of the first contract, which, for the reasons above stated, it is unnecessary to set out herein.

The answer of the defendant admits the execution of the contract and sets up as a defense that the "Al-Vista" cameras made under the patents of the plaintiff were imperfect and incomplete, and could not be successfully operated, used, or sold. It also denies that the plaintiff has performed its part of the contract, and also contains a general denial.

There was a trial and a verdict in favor of the plaintiff for the damages sustained, but the damages were confined by the court to the profits the plaintiff would have made on the orders it actually received for these cameras, but which it could not fill owing to defendant's refusal to furnish them.

[1] Before the cause was to be tried the defendant moved for a judgment on the pleadings, which was overruled after the plaintiff had amended its complaint. In our opinion, the complaint, as amended, is sufficient, although, had the defendant, at the proper time, made a motion to have it made more specific, the court would no doubt have granted it. Section 7770, Gen. St. Minn. 1913, provides that:

"If the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may strike it out on motion, or require it to be amended."

The defendant made no motion, before the trial, to require the complaint to be made more definite and certain, and it is too late to raise it in the appellate court. *Barker v. Foster*, 29 Minn. 166, 12 N. W. 460; *Truesdell v. Hull*, 35 Minn. 468, 29 N. W. 72.

[2] It is also insisted that judgment should have been rendered in its favor on the pleadings, because the contract is void for want of mutuality, and that there is no definite time within which it is to be performed. It is true that an executory contract without any express consideration passing to the party who undertakes to sell certain property or perform certain services, when there is no corresponding obligation on the other party, will be void for want of mutuality. But this rule does not apply when there is a valuable consideration paid by the one party to the other party who obligates himself to do a certain thing. In *Joy v. St. Louis*, 138 U. S. 1, 50, 11 Sup. Ct. 243, 258 (34 L. Ed. 843), the court quotes the following excerpt from the opinion of Mr. Justice Brewer, then Circuit Judge, delivered in that case in the Circuit Court:

"As to the objection that there is no mutuality in the contract, and therefore it cannot be enforced, the Circuit Court says in its opinion: 'As to the objection on the ground of the want of mutuality in the contract, I think it of little force. The respondent has been paid for the privilege that is now claimed. The consideration, as I have heretofore shown, was ample; and,

when a party has received payment for a privilege, I do not think it can resist the enforcement of that privilege on the mere ground that it cannot compel the other party to continue in its enjoyment.' We concur in this view."

Option contracts, whereby a party obligates himself, for a valuable consideration, to convey certain property, are of everyday occurrence. In none of them is there any obligation on the part of the would-be purchaser to make the purchase, that being discretionary with the party to buy. But the obligor, having received a valuable consideration, cannot be heard to defeat the contract because the obligations are not mutual, as is the case where the sole consideration is a promise for a promise. *Pomeroy on Sp. Per.* § 169; *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501; *Watts v. Kellar*, 56 Fed. 1, 4, 5 C. C. A. 394, 397; *Marthinson v. King*, 150 Fed. 48, 51, 82 C. C. A. 360; *Hoogendorn v. Daniel*, 178 Fed. 765, 102 C. C. A. 213.

[3] In the instant case the plaintiff was necessarily compelled to buy all the "Al-Vista" cameras it needed to supply its customers from the defendant, as it alone, as the assignee and owner of all the patents under which they could be made, could manufacture them. Therefore, by necessary implication, the contract compelled the plaintiff to purchase from the defendant all these cameras which it required as long as the patents were alive. This is sufficient. *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.*, 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696; *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.*, 121 Fed. 298, 58 C. C. A. 220, 61 L. R. A. 402; *Sterling Coal Co. v. Silver Spring B. & D. Co.*, 162 Fed. 848, 89 C. C. A. 520; *Golden Cycle Min. Co. v. Rapson Coal Min. Co.*, 188 Fed. 179, 112 C. C. A. 95.

The fact that there is no limit to the time within which the contract is to cease does not vitiate it, in view of the facts here existing. In *Pierce v. Tennessee Coal & Iron R. R. Co.*, 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591, the railroad company had obligated itself, for a valuable consideration, to give the plaintiff employment at such work as he could do at a certain salary per month, without specifying the length of time the employment was to continue. It thereafter discharged him. It was claimed that the contract was for a hiring from month to month; otherwise, being for an indefinite time, it was void. But the court construed it as being a contract of employment as long as he was unable to do full work and therefore the company was liable for a breach thereof when it discharged the plaintiff while he was still unable to do full work. The Supreme Court of Alabama, in construing the same contract, held that:

"The contract is sufficiently definite as to time, and bound the defendant to its performance so long as the plaintiff should be disabled by reason of the injuries he received, which, under the averment that he was permanently disabled, will be for life."

In that opinion the Supreme Court of the United States concurred. 173 U. S. 10, 19 Sup. Ct. 335, 43 L. Ed. 591. To the same effect is *Smith v. Duluth, etc., Ry. Co.*, 60 Minn. 330, 62 N. W. 392.

[4] In the case at bar, the cameras being made under patents of the United States, the plaintiff after having assigned these patents, and sold all the dies and tools necessary to make them, could not manufacture them itself, nor could it secure them from any other

person during the life of the patents. It is therefore a reasonable construction of the contract, in view of the rule laid down in the *Pierce Case*, that it was limited to the life of the patents, for thereafter others could manufacture them, and plaintiff obtain cameras from them.

In *McKell v. Chesapeake & O. R. R. Co.*, 175 Fed. 321, 330, 99 C. C. A. 109, 118 (20 Ann. Cas. 1097), the court held that such a contract was valid, saying:

"A more conclusive answer is that it should have been considered by the parties when they made their agreement whether it would impose too great a hardship upon them."

[5] It is also claimed that the plaintiff was estopped, but there is no such plea in the answer. Nor was there any proof to establish an estoppel. The allegation that the "Al-Vista" camera was imperfect can hardly be considered as a plea of estoppel. But, assuming that the defendant had amended its answer by pleading an estoppel, the court did not err in excluding evidence offered by the defendant that the "Al-Vista" camera was imperfect. For the reasons stated by the learned trial judge in excluding the evidence, this claim is untenable. He said:

"There is an allegation that the cameras were imperfect, inferior, and incomplete, and could not be successfully operated, used, or sold, and that, in order for defendant to manufacture and successfully dispose of said cameras to the trade, it became necessary for the defendant to make many changes and improvements in the construction of said cameras. That might have been necessary in order to sell to the trade other than the plaintiff; but, so far as the plaintiff was concerned, it was bound to take the cameras as they were made at first."

If the cameras purchased by the plaintiff were imperfect, the loss would fall upon it, and not on the defendant.

It is next claimed that the court erred in admitting the evidence offered by the plaintiff as to the measure of damages. The contention is that it was unsatisfactory, and that the books of the plaintiff ought to have been introduced, to show the exact cost of handling them for the trade. If the plaintiff's testimony as to the expenses of sale was unsatisfactory, the defendant had an opportunity to introduce evidence to rebut it. Nor was it necessary for the plaintiff to testify from his books as to the measure of damages. It appears from the record that the books of the plaintiff were in court at the trial, or, if not there, they could have been procured by a subpoena duces tecum, and defendant could have had them introduced, or, on cross-examination of plaintiff's witnesses on that point, have had them refer to the books. The testimony of plaintiff as to the damages was limited by the trial court to the profits on orders for the "Al-Vista" cameras which it had actually received before the institution of this action, but could not fill owing to defendant's refusal to furnish them, as it had agreed to do by its contract of December 2, 1908, less the expense connected with the sales. The defendant was permitted to show on cross-examination that there were overhead expenses, which had not been included by plaintiff's witnesses in estimating the expense of sale, and what these expenses were. It was also permitted, on cross-examination of plain-

tiff's witnesses, to show what cameras were returned by customers as defective, and therefore no profit made on them. These facts were evidently considered by the jury in assessing the damages, as their verdict is for several hundred dollars less than the amount claimed by plaintiff's witnesses on their direct examination. The damages originally claimed by plaintiff were for \$18,500; the damages claimed, after the court had limited them to the net profits on the cameras, for which the plaintiff had received orders from its customers, but could not fill owing to defendant's breach of the contract, as shown by the direct testimony of its witnesses, exceeded \$1,500. But no doubt, after considering the overhead expenses and the conflicting evidence on that point, the jury assessed the damages at \$1,287.50. Upon a motion for a new trial, the trial court approved that finding.

The record fails to show any error prejudicial to the defendant, and the judgment is therefore affirmed.

SPIRELLA CO. v. NUBONE CORSET CO. et al.

(Circuit Court of Appeals, Third Circuit. August 27, 1914.)

No. 1827.

1. PATENTS (§ 328*)—VALIDITY—CORSET STAYS.

The Beeman patent, No. 1,002,488, for a method of making garment stays, *held* void for lack of patentable novelty in view of the disclosures of the prior art.

2. PATENTS (§ 16*)—INVENTION—CARRYING FORWARD OLD IDEA.

The mere carrying forward of an old idea and doing what had been done before in substantially the same way, but with possibly better results, is a change not involving invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 14, 15; Dec. Dig. § 16.*]

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by the Spirella Company against the NuBone Corset Company, a New Jersey corporation, the NuBone Corset Company, a Pennsylvania corporation, George H. Barlow, and Joseph J. Desmond. Decree for defendants, and complainant appeals. Affirmed.

Frederick W. Winter, of Pittsburgh, Pa., and Charles Neave, of New York City, for appellant.

J. C. Sturgeon, of Erie, Pa., and Joseph C. Fraley, of Philadelphia, Pa., for appellees.

Before BUFFINGTON and McPHERSON, Circuit Judges, and WITMER, District Judge.

WITMER, District Judge. This bill in equity charges the defendants with infringement of letters patent No. 1,002,488, granted September 5, 1911, on application filed November 30, 1908, to complainant, as assignee of Marcus M. Beeman, for improvement in method of making garment stays. The usual defenses, denial of infringement, averments of prior use of the alleged invention, and invalidity of the letters patent, have been interposed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The parties herein are rival manufacturers of corset stays and corsets, and have before been in this court in a suit wherein these same complainants contended that the corset stay made by defendants in accordance with letters patent No. 868,763, granted to John R. Dean, October 22, 1907, for a corset stay made on the John R. Dean Stay Making Machine, patented December 6, 1910, to No. 977,515 on his application filed January 16, 1908, infringed letters patent No. 507,-875, granted to Marcus M. Beeman, October 31, 1893, for dress stay, and letters patent No. 645,444 granted to John P. F. White and Samuel S. Rider, March 13, 1900, for a corset stay stiffener, both of which patents were then owned by the complainant. A decision was therein rendered ordering a decree to be entered against the complainant dismissing the bill. 183 Fed. 984.

The alleged infringement of the present suit consists in the making on the Dean machine the Dean corset stay. It will be noted that the Dean machine patent antedates the application of the patent in suit, but it is said that stays were not commercially made on it until some time thereafter, and that the same was also anticipated by the Beeman improvement method. Be this as it may, in view of the conclusion reached it will not be necessary to discuss this aspect of the case.

[1] The patent in suit is for a method of making wire garment stays, the essential features of which consist in imparting to the wire, during the manufacture of the stay, a twist or torsional strain in order to increase the resistance of the stay against flatwise bending stresses in one direction as compared with the other, and also to increase the resiliency of the stay and its ability to resist a permanent set under bending stresses, as a result of which a stay of given strength can be formed of lighter wire than similar stays before manufactured.

The first claim of the patent only is here involved. This specifies the method in connection with a particular form of wire stay, to wit, one in which the wire is bent at intervals in opposite directions to form curved edge-forming loops or eyes and transverse connecting portions.

Claim 1 refers to the method as:

"The method of forming garment stays consisting in bending wire at intervals and alternately in opposite directions to form curved edge-forming loops or eyes and transverse connecting portions, and while so bending the edge-forming loops or eyes imparting a twist to the wire and thereby placing the same under initial torsional strain."

It will be noted that the form of stay to which the claim relates is one having a zigzag formation of the wire, as distinguished from one having a spiral formation or in which the curve runs continuously in the same direction. It is said that, if in this zigzag form of wire stay the wire is given a twist in the transverse portions or crossings of the stay, this will impart rigidity and resiliency to the stay as a whole when bent in one direction, and the patent in suit is for a method for producing this form of stay with a twist placing the wire under initial torsional strain. The patentee says that the bending may be performed in any suitable way and shows how it may be carried out by mechanical means, as follows:

FIG. 1.

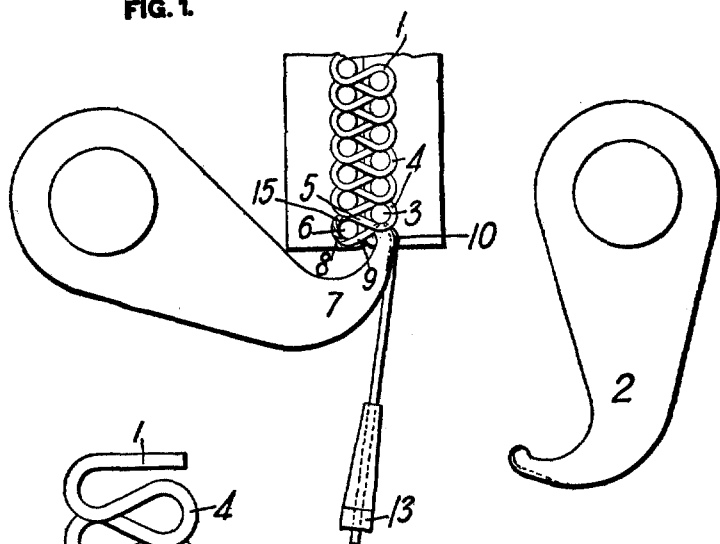


FIG. 4.

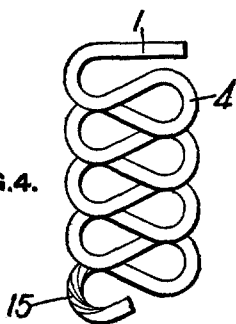


FIG. 5.



FIG. 3.

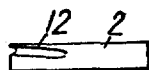
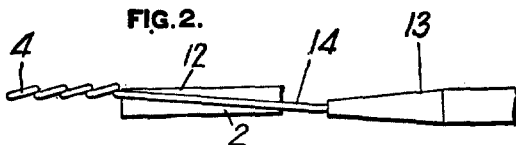


FIG. 2.

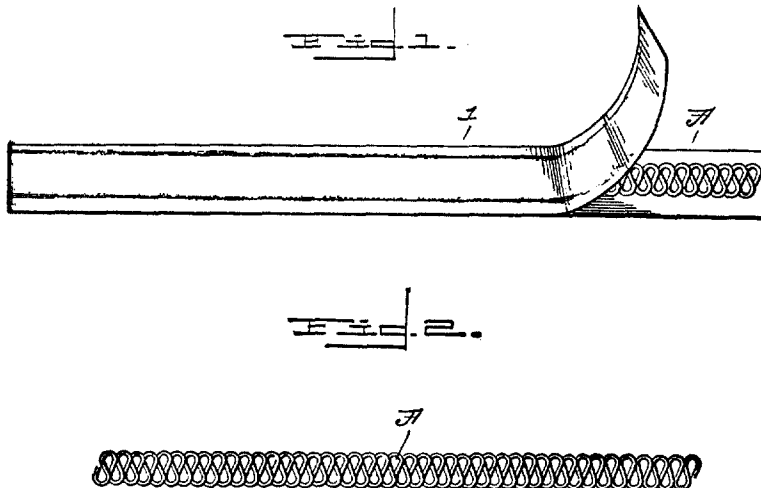


"As shown, the wire is taken by a finger 2 and bent around a pin 3 to form a loop or eye 4, and is carried by said finger across the stay, as at 5, and carried over another pin 6 which then rises, and the wire is caught by the opposite finger 7 and bent around said pin 6 to form a loop or eye 8 on the opposite side of the stay, and is then again carried across the stay, as at 9, and depressed and carried underneath the previously formed loop 4, as at 10. The bending as shown is performed by the bending fingers 2 and 7 having on their ends sloping or inclined lips 12 which serve to press the wire downwardly while bending the same around one of the pins and carrying the same across the stay. The unformed portion of the wire is held by the guide 13 inclined downwardly from the plane of the formed portion of the stay, as shown at 14, Fig. 2, and consequently the portion of the stay forming the loops or eyes is formed on a spiral running upwardly, relatively speaking, while the transverse connecting portions are on a spiral running downwardly, due to the action of the inclined lips 12 of the bending fingers which force the wire underneath a previously formed loop or eye. The consequence is that the wire is twisted at the loops, as indicated by the spiral shade lines 15, Figs 1 and 4, and is thereby put under an initial torsional strain. The loops of the fabricated portion of the wire are inclined or tilted from the plane of the stay, as shown in Fig. 2, while the unformed portion of the wire stands at the opposite angle or inclination from the plane of the stay. Consequently when the wire is carried across from side to side and

the eye is tilted to bring it to the inclined position, a certain amount of twist is necessarily given to the wire. This places the wire under an initial torsional strain. This manner of forming the stays, that is, by holding the unformed portion of the wire at an incline to the formed portion of the stay, and carrying the wire across the stay and simultaneously bending it down, results in depressing the edges of the loops or eyes below the normal plane of the stay, so that the finished stay is somewhat concave on its lower side, as shown at 16, Fig. 5."

The bended loops in the inclined position relative to the plane of the stay, so that each loop may slightly overlap the next one and the series of loops along either edge will have the shingled arrangement, in ribbon form somewhat concave on its lower side, it will be observed, is the characteristic feature of the stay described. It is obvious that whenever wire is bent to this form the same result will follow, to wit, a twisted condition of the wire. Now, therefore, if instrumentalities of the character shown in the Beeman method patent were formerly used, as contended by the defendants, for the manufacture of garment stays, the method covered in the patent was necessarily practiced. It appears that dress stays made from wire bent substantially to the form shown in the patent under consideration with alternating reversely bent loops along edge connected by cross-portsions, with the loops inclined to the plane of the stay and overlapped and shingled, were known long prior to this patent. It is useless to note any others since Beeman's own patent of stay, heretofore noted, is the best embodiment of the features involved. The wire is bent to the same form as that shown in his method patent, and, while an edge view is not shown in the earlier patent corresponding to Fig. 4 of the patent in suit, it is obvious from the plain view, as well as from the description of the construction, that the loops overlapped one another at each edge of the strip, necessarily inclining them to the general plane of the strip, bringing them into the shingled relation to one another as represented.

M. M. Beeman Dress Stay.



"The machine being then set in motion causes the finger *d* to swing in across the end of the bar *a* and push the wire inward over the front pin *b* of the depressed bar *ax*, where it leaves the wire in the shape of a partly formed loop, while the finger *d* swings back out of the way of the bar *ax*, which then rises and causes its front pin to enter into the said partly formed loop. Then the bar *a* descends and releases the wire from the front pin of said bar. Then the finger *dx* swings in and pushes the wire over the front pin of the depressed bar *a*, which then rises and causes its front pin to catch in the partly formed loop of the wire over said bar. This completes the first loop on the bar *a*. The second loop is formed by the action of the finger *d*. In the release of the loop from the front pin *b* the wire is allowed to slip longitudinally and causes the released loop to be caught on the rear pin *bx*, and thus form the loops contiguously side by side and slightly overlapping. The continuation of the alternate action of the bars and fingers forms a metallic band composed of correspondingly shaped loops disposed alternately in reversed positions. The notches *d'* of the fingers *d dx* receiving the wire through them and being slightly below the top of the raised bar causes the fingers to bend the wire down across the inner edges of the bars, and thus produce a transverse convexity on the underside of the metallic band formed from the wire. This convexity partly stiffens the said band on one of its sides and increases the flexibility on the opposite side. This feature is especially desirable when the described metallic band is to be used for stays."

Complainants admit the use of Mallett's machine as an instrument in carrying out their process in the manufacture of stays, but they argue that they have only been able to impart the twist of the wire resulting in "initial torsional strain and set" by readjustment of the machine, and they point to the curling up of the ribbon-like stay after passing through the bending process as an evidence of the torsional strain imposed. It will, however, be noted that the Mallett patent also speaks of this curling of the wire, and indeed the machine is provided with means to flatten or straighten out the fabric after it is bent into form. While the adjustment of the machine may add some additional twist to the wire in course of manufacture, it is of such little consequence that it would not of itself have been sufficient to suggest the happy thought of the initial torsional twist and set, which has been made the subject of this patent. It is beyond doubt that in the prior use of the Mallett machine, in fabricating the stay some twist was imparted to the wire, since it is not possible to weave wire into the form of a helix without imparting some twist to it. All that can, under the most favorable view of the case, be conceded to the complainant, is that by adjustment of the machine operating as before they may have improved to some degree the stay manufactured by placing the wire under an indefinite degree of additional torsional twist.

[2] However, the simple carrying forward of the old idea, and doing what had been done before, in substantially the same way, but with possible better results, is a change not involving invention. *Guidet v. Brooklyn*, 105 U. S. 550, 26 L. Ed. 1106. That the slight additional twist imparted by the further adjustment of the machine, and it will be noted that the machine was adjustably provided, does not rise to the dignity of invention is recognized in *Torrey v. Hancock*, 184 Fed. 61, 107 C. C. A. 79. There it is said that:

"Any changes made were in degree, proportion, or symmetry. The plow of his patent did the same thing in the same way, and by substantially the same means as before, and, although it produced better results, it did not

rise to the dignity of invention." *Smith v. Nichols*, 21 Wall. 112, 22 L. Ed. 566; *Belding Mfg. Co. v. Corn Planter Co.*, 152 U. S. 100, 14 Sup. Ct. 492, 38 L. Ed. 370.

Supporting their contention that such change or adjustment constituted invention, counsel cited the *Telephone Cases*, 126 U. S. 1, 8 Sup. Ct. 778, 31 L. Ed. 863. But it will be noted that the subject there discussed differs from all of the essential features of the case in hand. The adjusting of the Mallett machine was used and practiced in its operation to produce the stay manufactured while the adjusting mechanism of the Reis telephone which might have been used to bring about certain new and useful results were not understood and could not be utilized by the inventor so as to transmit speech; hence discovery of their possibilities was held to be invention.

However, if the method of the patent had been to the aim at increasing the amount of twist by adjustment of the Mallett machine, it could likewise not be sustained for the reason that there is nothing in the drawings, specifications, or claim that imparts the necessary information to accomplish this result. Carefully considered, it is but a description of a well-known function, or result of the operation of an old stay making machine, and, without carrying the discussion any further, we think the court below was right in its conclusion that the method set forth in the patent is entirely devoid of novelty in view of the disclosure of the prior art, and the judgment will be affirmed.

AMERICAN CAR & FOUNDRY CO. v. MERCHANTS' DESPATCH
TRANSP. CO.

KEITHLEY v. AMERICAN CAR & FOUNDRY CO. et al.

(District Court, W. D. New York. June 22, 1914. On Rehearing, July 29, 1914.)

1. SALES (§ 43*)—SALE OF PERSONALTY—FRAUD—CONCEALMENT.

Fraud in the purchase of personal property must ordinarily rest upon mistake, misrepresentation, or upon acts tending to mislead another to his pecuniary loss. The mere forbearance to make disclosure to the vendor, who is ignorant of the value of his property, even though with intent to deceive him, does not furnish a basis for equitable relief by way of rescission.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 86-92, 97-100; Dec. Dig. § 43.*]

2. PATENTS (§ 200*)—SALE OF PATENTS—RESCISSION OF CONTRACT.

Evidence considered and *held* insufficient to entitle a patentee to a rescission of assignments of patents on the ground that they were obtained by fraud and deceit.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 200.*]

On Rehearing.

3. EQUITY (§ 195*)—PLEADING—CROSS-BILL.

A cross-bill cannot be made an original bill in the same cause, unless the subject-matter is germane to the original bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 446-449; Dec. Dig. § 195.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the American Car & Foundry Company against the Merchants' Despatch Transportation Company. On cross-bill by Herbert R. Keithley, intervener. Decree dismissing cross-bill.

Charles W. Pooley, of Buffalo, N. Y. (D. S. Wegg and Walter H. Chamberlin, both of Chicago, Ill., of counsel), for cross-complainant.

Parsons, Hall & Bodell, of Syracuse, N. Y. (Edward W. Hatch, Charles J. Hardy, Frederick P. Whitaker, and Frederick H. Gibbs, all of New York City, of counsel), for defendant and cross-defendant.

HAZEL, District Judge. This action in equity was brought by the American Car & Foundry Company against the Merchants' Despatch Transportation Company, for infringement of letters patent No. 707,-702, granted to Herbert R. Keithley August 26, 1902, for underframes for railway cars. On January 16, 1909, the said patent, and 20 other patents relating to railway cars granted to the petitioner at different dates, were assigned by him in writing to the complainant company. After the testimony in the original suit for infringement was fully taken, there was a continuance for argument and the submission of briefs, but in the meantime a petition was filed and served on the complainant company by the patentee, alleging in substance that he parted with title to the patent in suit, and the other patents mentioned, in pursuance of a gross fraud practiced upon him by the American Car & Foundry Company (hereinafter called the company), in obtaining from him said assignments and transfers for an inadequate consideration, in that at the time of the execution and delivery thereof the company concealed from him material facts which it was its duty to have disclosed, namely, that prior thereto it had actually manufactured and sold a large number of underframes for cars embodying the invention of the patent in suit, and praying for a cancellation of the assignments and reconveyance thereof to him, and for an accounting for damages. Afterwards affidavits in opposition to the petition having been submitted on behalf of the company and cross-defendant herein, and the interested parties having been heard, the petition to intervene was granted, and the petitioner, Herbert R. Keithley, made a party to this cause, later filing a cross-bill of complaint, to which answers were interposed. Proofs have since been taken thereon, and the paramount question now to be determined is whether the evidence equitably justifies setting aside the assignments of the patents on the ground that nothing was said by Wolff, the agent of the company, regarding the prior car construction for the Atchison, Topeka & Santa Fé Railway Company (hereinafter called the Santa Fé cars), which, according to the prima facie evidence in the original suit for infringement, drawn out on cross-examination of the expert witness Weisbrod, embodied the Keithley invention in suit. An answer to this question necessitates a brief recital of the material facts.

In 1904 the patentee, who was a prolific inventor in the art of steel car construction, went to the office of the company at St. Louis, intending to dispose of five car patents, including the underframe patent in suit, taking with him four blueprints of drawings of the patents. He met Ames, the assistant general manager of the company, and left with

him the blueprints, saying that he would like to have the company examine his car designs with a view to manufacturing them on a large basis or to controlling the patents. He was asked by Ames to return later. On a subsequent day he returned, and was shown into the office of the witness Wolff, then the chief mechanical engineer of the company, but nothing was said at this time germane to the subject now under discussion. On April 27th ensuing, he wrote to the company, from his residence in Chicago, that he would consider an offer for his car designs on a royalty basis with a cash payment, and Ames, on receipt of the letter, took the blueprints to McBride, the vice president of the company, calling his attention to the letter and the blueprints, which, as he testified, had in the interval remained folded on his desk. The company replied to the letter of the petitioner, stating that the car designs had been looked over carefully and with interest, but that the company did not care to negotiate for their control, and returned the blueprints to him. According to the petitioner, one of the blueprints included the design in controversy, but the company denies any knowledge thereof.

Nothing further to interest the company in the patents was done until 1908, when the patentee again went to the office of the company, intending to interest the witness Wolff (who he supposed at the time was an officer in a corporation engaged in constructing side frames for cars) in another patent for a side car frame which he wished to sell. He testifies that during his conversation with Wolff he was asked what he had done with his car patents, and was told that the company might make an offer for them if he would sell them cheaply enough. Wolff also stated that the company never expected to use them, and that, if they had had any use for them, they would have looked him up. Afterwards there were other conversations between them relative to the car side frame, but no particular reference was made to the car patents which the petitioner had offered to sell the company in 1904.

There is testimony to show that on a subsequent occasion, when the petitioner was at the office of the company, Wolff directed the patent attorney of the company to make a list of the Keithley patents from the Patent Office Gazette, and that later he handed to the petitioner copies of three patents, upon each of which was marked in lead pencil \$100, stating that he would give \$300 for the three; that the petitioner replied that he ought to have more money for them, whereupon Wolff offered \$450 for the 21 patents, which was accepted. The assignments were "some time later" (January 16, 1909) executed and delivered by Keithley after an examination had been made and the titles found to be clear. Wolff's version of what occurred at the time of the bargain is somewhat at variance with Keithley's, but not as to important particulars. He testifies that he offered Keithley \$300 for all his car patents, and that Keithley requested \$500, and that they finally agreed on \$450 for the lot.

The conversation leading up to the meeting of minds was most commonplace and devoid of discussion of the merits of the inventions. No reference was made to other car constructions or to the car frames manufactured by the company for the Santa Fé Railway Company, or to any extrinsic or intrinsic facts or circumstances which might bear upon

the value or practicability of the assigned patents. Efforts had previously been made by the petitioner to dispose of them to various other car manufacturers, but without success, and it is evident that, at the time of the assignment, he valued them at only a nominal figure. No misrepresentations as to their value or usefulness are claimed to have been made. Nothing was said by Wolff or any other representative of the company that may fairly be regarded as evasive or adroit either as to their value, their importance, or the use to which it was intended to put them, and the patentee made no inquiries in relation thereto. In my judgment it would not be proper from this interview to impute to Wolff a knowledge that the company had infringed the underframe patent in suit by the Santa Fé car construction, or to consider him as scheming and conniving to obtain control of it for a trifling sum. To persuade the court that an asset was acquired by fraud or deceit, there must be some overt act or some expression of a convincing nature indicative thereof.

[1] The general rule relating to the purchase of personal property is that no duty devolves upon one party to disclose to another any facts or information possessed by him regarding the value of any personal property he may wish to purchase, even though the vendor is ignorant of the true value and would not part with his property if he were fully apprised thereof. Fraud in the purchase of personal property must ordinarily rest upon mistake, misrepresentation, or upon acts tending to mislead another to his pecuniary loss. The mere forbearance to make disclosure to the vendor, who is ignorant of the value of his property, even though with intent to deceive him, does not furnish a basis for equitable relief by way of rescission. Cases abound in support of this principle, but their citation is unnecessary, in view of the contention that the general rule does not apply to the facts adduced at the trial.

[2] The petitioner's claim is that the relations between him and the company were of such a peculiar nature that there was a positive duty upon the latter, which it could not ignore, to disclose the fact of the building of the 2,500 Santa Fé cars, and that silence in relation thereto affords sufficient ground in equity for canceling the assignments, particularly the assignment which is the subject of this controversy. The general rule of disclosure in relation to material facts no doubt has exceptions, as, for instance, where there is a relationship of trust and confidence between the parties, making it obligatory upon one to impart full information to the other, and giving the other a right to expect full information. In such cases the intentional withholding of information may amount to fraud and be subject to reparation in equity. In *Doyle v. Union Pac. Ry. Co.*, 147 U. S. 413, 13 Sup. Ct. 333, 37 L. Ed. 223, Mr. Justice Shiras, speaking of exceptions to the general rule, substantially says that one party must make disclosure to the other only where there is a trust relationship, "such as where the contracting party is at a distance from the object of negotiation, when he necessarily relies on full disclosure," or "where, being present, the buyer put the seller on good faith by agreeing to deal

only on his representations." And then quoting Atkinson on Marketable Titles, 134:

"The vendor and vendee, in the absence of special circumstances, are to be considered as acting at arms length." "When the means of information as to the facts and circumstances affecting the value of the subject of sale are equally accessible to both parties, and neither of them does anything to impose upon the other, the disclosure of any superior knowledge which one party may have over the other is not requisite to the validity of the contract."

And it is urged that the asserted infringement was such an act as would manifestly be exclusively within the knowledge of the company, and that the concealment thereof falls within the exceptions to the general rule. But upon careful reading of the testimony I find nothing which makes this exception apposite to the present case.

It is shown that the order for the construction of the Santa Fé cars came from the National Dump Car Company in 1907, and that they were manufactured from sketches, drawings and specifications furnished by said company. The American Car & Foundry Company did not intentionally or consciously adapt to such cars the design of the Keithley patent. The underframe used therein was designed by one Posson, who filed an application for patent on March 9, 1907, which was granted June 10, 1913, and numbered 1,064,004. It would make an important difference, I think, if the design or drawings for the cars had been furnished by the company, for then the inference might fairly be drawn that it intentionally appropriated the design in suit, which had been submitted to it for purchase in the year 1904. The Posson photographs in evidence indicate the use of floor beams extending through side sills, as in the Keithley construction, but, as three years had elapsed since the company had had its attention directed to the latter, the presumption is not warranted that either McBride or Wolff, the representatives of the company, had it in mind at the time of building the Santa Fé cars or connected it with such building when buying the patents in suit. Indeed, the absence of wrongful intent is clearly indicated by the fact that, after the assignments were delivered, the company, in its efforts to obtain a standard type of underframe, experimented with a type designed by one of its engineers, and that only after the rejection of this design did it try out and adopt the Keithley type. Wolff's letter in evidence, written in 1910 to the general sales agent of the company, states that the Keithley design had not before been constructed, but that arrangements were under way to build a sample car underframe in conformity therewith. This would seem to be corroboratory of the assertion that the Santa Fé construction had no connection in his thoughts with the negotiation for the Keithley patents. It is true there was testimony to the effect that the Keithley underframe was a radical departure from prior constructions, which would tend to impress it upon the minds of the representatives of the company, and this fact might justify a suspicion of bad faith, but a mere suspicion has never arisen to the dignity of sustaining an accusation of fraud. As to the reason for buying the Keithley patents, it was explained that in the year 1908 the company,

in connection with its business, inaugurated a research department to keep files of patents relating to steel cars and underframes, and adopted a policy of purchasing such patents as it was thought might prove desirable.

Although it seems to have been taken for granted that the Keithley design was a distinct departure from the prior art, yet at the trial, to prove infringement by the Merchants' Despatch Transportation Company, novelty was strongly contested. The defendant's expert witnesses testified that structures, substantially like that under consideration, were not new to the art; that the use of longitudinal center sills and side sills in underframes was old; and that transoms connecting the center sills with the side sills were in their opinions disclosed in several prior patents. In view of such testimony, it is difficult to conceive of how the company is chargeable with knowledge of the asserted infringement. The proofs are wholly insufficient to warrant the finding of fraud or deceit, either actual or constructive, misleading the patentee to his disadvantage, and inducing him to make the assignments in question. In this connection, Jones on the Law of Evidence substantially says that, while it is true that fraud may be inferred from circumstantial evidence as well as from what the parties say and do, still the party alleging fraud or deceit must adduce stronger proof than would suffice to establish a mere debt or sale; and that where the facts arising out of a business transaction admit of two interpretations, one pointing to innocence and the other to dishonesty of intention, unless the evidence predominates in favor of the latter, the court will adopt the interpretation consistent with honest and fair dealing.

Importance is also attached to the case of *Files v. Rankin*, 153 Fed. 537, 82 C. C. A. 491, relating to fraudulent concealment by the purchaser, of the existence of certain collateral of which the receiver had no knowledge, which enhanced the value of the judgment sold, and because the latter lived at a distance, necessitating negotiating by correspondence, it was properly held that misrepresentations made by the purchaser in the correspondence amounted to fraud and deceit, entitling the seller to rescission of the sale, but neither the facts nor circumstances of this case are similar to those of the case at bar.

It is next contended that inadequacy of price, coupled with inequitable circumstances, is sufficient for canceling or annulling an assignment, but it is unnecessary to attempt an analysis of the adjudications cited in the petitioner's brief on this point, for I believe the law to be that it must be proven that an undue advantage was taken of the owner of the property to induce him to part with it at an unconscionably low figure. To justify a setting aside of the assignment, there should be cogent facts and circumstances amounting to fraud or deceit. The record in this case is devoid of any such disclosure of impropriety of conduct of that nature. It is true, as contended, that gross inadequacy alone, "such as would shock a correct mind," may sometimes convince a court of equity of the righteousness of annulling a transfer or bargain, but such a decree is usually based upon the character of the transaction and upon the fact that gross inequality

furnishes a "most vehement presumption of fraud." *Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. Ed. 839; *Dunn v. Chambers*, 4 Barb. (N. Y.) 376; *Story's Eq. Jur.* § 246. But any such rule cannot safely be applied to patent rights possessing doubtful value, for as said Judge Coxe in *E. Bement & Sons v. La Dow* (C. C.) 66 Fed. 185, in speaking of the uncertainty of the value of patents, there is "no property more speculative in character or held by a more precarious tenure." Therefore the English cases (*Fox v. Mackreth*, 2 Brown's Ch. 400; *Turner v. Harvey*, 1 Jacob's Rep. 169; and *Phillips v. Homfray*, L. R. 6 Ch. App. 770), cited by the petitioner, involving misrepresentations or suppression of facts regarding the value of real estate sold, have no decided application here.

It is true that Keithley sold his patents for a trifling sum, but he was a man of discernment and qualified to personally negotiate for the sale of his inventions, and the record shows that he did so negotiate, not only with the company, but with various other car manufacturing companies. The value of his underframe invention, because of the art to which it belonged, depended altogether upon his success in interesting a car manufacturer in its exploitation, and what has since been done to enhance its value is not an indication of its value at the time of the assignment. From his selling his patents at a nominal figure, the presumption obtains that he did not value them highly, in view of his previous unsuccessful efforts to dispose of them. Considering that the company expended large amounts of money and labor in the exploitation of the patent in controversy, and is conducting an infringement suit against the Merchants' Despatch Transportation Company for infringement thereof, it is obvious that it would be difficult to put the parties back in statu quo by a rescission of the assignments, while, on the other hand, to refuse rescission will not deprive the petitioner of protection, for, if the company did in fact infringe his patent before purchasing it, he has a full and complete remedy without recourse to the equitable relief sought herein.

The question of laches and good faith on the part of the petitioner was also extensively discussed at the hearing, but, in view of the foregoing, the question need not be passed upon or decided.

A decree may be entered in favor of the cross-defendants dismissing the cross-bill, with costs.

On Rehearing.

The effect of the opinion heretofore filed herein was to dismiss the cross-bill filed by Keithley; his allegation of infringement by the construction of the 2,500 Santa Fé cars being considered as merely incidental to the gravamen of the cross-bill, which was a request for the rescission of the assignment of his patents to the American Car & Foundry Company on the ground of fraud or deceit in their procurement. Whether such cars were actually infringements of the patent was not decided, and upon that question the car company has not had its day in court, although it was perhaps not seriously disputed that the said cars were of the same type of construction as Keithley's. Accordingly the issue which is now put forward would seem to be col-

lateral to the object of the cross-bill, to which a cross-answer was filed by the American Car & Foundry Company. Modifying the decision as requested would bring into the case new issues, which would entitle Keithley, if his allegations of infringement are proven, to a totally different relief from that demanded by the cross-bill. Reliance is placed upon rule 23 of the new equity rules (198 Fed. xxiv, 115 C. C. A. xxiv), which substantially provides that matters ordinarily determinable at law arising in equity suits shall be determined in the same suit according to the principle applicable without transferring the case to the law side of the court; but in this case the cross-complainant now desires the consideration of the court, not only on the question of infringement, but also on the question of an accounting for profits and damages which are peculiarly matters of equity jurisdiction.

[3] There is another point which, in my opinion, is inimical to cross-complainant's contention, and that is that the American Car & Foundry Company is entitled to the interposition of an original bill charging infringement by it, and under the authorities a cross-bill cannot be made an original bill in the same cause of action, unless the subject-matter is germane to the original bill, which is not here thought to be the case.

Petition for rehearing or modification of the decision is denied.

COLMAN et al. v. BOWEN.

(District Court, D. Massachusetts. November 13, 1912.)

No. 299 (C. C. 909).

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—KNOT-TYING IMPLEMENT.

The Colman patents, No. 672,636, for a knot-tying implement for use in the spooling process in textile manufactures, and consisting of a rotatable tying-bill, with means for securing it to the hand of the operator, and which, when actuated by a thumb lever, automatically ties the threads together and cuts the ends to a uniform length, and No. 755,110, for improvements thereon, both *held* not anticipated, valid, and infringed.

In Equity. Suit by Howard D. Colman and others against Charles A. Bowen. On final hearing. Decree for complainants.

Luthur L. Miller, of Chicago, Ill., and Melville Church, of Washington, D. C., for plaintiffs.

Charles E. Brock, of Washington, D. C., for defendant.

BROWN, District Judge. The bill charges infringement of letters patent to Howard D. Colman, No. 672,636, April 23, 1901, for knot-tying implement, and letters patent No. 755,110, March 22, 1904, for knot-tying implement. Of the earlier patent, No. 672,636, claims 17, 40, 48, 66, and 78 are in issue; of the later patent, claims 2, 9, and 18 are in issue.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Claim 17 of the earlier patent is as follows:

"17. In a knot-tying implement, in combination, a rotatable tying-bill, means for securing said tying-bill to the hand of the operator, and a lever adapted to be operated by a movement of the thumb of the hand to which the implement is secured, for rotating said tying-bill."

The knot-tying implement to which both patents relate, the later being merely for improvements, is known to the trade as the "Barber Knotter." It is adapted for use in the spooling process in textile manufacture for tying the tail end of the thread on the spool to the leading end of the thread on a new bobbin, all the thread of several bobbins being thus united and wound upon a single spool in a practically continuous thread.

In the prior art the threads were tied by hand. The operation was slow and likely to be inaccurate. The Barber knot-tying implement ties the knot automatically and uniformly and cuts the ends to a proper and uniform length.

The testimony as to the utility of the invention in saving the cost of spooling and in producing a better fabric is satisfactory, and is practically undisputed. The defendants deny patentability in the combination of the claims of the earlier patent, and deny infringement of the second patent.

Both patents were in suit in the Eastern district of North Carolina upon the same claims and upon a substantially similar record, and the claims were held valid and infringed.

The element, "a rotatable tying-bill" for tying a knot, is disclosed in the prior art; as, for example, in patents to Augsburgsburger, No. 242,859, June 14, 1881, for grain binder, and to Olson, No. 273,761, March 13, 1883, for grain binder. The prior art, however, does not show the conception of mounting a rotatable tying-bill upon the hand of an operator, and of rotating it by a simple movement of the thumb upon a lever which serves to rotate the tying-bill.

Defendant's expert concedes that the knotters of the prior patents are intended to be operated by the mechanisms of the machines on which they are mounted, but says that, as it was old in the art to provide means for securing various hand-operated implements to the hand of the operator and to operate such implements by thumb levers, claim 17 of the Colman patent, No. 672,636, does not, in his opinion, cover a combination requiring invention in its production.

Reference is made to the patent to Titus, No. 354,363, December 14, 1886, for fruit-gathering shears, in which shears for cutting the stems of fruit and a lever to operate the shears are mounted upon the hand; also to patent to Swift, No. 634,152, October 3, 1899, for a knot-tying implement intended for tying the spooler's knot, which shows a tying-bill with suitable handles for the thumb and fingers of the operator. This patent, however, does not show a rotatable tying-bill, rotated mechanically by a lever, as in the patents in suit. While it is true that it might be partly rotated by a rotation of the wrist of the operator, it is far from anticipating the conception of automatic operation in the tying of a knot, which is characteristic of the patents in suit. It is a hand tool for a knot-tying operation effected principally by the hand, while

in the complainants' device we have an implement in which automatic operation for tying the knot is the predominant feature.

Nor do we find in the Swift patent an anticipation of the conception of mounting a rotatable tying-bill upon the hand, and of rotating it automatically, and thus tying a knot merely by pressing upon a lever. In the Swift device, as we have said, the hand operation is predominant.

I am of the opinion that the broad combination of claim 17 involved more than the exercise of mechanical skill, and that it covers a conception which is an inventive conception, quite remote from what would occur to the ordinary mechanic.

The knot-tying devices of the prior art were not at all suggestive of use in a hand implement, and the making of a hand implement, wherein the hand could both carry and operate the complicated mechanism, involved, as is conceded by the defendant's brief, mechanical skill of a high order. Therefore there was not the mere conception of mounting the rotatable tying-bill upon the hand, but there was required, also, a further and definite conception of the relation of the hand-operated lever to the means for performing the various operations of knot-tying. This was necessary before the inventor could determine that his generic conception was mechanically practicable, so that it would be unjust to say that this was a mere carrying out of what was obvious to the mere mechanic.

Being of opinion that claim 17, which covers the invention broadly, is valid and infringed, it becomes unnecessary to consider in detail the other claims of the earlier patent. Each of these claims, in my opinion, is valid and infringed.

The improvement patent, No. 755,110, relates more specifically to the construction of the parts of the tying-bill. An improvement disclosed in this patent consists in the removability of parts of the cutting mechanism and provision for more convenient sharpening.

The defendant insists upon a very narrow construction of the claims in order to escape infringement. Though the claims are concededly for special improvements, I am of the opinion that the construction which the defendant seeks to place upon them is too narrow, and that, fairly interpreted, these claims are infringed. This, perhaps, is less clear as to claim 9 than as to claims 2 and 18. While as to claim 9 there may be doubt, this is not sufficient to lead me to a different conclusion from that reached by the learned judge in the former decision concerning this patent.

I am of the opinion that claims 17, 40, 48, 66, and 78 of patent No. 672,636, and claims 2, 9, and 18 of patent No. 755,110, are valid and infringed. A draft decree may be presented accordingly.

WILLIAMS v. MOTOR & MFG. WORKS CO.

(District Court, W. D. New York. April 1, 1914.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—HEATING AND VENTILATING SYSTEM FOR AUTOMOBILES.

The Williams patent, No. 873,399, for a combined heating and ventilating system for automobiles, claim 1, while not of broad scope, discloses patentable invention; also *held* infringed.

In Equity. Suit by Nathan W. Williams against the Motor & Manufacturing Works Company. On final hearing. Decree for complainant.

Samuel W. Banning, of Chicago, Ill. (Thomas A. Banning, Thomas A. Banning, Jr., and Ephraim Banning, all of Chicago, Ill., of counsel), for complainant.

J. William Ellis, of Buffalo, N. Y., for defendant.

HAZEL, District Judge. This suit in equity involves the alleged infringement by the defendant, the Motor & Manufacturing Works Company, of claim 1 of patent No. 873,399, granted to Nathan W. Williams December 10, 1907, for a combined heating and ventilating system for automobiles. The claim reads as follows:

"1. In combination with the structure to be heated, a hydro-carbon engine, an exhaust pipe leading therefrom, a muffler secured to the discharge end of the exhaust pipe and in open communication with the atmosphere, an inclosing box secured to the structure to be heated and provided with an intake opening for supplying fresh air, a register in communication with the inclosing box for controlling the flow of heated air therefrom, a radiator box within the inclosing box, a branch pipe leading from the radiator box to the exhaust pipe intermediate the muffler and the engine, and a discharge pipe leading from the radiator box and out of the inclosing box and discharging directly into the atmosphere, substantially as described."

A few of the enumerated elements seem to indicate that claim 1 is limited to a circulating and ventilating device; but, as all the elements are believed to be substantially embodied in defendant's structure, it makes no difference that the claim includes features for ventilating the automobile as well as for heating it. The specification says:

"The object of the present invention is to utilize the heat of the escaping products of combustion for heating purposes, by tapping the exhaust pipe intermediate the engine and muffler and conveying a portion of the heated waste gases to a heater located beneath the floor of the automobile, for the purpose of heating the air supplied to the closed vehicle body. The invention is further intended to relieve the muffler by reducing the volume of heated waste gases delivered thereto, and to further relieve the engine by reducing the back pressure owing to the increased facility with which the waste gases are permitted to be discharged."

In the heater described in this patent, the fresh air circulates through a passage into the inclosing box to the radiator box, which is located in the inclosing box and has within it several small pipes open at their ends, and thence through the register or grating to the inside of the car. The coil or elbow-shaped branch of pipe in the inclosing

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

box receives a supply of hot gases from the exhaust pipe connected with the engine, by which the fresh air is heated before passing through the register. The elements of the claim separately considered are old, save the feature of the discharge pipe which leads from the radiator box through the inclosing box and discharges the gases directly into the open air to relieve the back pressure on the engine.

The defendant denies infringement, and contends that the patent, because of the prior art, must be given a strict construction, excluding from its scope a heating device such as that marketed by defendant. It is true enough that the patentee herein was not the first to tap an exhaust pipe between the engine and the muffler attachment of an automobile for the purpose of using the gases to heat the interior of the car. The prior patents to Kampshall and Pliske disclose, respectively, a foot warmer and a circulatory heater for use in automobiles; but they lack the means for discharging the heated gases directly to the outside of the car to decrease the back pressure on the engine.

In the Foster patent, upon which the defendant lays stress, the products of combustion are discharged through the muffler device, as in the Pliske and Kampshall patents, and not directly into the atmosphere. In the Pliske patent, the natural course of the gases is directly to the muffler, and upon opening a valve attached to the heater the gases circulate through the coils of the heater; but they are not deflected to the open air by a discharge pipe to relieve back pressure of the engine.

It will not be denied that the change or alteration made by the patentee from the Pliske heater was simple and not difficult of accomplishment after the new idea had been ingrafted upon it, but in the Patent Office the Williams conception was considered an improvement. While the expert witness for the defendant disputes the testimony of complainant to the effect that the back pressure is affected by the outlet of the gases, still I think the presumptions arising from the grant of the patent have not been overcome, and that the patentee made a modest advance in the art, which entitles him to protection from infringement of the essence of his invention.

There was discussion with regard to the air intake opening (Fig. 18 of the drawing), through which the fresh air is supplied to the radiator box of the patent in suit; but this was not an important feature of the invention. It makes no difference that the defendant supplies air for its radiator box from the inside of the car and that fresh air is introduced into the car through the door or through crevices; it is sufficient to establish infringement that the defendant appropriated in connection with its heater the essence of complainant's invention—i. e., a discharge pipe leading from the radiator which discharges gases directly into the open air, in combination with other elements which, though differently located, do not perform a different function and are not patentably different from complainant's.

A decree, with costs, may be entered holding the claim in controversy valid and infringed.

In re CHOTINER.

(District Court, W. D. Pennsylvania. September 17, 1914.)

No. 6440.

1. BANKRUPTCY (§ 268*)—SALE OF PROPERTY—RIGHTS OF PURCHASER—DOWER INTEREST OF WIFE.

Under the law of Pennsylvania, by which dower is an estate of the wife and not of the husband, a sale of real estate by a trustee in bankruptcy under order of the bankruptcy court, free and discharged of all liens, does not divest the property of the inchoate dower interest of the bankrupt's wife.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 372-379; Dec. Dig. § 268.*]

2. BANKRUPTCY (§ 143*)—RIGHTS VESTING IN TRUSTEE—RIGHTS OF LIEN CREDITORS.

The provision of Bankr. Act July 1, 1898, c. 541, § 47a(2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), that, as to all property coming into the custody of the bankruptcy court, the trustee shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon cannot be held to affect any estates other than that of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. § 143.*]

In Bankruptcy. In the matter of A. H. Chotiner, trading as A. H. Chotiner & Co., bankrupt. On review of order of referee. Reversed.

Alpern & Seder, of Pittsburgh, Pa., for trustee.

Chas. H. Sacks, of Pittsburgh, Pa., for exceptant.

ORR, District Judge. [1] The referee in bankruptcy has certified to the court the following question, viz.:

"Whether, on the sale of real estate by the trustee under the order of the bankruptcy court, free and discharged of all liens, the title of the bankrupt passed to the purchaser free and discharged of any right of dower in the wife of the bankrupt; the bankrupt and his wife both being alive at the time of said sale."

The question is one of great importance which has never been decided by the Court of Appeals of this circuit or by the Supreme Court, so far as I have been advised. It is with hesitation that this court must answer the certified question in the negative, because the referee, in support of his position, has relied upon a decision by Judge Witmer in the Middle District of Pennsylvania (In re Codori, 30 Am. Bankr. Rep. 453, 207 Fed. 784), which is directly in point.

That dower is an estate of the wife and not of the husband, under the laws of Pennsylvania, is clear. No citation of authorities is necessary to this end. If, therefore, the estate of the wife is to be applied to the payment of the debts of the husband, it should be made clear in legislation intended to accomplish that end. This is the view taken by the Supreme Court in the opinion of Mr. Justice Gray in

*For other cases see same top'c & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Porter v. Lazear, 109 U. S. 84, 3 Sup. Ct. 58, 27 L. Ed. 865. Commenting upon the bankruptcy act of August 19, 1841, chapter 9 (5 Stat. 440), which contained in its second section the proviso that "nothing in this act contained shall be construed to annul, destroy, or impair any lawful rights of married women, * * * which may be valid by the laws of the states respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act," and further commenting upon the fact that that proviso was omitted from the bankruptcy act of 1867 (14 Stat. 517, c. 176), which omission was urged in the case then under consideration as indicative of the intention of Congress that dower of the wife might be subjected to the payment of the husband's debts under the later act, stated (109 U. S. at page 89, 3 Sup. Ct. at page 61, 27 L. Ed. 865) that the court had "no hesitation * * * in holding that the proviso relied on was not in the nature of an exception to or restriction upon the operative words of the act, but was a mere declaration, inserted for greater caution, of the construction which the act must have received without any such proviso, and that the omission of the proviso in the recent bankrupt act does not enlarge the effect of the assignment or of the sale in bankruptcy, so as to include lawful rights which belong not to the bankrupt but to his wife." The court further says in the opinion in that case, on page 88 of 109 U. S., on page 60 of 3 Sup. Ct. (27 L. Ed. 865):

"It thus appears that the right of dower in Pennsylvania does not differ, in nature or extent, from the right of dower at common law, except so far as the local law has made it a chattel for the payment of debts of the husband, either by converting it into personalty, in his lifetime, by virtue of the effect attributed by that law to a judgment recovered against him or a mortgage executed by him, either of which could only be enforced in that state by a levy of execution in common form, or by giving his creditors, after his death, a lien upon the whole title in the land. The state court has accordingly constantly held that, with these exceptions, the right of dower is as much favored in Pennsylvania as elsewhere; that the old decisions are not to be extended; and that neither an absolute conveyance by the husband, nor an assignment by him for the benefit of creditors, whether executed voluntarily or under a requirement of the insolvent law of the state, impairs the wife's right of dower."

In support of the foregoing, many Pennsylvania cases are cited.

It will be noticed, then, from what has been said, that the enforcement of the judgment, which will subject the dower to the payment of the debts of the husband, must be "by a levy of execution in common form," and further "that the old decisions are not to be extended." That case went to the Supreme Court of the United States upon a writ of error to the Supreme Court of Pennsylvania in the case of Lazear v. Porter, Assignee, found in 87 Pa. 513, 30 Am. Rep. 380, and the judgment of the Supreme Court of Pennsylvania was affirmed. In the opinion of the Supreme Court of Pennsylvania, this language was used as the embodiment of various expressions used in divers opinions of that court and as expressions of the views of that court at the time the decision was rendered:

"A widow's right of dower commences with her marriage; it is held so sacred a right that no judgment, recognizance, mortgage, or any other incum-

brance whatever, made by the husband after the marriage, can, at common law, affect her right of dower; even the king's debt cannot affect her. Shippen, P. J., *Graff v. Smith*, 1 Dall. [Pa.] 484 [1 L. Ed. 232]. The only modification of these principles that we have suffered is in treating the rights of creditors as paramount, and permitting them, through a judicial sale, to bar dower—a policy often questioned and which is not to be extended beyond established limits. Woodward, J., *Worcester v. Clark* [2 Grant, Cas. (Pa.) 84] *supra*. That policy, from any principle of analogy, should not be extended a whit farther. It has been carried too far, and has too often divested estates of women, incident though they be to the marital relation, when no equitable principle so required. Nothing should be taken to prejudice a wife's estate by mere inference. A statute ought not to be interpreted as authorizing a sale of the husband's lands, freed from dower, unless such is its clear intentment. Were the meaning of the bankrupt law and the effect of a sale of the bankrupt's land, as to dower, doubtful, the conclusion must be that the wife's estate is not divested."

[2] But it is urged that by section 47a (2), as amended by the act of June 25, 1910, the trustee has the power to divest the dower of a wife, because that amendment provides that he "shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings" upon the estate of the bankrupt husband.

Section 70a, subd. 5, vests in the trustee "the title of the bankrupt * * * to all * * * property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." That language has been construed by the Circuit Court of Appeals of the Sixth Circuit in *Re Hays*, 181 Fed. 674, 104 C. C. A. 656, which holds that the dower interest of a bankrupt's wife in mortgaged real estate, sold as part of the bankrupt's estate, was no part of the bankrupt's assets, since that section of the act, vesting the title of the bankrupt in his trustee, does not purport to affect the wife's interest. That case was carefully considered by the Court of Appeals of the Sixth Circuit, and seems to have settled the law with respect to the act as it existed prior to the amendment of June 25, 1910. The amendment of June 25, 1910, seems to have been passed to remedy a defect in the bankruptcy act of 1898, which was made apparent by the decision of the Supreme Court in *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, and kindred cases, which held that the trustee in bankruptcy, under the original act, was vested with no better right or title to property than the bankrupt had when the trustee's title accrued, and therefore that personalty which was the subject of a conditional sale, and which had not been taken in execution by a creditor of the conditional vendee, should be surrendered by the trustee of the conditional vendee to the vendor, holding, in other words, that although a contract of conditional sale of personalty was void as against the creditors of a conditional vendee, who had levied thereon prior to the bankruptcy proceedings, yet as between the parties thereto the contract was valid, and, because the trustee was vested with no better title to the property than the conditional vendee who had become bankrupt, the conditional vendor was entitled to recover the property.

That the object of the amendment was as stated is the view taken by Mr. Collier in his work on Bankruptcy (10th Ed.) § 47, p. 659, wherein reference is made to the Congressional Record of the Sixty-First Congress, Second Session, pp. 2552-2554. That such was the purpose of the act may be inferred from the large number of cases in which the subject of the conditional sale in the hands of the bankrupt vendee was subjected to the payment of debts and not returned to the conditional vendor. Of course the majority of the cases were federal cases, but the state courts recognized the change in the law. *Bank of North America v. Penn Motor Car Co.*, 235 Pa. 194, 83 Atl. 622, a case involving the title to personal property, is a case in point. The court there expressed the view that:

"The manifest purpose of the amendment was to enlarge the rights, remedies, and powers of a trustee in bankruptcy, and it had the effect of vesting in the trustee the rights, remedies, and powers of a judgment or other creditor having a lien, and of an unsatisfied execution creditor without a lien at the time of instituting bankruptcy proceedings. In other words, the trustee was given the power to assert every right which such creditors could have asserted during the period of four months immediately preceding the filing of the petition in bankruptcy."

While that language, taken by itself, is very broad, yet the case involved the title to personal property only, and no inference is to be drawn from the decision in that case that the Supreme Court of Pennsylvania would construe the act in such way as to affect the dower which the wife of the bankrupt might have.

At this point the case of *Holt v. Henley, Trustee*, 232 U. S. 637, 34 Sup. Ct. 459, 58 L. Ed. 767, may be referred to as conclusive authority that the amendment of June 25, 1910, was not intended to affect property rights which existed prior to the passage of such amendment. Upon the authority of this case, the question now before the court would have to be answered in the negative, because, if for no other reason, the record does not show that the estate of the wife of the bankrupt arose subsequent to the passage of the amendment. The case, however, should not turn upon this narrow view, but upon the broad ground that the bankruptcy act, as amended, cannot be construed to affect estates other than that of the bankrupt. The act vests in the trustee no other estate than the bankrupt's. If, however, such a construction should be given to the act as that the trustee should be deemed to have an "execution in common form," yet it should not be held that, because of having such an execution, he has the right to sell the estate of the wife, in view of the limitations expressed in the decisions of Pennsylvania upon the right to divest the dower, and in view of the act of Assembly of Pennsylvania of the 16th of June, 1836 (section 48 and other sections), which impose upon the sheriff the duty of executing writs in a particular way at particular times after special notice, etc. For instance, sections 48, 49, 50, and 51 of that act (P. L. 769) provide for an inquisition by the sheriff as to whether the clear profits of the real estate will be sufficient to pay the debt or damages, together with the costs, and an assessment of the value of the yearly rents, and if the land will pay

in seven years the debt, etc., the sheriff is to deliver possession to the execution creditor, but, if it will not, then a writ of venditioni exponas may issue. It is true that, where the judgment debtor waives inquisition and condemnation, inquisition by the sheriff is not required. If, therefore, the trustee in bankruptcy be deemed to have an execution in common form, is he also to be deemed to have a waiver of inquisition by the bankrupt? If inquisition shows that the profits from the land will pay the debt, then there is no sale, and the widow's dower is not discharged. Plainly the language of the bankruptcy act, as amended, does not even in general terms contemplate the divestiture of the widow's estate in the bankrupt's lands in the manner in which such estate may be divested in Pennsylvania. Therefore it must be that the act does not in any way affect the dower of the wife.

Another consideration arises that in many states the dower of the wife is not divested even by an execution in common form, or by foreclosure of a mortgage, unless it be a mortgage given to secure purchase money. In *Ency. of Pleading & Practice*, vol. 9, p. 316, a footnote gives a list of the states in which the wife of a mortgagor is a necessary party to foreclosure proceedings. They are Alabama, Illinois, Iowa, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, South Carolina, Tennessee, Virginia, and Wisconsin. If dower in those states be protected in proceedings upon mortgages given by the husband, the amendment of June 25, 1910, could not have the effect in those states of giving the trustee such an interest in the bankrupt's lands as would enable him by sale to divest dower. That the act was not intended to affect dower generally throughout the United States must be held. That it should affect dower in Pennsylvania must depend upon the law of Pennsylvania, where that law appears to have been within the purview of the bankruptcy act. As we have seen, the law of Pennsylvania protects the dower, except as hereinabove outlined. The act of Congress does not in terms expressly give the trustee any right to dispose of the dower of the wife. Therefore the trustee should not have attempted to sell the property of the bankrupt free and discharged of the wife's dower.

The decision of the referee must be reversed, and the certified question answered in the negative.

In re COZATSKY.

(District Court, D. Connecticut. August 25, 1914.)

No. 3233.

1. BANKRUPTCY (§ 228*)—FINDINGS OF REFEREE.

Findings of fact made by a referee, who has heard the witnesses testify, should be accepted by the court, unless manifestly erroneous.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. § 228.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. BANKRUPTCY (§ 140*)—PROPERTY PASSING TO TRUSTEE—CONSIGNMENT OF MERCHANDISE.

A finding by a referee that a consignment agreement, under which merchandise was furnished to a bankrupt and was mingled by him with his other stock, was not made in good faith, but was fraudulent as to other creditors, affirmed, and the goods *held* to have become a part of the bankrupt's estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

In the matter of Samuel Cozatsky, bankrupt. On petition of Nathan Spiro to review findings of referee. Affirmed.

Spotswood D. Bowers and A. S. Geduldig, both of Bridgeport, Conn., for Nathan Spiro.

James E. Connor, Jr., of New Haven, Conn., for trustee.

THOMAS, District Judge. This matter comes before the court on the petition of Nathan Spiro, requesting that the referee's finding be added to and otherwise corrected. He also claims a review of the order of the referee by which his motion to intervene was disallowed.

The question concerns the claim of Nathan Spiro to a lot of merchandise constituting the larger portion of the bankrupt's clothing stock, which Spiro says he sent to the bankrupt on consignment, but which the trustee claims as part of the bankrupt's estate. The merchandise was sold by the trustee to Max Spiro & Co. for \$500 by virtue of an order of the referee which provided that the money received from the sale should be held pending a decision on the petition for review.

All of the evidence has been certified and forms part of the record. It has been carefully examined. The question to be decided is whether this evidence is sufficient to sustain the referee's decision. The motion to intervene was denied, on the ground that the arrangement made was not between the bankrupt and Nathan Spiro, but was in fact between the bankrupt and the firm of Max Spiro & Co., and that they furnished the merchandise; that the arrangement was intended as a cover; that the written agreement (Exhibit B, hereinafter referred to), which was executed in the name of Nathan Spiro and the bankrupt, not being properly acknowledged, could not be upheld as a valid conditional sale agreement under the law of Connecticut; and that the arrangement tended to give the bankrupt a false credit.

The evidence in the case establishes the following facts: Samuel Cozatsky, the bankrupt, was the proprietor of a small retail men's furnishing business in New Haven, and had been accustomed to purchase merchandise of Max Spiro & Co., a firm engaged in the manufacture of men's clothing in New York City; that this firm consisted of Max Spiro, Leo Weiss, and Jacob Cohen; that Weiss was accustomed, as traveling salesman for the firm, to visit and sell merchandise to Cozatsky and to make collections on bills owed by the bankrupt to that firm; that early in June, 1913, on one of his visits, Cozatsky informed Weiss that he desired to move to a new store in New Haven, but that he did not have sufficient capital to warrant him in moving. The evidence further shows that in June, 1913, the bankrupt was owing Max Spiro

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

& Co. between \$100 and \$150, and had about reached the limit of the credit which that firm was willing to give him. Weiss, however, told the bankrupt to rent the new store; that his firm would send a large amount of clothing on conditional sale or consignment, and would furnish \$100 towards the expense for rent and lighting, and would pay the freight and cartage on the clothing which the firm would send, provided the bankrupt would agree to sell the clothing at retail, and semi-weekly send the firm the total amount of such sales, and that the firm would then remit to the bankrupt his share of the net profits. To this the bankrupt agreed.

Although the firm of Max Spiro & Co. were thus to furnish a large quantity of clothing to the bankrupt, the transaction, on the suggestion of Weiss, was to be considered as between the bankrupt and one Nathan Spiro. The reason for this was that Max Spiro & Co. did not desire to be known as selling goods under conditional sale or consignment agreements, as this was not their custom. Nathan Spiro was the son of Max Spiro, a nephew of Weiss, and was, according to the testimony of Weiss, a young man between 19 and 21 years of age. Nathan was so connected with the business of the firm of Max Spiro & Co. that the bankrupt thought at the time this arrangement was made, as well as at the time of the hearing before the referee, that he was a member thereof. He had a desk in his father's office in the place of business of Max Spiro & Co. and assisted in showing merchandise when Cozatsky called to select stock for his new store.

On the 16th of June, 1913, the bankrupt went to the office of Attorney Geduldig in Bridgeport for the purpose of meeting a representative of Nathan Spiro, and the following agreement (Exhibit B) was drawn up and executed.

"This agreement, made this 16th day of June, by and between Nathan Spiro, of the city, county and state of New York, of the first part, and Samuel Cozatsky, of the city and county of New Haven, and state of Connecticut, witnesseseth:

"I. That the said Spiro hereby covenants and agrees to and with the said Cozatsky that he will furnish the said Cozatsky with a full line of men's and youth's clothing, which clothing will be placed in the store of the said Cozatsky, in the city of New Haven (corner Grand Ave., and Hamilton St.), on consignment, the title and ownership of the said merchandise to remain in the said Spiro until the same is sold; and the said Spiro further agrees to pay one-half of the rent and light for the said store in which the said merchandise is to be located, as hereinafter stated. And

"II. In consideration of the said Spiro furnishing the said Cozatsky with the merchandise, as aforesaid, the said Cozatsky covenants and agrees to and with the said Spiro that he will not buy any men's and youth's clothing from any one else, except the said Spiro, and further agrees to give the said Spiro one-half of the profits accruing from the sale of the aforesaid merchandise, and is to render to the said Spiro an accounting of the said profits each and every half week from the date arrival of merchandise.

"III. It is further agreed by the said parties that the merchandise is to be billed and sold on condition and consignment and the amounts to be delivered it to be mutually agreed upon.

"IV. It is further agreed that this agreement is to continue for a period of 6 months, but may be extended by mutual agreement, after which the same may be terminated upon either party giving the other notice, in writing, 30 days before termination shall take place.

"V. That the said Cozatsky will use his best efforts to sell the said merchandise which the said Spiro shall place in his care, and shall send all the moneys taken in from said sales to the said Spiro semiweekly, and the said Spiro will render to the said Cozatsky a monthly accounting of the profits and expenses.

"VI. The rent and expenses are to be paid as follows: The said Spiro is to deduct the one-half expenses from the profits of the sales of merchandise, and the balance of the profits are to be equally divided, and if there is not enough profits to pay one-half expenses the said Spiro is to make good the difference.

"In witness whereof, we have hereunto set our hands and seals the day and date first above written.

Nathan Spiro.

"Sam Cozatsky.

"In the presence of
 "Louis Spinner.
 "A. S. Geduldig."

This agreement was recorded on the 30th day of June, 1913, in the town clerk's office in New Haven.

Subsequently Cozatsky went to Max Spiro & Co.'s place of business in New York and made selections from their stock of clothing, for use in his business. When he went there, he met Weiss and Nathan Spiro. Nathan assisted in showing the bankrupt the stock. Weiss drew and signed a check in behalf of Max Spiro & Co. for \$75, payable to Nathan Spiro, who indorsed it over to Cozatsky, which sum was intended as part of the \$100 promised for use in fitting up the new store, and the bankrupt used it for that purpose.

Some time afterwards the bankrupt received at different times three other firm checks, made out and indorsed in a similar manner, amounting in all to \$90, to pay one-half the amount of rent of the new store for July, August, and September, 1913, and the money so received by Cozatsky was used by him for that purpose. Neither the firm nor Nathan Spiro paid anything towards the small expense of lighting the store, and at the time of adjudication there was a small amount due Cozatsky from the firm for freight which he had paid on the merchandise shipped him.

Although the agreement (Exhibit B) was not so executed and acknowledged as to meet the requirements of the provisions of the Connecticut statutes concerning conditional sale agreements, nevertheless Max Spiro & Co. shipped the bankrupt a lot of men's clothing billed at \$889.25, the invoice thereof being typewritten and headed:

"All claims must be made within 5 days after receipt of goods.

"New York, July 1, 1913.

"Goods shipped to Mr. S. Cozatsky on consignment to be covered by insurance.

"Bought of Nathan Spiro, 119-121 Bleecker Street.

"Lot.	Quantity.	Price.	Amount."
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Here followed a long list, describing the lot, quantity, price, and total, amounting to \$889.25.

Cozatsky received this lot, containing 119 suits of clothing, and placed them in the new store, hanging them up on that side of his store devoted to the clothing business; the other side, with a counter in front of the

shelves, being used by him for the sale of his gent's furnishings. In the same section of his store in which said shipment of clothing was placed, bankrupt also placed other clothing forming a part of his stock in trade, some of which he carried over from his former place of business, and these were not kept separate from the others. Other than the manufacturer's brand of "Max Spiro & Company" there were no marks or anything else on the clothing thus shipped to the bankrupt to distinguish it from any other part of Cozatsky's clothing stock, and he never informed any other creditor, nor the mercantile agencies of Dun or Bradstreet when their representatives called, that the said clothing was not a part of his regular stock in trade. Neither were there any signs on the racks, or on the showcases, or on any part of the store wherein this clothing was kept, or anywhere about the store, to indicate that Nathan Spiro or any one other than the bankrupt was the owner thereof.

Bankrupt opened up business in his new store on July 5, 1913, and continued to carry on business there until the filing of his petition in bankruptcy, which was on September 27, 1913. During that period Weiss called from time to time, and examined the stock of clothing, and checked bankrupt's record of the sales which he had made therefrom.

On September 12, 1913, another lot of men's clothing consisting of 65 suits, billed at \$467.01, was shipped to bankrupt from the business place of Max Spiro & Co., which lot bankrupt received and placed in his store with other clothing. This invoice, as well as bankrupt's name and address, and the words "To be covered by insurance," was written with ink on the regular printed billhead of Max Spiro & Co. and the same read as follows:

Max Spiro

Leo Weiss

Jacob Cohen

All claims must be made within 5 days after receipt of goods.

Telephone 8015 Spring.

New York, Sept. 12, 1913.

M Consigned to Sam Cozatsky—New Haven, Conn.

To be covered by Insurance.



Bought of MAX SPIRO & CO.,

Manufacturers of
CLOTHING.

Terms
Shipped via

119-121 Bleecker St.

When this invoice was exhibited at the hearing before the referee, it plainly showed, and does now, that some one using a black lead pencil had drawn a line partly through the name "Max," and had placed above that name, also in lead pencil, the letter "N." Likewise a lead pencil line had been drawn through the characters "& Co." It also ap-

pears that some one had subsequently attempted to erase those alterations. The writing of the letter "N" with lead pencil was not, however, in the handwriting of Nathan Spiro, as is found by comparing his signature to the petition and the affidavit attached thereto and presented to the court in support of his petition for review, and it does not appear from the evidence who made the changes, although the billhead was produced in court by the bankrupt, who claimed to have had it in his possession all the time since receiving it from New York.

With the first lot of clothing Max Spiro & Co. sent bankrupt a book containing the lot numbers of the suits and the prices for which each was to be sold at retail, and the bankrupt was to make a note in said book of such of the clothing as he sold. The terms of the agreement (Exhibit B) were not carried out further than is above indicated, and when bankrupt sold articles from these lots of clothing it was his custom to put the money in his pocket, the same as other moneys belonging to himself.

At no time did the bankrupt pretend that he was doing a consignment business, and the amount of stock sent him by Max Spiro & Co. was so large that it must have tended to induce others not acquainted with the facts to extend to him larger lines of credit than would otherwise have been given.

The bankrupt sold in all 33 suits from the two lots sent him as above set forth, receiving therefor about \$280. The following remittances were made by Cozatsky by checks payable to Max Spiro & Co. and when returned through the clearing house to the Merchants' National Bank of New Haven, upon whom they were drawn, bore the indorsement "Max Spiro & Co.," viz.:

July 21, 1913.....	\$ 44 85
" 26, "	39 30
Aug. 20, "	56 65
" 23, "	46 85
	<hr/>
	\$187 65

There was nothing whatever on the checks to indicate that Nathan Spiro had in any way been connected with the same.

Cozatsky's petition in bankruptcy was dated September 24, 1913, and filed September 27, 1913. In his schedule of assets attached to his petition there is this entry in relation to the bankrupt's clothing stock, viz.:

"Clothing in store #685 Grand avenue subject to the rights of Nathan Spiro, \$1,150."

Cozatsky was adjudicated bankrupt September 29, 1913. It does not appear that he informed either Nathan Spiro or any member of the firm of Max Spiro & Co. of his intention to file his petition in bankruptcy.

[1, 2] In the bankruptcy proceedings Attorney Geduldig, of Bridgeport, represented the interests of Max Spiro & Co. and of Nathan Spiro, and was engaged by Weiss, who also testified in behalf of his firm and in behalf of Nathan Spiro. The latter did not appear or testify. The referee heard the evidence and saw the witnesses, and had an opportunity to judge of their credibility, and as his conclusion, in

so far as Nathan Spiro is concerned, seems fully warranted by the evidence and all legitimate inferences that may be drawn from it, the court is not justified in setting aside the order appealed from, and so confirms it.

In cases like this the rule is that the court should accept the conclusions of the referee on questions of fact unless the same are manifestly erroneous, because the referee hears the testimony and can note the demeanor of witnesses, and so is in a better position to determine the credit to be given the oral testimony. In *re Shults et al.* (D. C.) 135 Fed. 623; In *re Wright-Dana Hardware Co.* (C. C. A.) 30 Am. Bankr. Rep. 582, 211 Fed. 908; In *re McDonald & Sons* (D. C.) 178 Fed. 487; In *re Williams* (D. C.) 120 Fed. 542; *Fouche v. Shearer* (D. C.) 172 Fed. 592.

While consignment agreements are permitted and upheld under the law of Connecticut, the main question at issue always is: Was the agreement entered into by the parties in good faith? *Lambert Hoisting Engine Co. v. Carmody*, 79 Conn. 419, 65 Atl. 141; *Romeo v. Martucci*, 72 Conn. 504, 45 Atl. 1, 99, 47 L. R. A. 601, 77 Am. St. Rep. 327; *Harris v. Coe et al.*, 71 Conn. 157, 41 Atl. 552.

As a result of the referee's finding, based upon the evidence to support it, as disclosed by the record, in which I concur, this question has been answered in the negative. For this reason, as well as for the further one that the evidence fails to disclose any real interest on the part of Nathan Spiro in the subject-matter of the controversy, in view of this finding, a decree will be entered confirming the referee's order and denying the requests contained in the petition for review.

Ordered accordingly.

THE SMEDLEY (two cases).

(District Court, S. D. New York. February 13, 1914.)

1. COLLISION (§ 71*)—MOVING BOATS IN SLIP—DUTY OF CARE.

Those engaged in moving boats in a slip are bound to the exercise of reasonable care to prevent injury to other vessels, and are liable for an injury which such care would have prevented.

[Ed. Note.—For other cases, see *Collision*, Cent. Dig. § 101; Dec. Dig. § 71.*]

2. COLLISION (§ 141*)—MOVING BOATS IN SLIP—UNSEAWORTHINESS OF INJURED VESSEL.

The owner of a coal boat, which was negligently struck and sunk by another boat being moved past her in a slip, *held* entitled to recover half damages; it being shown that, but for her age and weakened condition, she would not have been injured so badly, if at all.

[Ed. Note.—For other cases, see *Collision*, Cent. Dig. § 294; Dec. Dig. § 141.*]

In Admiralty. Suit for collision by Ned Irish and J. B. Irish, co-partners trading as Irish Bros., owners of the coal boat Macy, against the barge Smedley, the Powelton Barge Company, claimant, with the Baltimore & Ohio Railroad Company and the Staten Island Rapid

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Transit Railway Company impleaded. Decree for libelants for half damages against the Rapid Transit Company.

Harrington, Bigham & Englar, of New York City, for libelants.

Chauncey I. Clark, of New York City, for claimant.

Cravath & Henderson, of New York City, for respondents.

HAZEL, District Judge. In September, 1907, the coal boat Macy was moored at the dock at Staten Island, not far distant from the coal chutes maintained by the respondent the Staten Island Rapid Transit Railway Company. The Macy had been under the chutes, and had taken aboard about 150 tons of coal, when the loading was temporarily discontinued and she was moved away by the employes of the Rapid Transit Company to a point farther up the pier, in order to permit the barge Smedley to load. After the Smedley was loaded, she was hauled past the Macy by a line on a manually operated winch, and in the course of the shifting operation she struck the Macy on her port bow, causing her to sink shortly afterwards, when she had again been moved under the chutes and completed her loading.

The libel filed against the barge Smedley alleged that the sinking was wholly due to her fault in not keeping clear, but subsequently, on petition of the owner of the Smedley, the Staten Island Rapid Transit Company was brought into the proceeding under a provision of the admiralty rules. At the close of the evidence the libel against the barge was dismissed, and the question now is whether the Rapid Transit Company, whose employes were in sole charge of the movements of the Smedley at the time of the collision, were in fault for the injuries sustained by the Macy. Though the impingement is conceded, it is claimed that the impact was slight, being a blow such as ordinarily occurs where boats are moved from one place to another in a slip, and that the Macy was unseaworthy and unfit, and should not, therefore, have exposed herself to such ordinary dangers.

[1] I think it is the law that those engaged in the moving of boats in a slip in the vicinity of other boats moored to a dock must exercise reasonable care in the performance of their work, and must be held responsible for injuries inflicted where boats are shifted with the assistance of a hand winch in such a careless manner as to impinge other boats moored to the dock. Of course, liability does not always follow from ordinary contacts such as are not inconsistent with the exercise of reasonable care in moving a boat; but in the present case the evidence shows that though the barge was moved slowly, and a man stood forward with a pole to prevent contact, and though the master of the Macy shouted out a warning when the Smedley was about eight feet distant, the boats were nevertheless permitted to collide. It is true that the contact was not severe; but in view of the fact that the Macy was partially loaded, as was also the Smedley, it was more harmful than if they had been without load, and forced the Smedley over against the dock and spiles. In view of the manual operation of the winch and the presence of the man forward with the pole, the contact was unjustifiable, and could have been avoided by the exercise of a proper degree of care.

[2] While the injured boat was old and weak, still it is not shown, as claimed by the respondents, that the forward planks were rotten, or that she was unfit for transporting coal. Indeed, the testimony of the witness Jensen was to the effect that a survey showed that her timbers were all right, both at the bow and the stern, and that in his judgment the appearance of the break in her planks indicated that it had been caused by an impact which forced her against the spiles or side of the dock. There not only was evidence to show that the Macy was old and weak, but it was conceded that she had previously been jammed by ice in the river and sunk, and that at another time she turned turtle, and as it does not appear to what extent she was repaired, or whether or not she was overhauled following such mishaps, I am in doubt as to whether she would have withstood the Smedley if she had been a more substantial boat; the testimony of the respondents being to the effect that the probabilities are that she would not have sustained damage from so slight a contact if she had not been so old and weak. In this view of her condition, she must be held to be also in fault; for, as said by Judge Brown in *The N. B. Starbuck* (D. C.) 29 Fed. 797:

"To allow old boats, that give no notice of their weakness, a right to be fully repaired, would encourage them to run in the way of others."

Moreover, the fact that the mishap occurred more than 6 years ago, and that the libel was not filed until January, 1913, about 5½ years thereafter, would seem almost sufficient to bar the claim of the libelants for staleness. Certainly the delay may be considered in support of the view that the Macy, though not wholly in fault, was, because of her evident weakness, partially so.

A decree may be entered for half damages in each case, and a reference taken to a commissioner to ascertain the amount.

UNITED STATES TRUST CO. v. GORDON et al.
In re DOVEY COAL CO.

(Circuit Court of Appeals, Sixth Circuit. October 9, 1914.)

No. 2421.

BANKRUPTCY (§ 310*)—CORPORATION—PROOF OF MORTGAGE BONDS—RIGHTS OF MORTGAGE TRUSTEE.

A bankrupt corporation had issued bonds secured by a mortgage, which provided that in case of default for six months the mortgage trustee might on its own motion, or on request of bondholders, proceed by suit to enforce its provisions, or it might decline to do so, in which event only a bondholder might proceed in his own name. At the time of the bankruptcy there had been default for more than six months, but the trustee had instituted no suit, nor had there been any request therefor. Two men, who owned all of the bonds severally, proved their claims as secured creditors, and the same were allowed. Afterwards the mortgage trustee filed a claim for the entire mortgage debt, and asked that the property be sold by the trustee in bankruptcy, which was done on his own petition, without objection. *Held*, that the proceeding was not such an enforcement of security as was committed by the mortgage solely to the trustee, and that, the debts having been proved and allowed to the real owners, it was not error for the bankruptcy court to refuse to recognize any right in the mortgage trustee and to reject its claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 501-507; Dec. Dig. § 310.*]

Appeal from the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

In the matter of the Dovey Coal Company, bankrupt; W. L. Gordon, Jr., trustee. The United States Trust Company, as trustee, appeals from an order rejecting its claim. Affirmed.

P. N. Booth, of Louisville, Ky., for appellant.

Before WARRINGTON and KNAPPEN, Circuit Judges, and HOLLISTER, District Judge.

KNAPPEN, Circuit Judge. The Dovey Coal Company, a corporation, on May 1, 1905, issued a series of negotiable bonds aggregating \$50,000, securing the same by deed of trust in nature of first mortgage on all its property and franchises to the United States Trust Company, of Louisville, Ky., as trustee. On October 30, 1905, and November 29, 1905, respectively, the Coal Company gave the Trust Company further mortgages securing the same bond issue. On July 1, 1910, the Coal Company issued a further series of negotiable bonds amounting to \$40,000, securing the same by a second mortgage trust deed upon its assets to the same trust company as trustee. Each mortgage contained sinking fund provisions. All the bonds of both series were held in severalty by two creditors, Lam and Eades (the bonds being in their sole and actual possession), except \$5,500 of first mortgage bonds held by the Trust Company, in connection with \$147.50 cash, under the sinking fund provision of the first mortgage. Each mortgage contained a clause providing for immediate maturity of the bonds in case of six months' default in making interest or sinking fund payments, or in the performance of other conditions, and for the effecting of such maturity through

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
216 F.—59

a written demand upon the trustee by the holders of 10 per cent. in amount of the bonds, and the trustee's notification to the Coal Company of such maturity. Subdivision 2 of the default article is printed in the margin.¹

In case of "enforcement of the terms of this indenture," the proceeds of sale, as well as the sinking fund, were to be devoted, first, to the payment of costs; second, to the trustee's expenses, counsel fees, and compensation; and, third, to the equal pro rata benefit of bond and coupon holders.

The Coal Company having become bankrupt after default in payment of interest Lam and Eades, on November 25, 1911, made proof of their respective claims as bondholders under the deeds of trust, both claims being allowed on either November 25 or December 5, 1911. After this allowance, and on December 5, 1911, the Trust Company, as trustee, filed proof of claim on account of the entire of both bond issues, claiming lien for the full amount of both, also alleging default with respect to three semiannual sinking fund payments of \$500 each under the first mortgage and of two such payments of the same amount under the second mortgage, the proof of claim stating that the Trust Company would "hereinafter plead further as to the enforcement of its rights as trustee under the aforesaid deeds of trust and mortgages and as to the sale of property hereinbefore referred to on which it holds liens as trustee."

On March 12, 1912, the petition of Lam and Eades for sale of the mortgaged property came on for hearing before the referee. The Trust Company, as trustee, objected (so far as here material) that the sale could be made only on the petition of the trustee in bankruptcy or after he had been given opportunity to make the same, and because of the power conferred on the mortgage trustee by the default provisions of both mortgages, the Trust Company expressing a desire to "bid on the property to be sold and to use the value of its lien in part payment of the purchase price." Without waiving these objections, the Trust Company asked that the trustee in bankruptcy be made to elect whether to sell the mortgaged property or the bankrupt's interest therein, and to show cause why he should not be required to file a petition for such sale. That officer thereupon elected to sell free of liens, and, by permission of the court, and without objection thereto, joined in and adopted the allegations of the petition of Lam and Eades, filing, however,

¹ "In case default shall be made by the Coal Company as set forth in the preceding section, and shall continue for the time therein prescribed, the trustee may, on its own motion or upon being requested by the holders of 10 per cent. of the then outstanding bonds and upon being indemnified by such holders against all costs, including expenses and counsel fees, shall proceed to enforce the provisions of this indenture by filing suit in its own name in some court having jurisdiction in the premises. The trustee may, however, upon such demand being so made upon it, decline to proceed; in which event, and in that event only, the holder or holders of any of the bonds secured hereby may proceed in his or their own name, and in any such proceeding taken by the trustee or by the holders of bonds a receiver may be at once appointed, and all tolls, rents, issues, incomes and profits shall pass to such receiver, as well those then accrued as those thereafter accruing, and such receiver shall take into his possession all of the real and personal property then under lien for the security of the bonds or covenants herein contained."

a new petition. The referee held that Lam and Eades had the right to claim the benefit of the mortgage security and that the mortgage default clause had no application to existing conditions, expunged the claims of the mortgage trustee as creditor (its claim having never been allowed), and granted the petition of the trustee in bankruptcy for sale of the mortgaged property. The court, on petition for review affirmed the referee's order, reserving to the Trust Company the right to present further claims for whatever was owing it when its proof of debt below was presented, for expenses and compensation in connection with and in the discharge of its duties as mortgage trustee.²

The Trust Company invokes the rule that individual bondholders secured by mortgage containing foreclosure-default provisions such as exist here cannot take proceedings to enforce the security except in case of the mortgage trustee's disqualification or refusal to act. This rule, as applied to the usual case of enforcement of security is well settled. 3 Cook on Corporations (6th Ed.) § 826; *Electric Co. v. Electric Co.* (C. C. A., 9th Cir.) 87 Fed. 590, 31 C. C. A. 118. The question is whether the rule is of controlling application under the facts presented here. It will be noted that, although default under both mortgages had existed for more than six months before bankruptcy occurred, the mortgage trustee has never attempted to foreclose, nor has it been asked to take such action, either before or after bankruptcy. Had foreclosure been pending when bankruptcy intervened, the foreclosure would not ordinarily be interfered with by the bankruptcy court. In *re Rohrer* (C. C. A., 6th Cir.) 177 Fed. 381, 383, 100 C. C. A. 613, and cases there cited. Had the bankruptcy court been applied to for leave to institute foreclosure proceedings, that court would have had power, in its discretion, to grant it. 1 *Loveland on Bankruptcy* (4th Ed.) § 57, p. 171. But such leave was not requested; the only enforcement of security actually asked for by the mortgage trustee was a sale by the trustee in bankruptcy. The substantial grievance of the mortgage trustee is that it was not allowed the status of creditor in recovery upon the bonds, and thus the receipt through the bankruptcy proceedings of the proceeds of the sale of the mortgaged property. Of course, the practical value to the mortgage trustee of the recognition asked lies in the opportunity thereby to recover commissions on the amounts received by it from the bankruptcy trustee and disbursed by the mortgage trustee to the bondholders. This is a valuable right, and should be protected under applicable situation.

But we think the court below reached the correct conclusion upon the case before it. The bondholders were clearly creditors of the bankrupt, and under section 57 of the Bankrupt Act (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]) had the right to prove their claims as such, unless the mortgage has given the trustee a superior right. The mere fact that the trustee holds the legal title to the security, does not necessarily make it, in equity, a creditor with respect to the debt itself. The mortgage trustee's proof of claim alleges that the consideration of the mortgage debt is "moneys loaned to

² This reservation is found in the court's opinion, which contains the only order on review printed in the record.

said Dovey Coal Company by the owners and holders of the bonds referred to in the mortgages or deeds of trust hereinafter mentioned or by their assignors," and the record contains the concession in argument below that the Trust Company "as trustee or otherwise has no pecuniary interest or ownership in said bonds or any of them." It should go without saying that the bondholders are alone interested in the sinking fund. When the Trust Company filed its claim as creditor the bondholders had already been awarded the status of creditors, and no review of this action appears to have been attempted. As said by Judge Evans, in deciding the case below, the trustee "assumed to act for the bondholders after they had acted for themselves, and after their claims had been allowed in an adequate manner."

The case is scarcely within the strict letter of the mortgage, for the trustee has neither been asked, nor has it sought, to "enforce the provisions" of the mortgage "by filing suit in its own name in some court having jurisdiction in the premises." In the absence of direct authority on the subject, we are not satisfied to hold that the petition to have the mortgaged property sold by the trustee in bankruptcy free of liens and the proceeds applied upon the mortgage debt is such an enforcement of security as the default provisions contemplate as inflexibly committed solely to the mortgage trustee. Nor is the case within the spirit of the provision invoked, because there is no longer occasion for the exercise of the authority in question, since bankruptcy has rendered receivership to prove claims thereunder unnecessary; all the bondholders (there being but two) are before the court, and there is thus no possible conflict of interest as between themselves or as between them and the mortgage trustee, except possibly as respects the fixing of fees for past services. Any controversy of this nature the bankruptcy court has ample power to adjust.

In these circumstances, the passing of the proceeds of sale from the trustee in bankruptcy to the two bondholders through the mortgage trustee, as a mere conduit, would be an unnecessary and expensive formality.

The order of the District Court is affirmed, with costs.

WILLIAM KANE MFG. CO. v. ECONOMY IRON WORKS.

(District Court, E. D. Pennsylvania. September 11, 1914.)

No. 1129.

PATENTS (§ 328*)—INFRINGEMENT—IMPROVEMENT IN BOILERS.

The Kane patents, No. 620,931 and No. 686,900, for an improvement in steam and hot water boilers, *held* not infringed.

In Equity. Suit by the William Kane Manufacturing Company against the Economy Iron Works. On final hearing. Decree for defendant.

Cyrus N. Anderson, of Philadelphia, Pa., for plaintiff.

John E. McDonough, of Chester, Pa., for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

DICKINSON, District Judge. This case concerns the proprietary rights conferred by the grant of letters patent No. 620,931 and No. 686,900, and now owned by the plaintiff by assignment.

The defenses are the usual ones. In the view we have taken, it is unnecessary to refer to any of them, except the denial of infringement. The claims are for an improvement in steam and hot water boilers. The patentee sought to make all the units of heat of avail by inducing, or at least promoting, an active circulation. It is claimed for him that in this he succeeded. Whether the result was accomplished in just the way he had planned to accomplish it is by no means clear. If, however, the means of producing that result are present in his device, to be observed, and they are of his devising, the right to their exclusive use belongs to him, even if he failed to recognize the true principles of their operation, or to accurately enunciate the principle, or, indeed, ascribed the result to the wrong cause. His right springs from what he did, and not from his description of how it was done. What he claims to have done is to promote circulation by the means which he adopted.

The true principle of the operation of the means which he provided has been shown to be that of having tubes of different lengths, whereby the water in the longer ones is relatively superheated and passes through them, returning through the shorter ones. The word "length" describes this difference. The patentee uses this word, but it would seem that what he really had in mind was not "length" but "altitude." The impression is given that the thought in his mind was of a series of tubes, some longer than others, and therefore projecting further into the dome or chamber above the crown plate. The ends of the longer ones would thus be considerably above the crown plate and of the shorter ones just reaching it. The drawing accompanying the application emphasizes this. It is true that it is stated to be only of a preferred form, but it is difficult to escape the conclusion that the patentee thought the merit of his contrivance consisted in the fact of this longer protrusion into the upper dome, and that the promoted circulation was due to this. The practical construction, however, while retaining the length of the longer tubes, eliminated the feature of the altitude of their ends by bringing the ends of all the tubes down to about the level of the crown plate. The differing length feature was retained by having the longer ones bent and the shorter ones straight. This brought the whole length of each tube within the drum below the dome, and it is easy to understand how by this circulation was stimulated.

The very capable expert, who testified for the plaintiff, brought the design as reduced to practice within the design as described in the application by taking the latter construction of boiler and then drawing the longer tubes into the drum until the ends of all the tubes were on a level. If this were done, the longer tubes would be bent or curved, and the shorter ones would be straight, and you have the boiler construction as reduced to practice. The position taken is that such a boiler would answer to the claims of the patent, because it would have all the features of the claims, including the differing length

of tubes. It would differ from the drawing accompanying the application only in that the tubes in the one would be shown as all having the same altitude of ends, the longer ones being bent and the shorter ones straight, and in the other as all straight, the longer ones protruding further into the dome space.

As the latter construction is given in the application as preferential only, it does not so limit the claims as that they cannot be construed to cover the former. Moreover, the claim is for length of tube. We cannot assume that the patentee meant "altitude," and both forms of construction possess tube length. This, it is claimed, gives to the patentee the right of protection against the unwarranted use of his idea of inducing circulation by causing the water to pass up the long tubes and down the short ones by the superheating of the long tubes, and brings us to the question of infringement.

The fact is found against the plaintiff. Its claim of infringement is based upon a mistaken idea of what the defendant had done. There is in both makes of boiler a similarity of construction. This they have in common with all makes. The principle of construction of the defendant's boiler in its circulation features, as the plaintiff supposed it to be, is that the water was heated in a floating water chamber suspended by the boiler tubes over the gas and passed up through the superheated long bent tubes, returning to the water chamber through the short straight tubes. The annular water leg or jacket enveloping the drum played no part in the circulation, because the water there was dead slack water, entirely shut off from the circulating current. This was based upon the supposed fact that the raw water was introduced through a pipe passing through the water jacket and connected up with the water chamber, and that the construction was such that the water in the jacket had no connection with the water chamber, except through the boiler tubes. If this were the fact, then, of course, the current of circulation would be from the water chamber up through the longer tubes and back through the short tubes, and the water in the jacket would have played no part in the circulation. So sure of this was the plaintiff that its expert rested the plaintiff's whole case on this fact, and expressed himself as willing to stand or fall by it.

It is now admitted that the fact is otherwise than as plaintiff supposed it to be. The water pipe referred to leads, not from outside the boiler directly into the water chamber, but into the water jacket. This pipe part of the construction is therefore not a water chamber, as in plaintiff's boiler, but a conduit pipe, and the circulation is from the water jacket, through the conduit pipe, and up the tubes into the jacket. The activity of circulation is dependent upon the temperature of the water in the jacket being relatively low. The whole principle of operation is a different one from that of the plaintiff's boiler, and there is no infringement. As the plaintiff's expert admits this conclusion, there is no occasion to vindicate it. The plaintiff's whole case turns on the defendant's construction of boiler being as the plaintiff supposed it to be constructed. The construction is not as it was supposed to be, and the plaintiff should be willing to abide the result of this finding.

When the defense was presented, the defendant's expert described its boiler as so constructed that the water in the jacket was in flow with the water in the pipe over the gas burners, and the principle of its operation was in a current of circulation from the jacket, through the pipe, and up the tubes. There was no cross-examination. The plaintiff then recalled its expert in rebuttal. He testified that the defendant's expert was wrong in his description of defendant's boiler, but admitted that, if he were right as to the fact, he was right in his conclusion of no infringement. Infringement, therefore, by the admission of the parties, turned upon the fact. The fact is with the defendant's expert, and the conclusion follows. The testimony referred to was given when plaintiff's expert was called in rebuttal:

Rudolph M. Hunter, recalled (page 97 of stenographer's notes): After stating that he and defendant's expert differed as to the fact referred to, and giving the different versions of the fact (at page 104), he makes the statement that, if he were wrong as to the fact of construction, he would be wrong in his conclusion, and it follows that, if defendant's expert was right as to the fact, he would be right in his conclusion. Speaking of defendant's idea of the construction and his own, he uses this language (page 105):

"That would change the whole character of the testimony which I gave, if I was not right."

Again, referring to his view that the circulation in the defendant's make of boiler was the same as that in the plaintiff's patented boiler, and reiterating his understanding of the construction of defendant's boiler, he says:

"No water circulates from the annular water leg into the floating tubular water chamber."

He was then interrogated as follows:

"By the Court: Q. I received, of course, that same impression from the testimony in chief. Supposing, however, it be the fact that there is a circulation such as Mr. Berry stated it to be, then what? A. If that circulation was, as he says it was, from the leg, we would then not have the benefit of the long and short tubular passages, and I am free to confess that it would change my opinion which I have expressed, because I understand that the essential part of this invention is in the provision whereby circulation may be had within the floating water chamber by reason of the tubes by which it is suspended. We do not show any water leg, and we do not have any means of circulation from such a water leg. (Page 122.)"

After some colloquy as to what the drawings show, the witness' testimony continued:

Q. "But they [the defendants] are making something more than drawings. They are making boilers. A. That is true. If a boiler was here, it would be self-evident. Q. What I cannot understand is how you two men, the man I assume you to be, and I know Mr. Berry to be, disagree about a thing of that kind. I understand from you and from him now that the difference between you is on that one little simple fact: Does that pipe extend from the outside source of supply right through the water jacket into the lower chamber, or is there an opening into the water jacket, an opening from the water jacket into the lower chamber? That is the proposition, is it not? A. That is the proposition. (Page 123.)"

The witness then expressed his absolute confidence that he was right as to the fact of the construction, and that he was not afraid, but wholly content, to rest the question of the correctness of his conclusions and those of the defendant's expert upon the fact as it would be determined by an inspection of the boiler. Arrangements were made for the inspection of the boiler by counsel for plaintiff. The inspection was made, and the fact is admitted that the plaintiff's expert was wrong and the defendant's expert right. We feel, therefore, constrained to draw the conclusion which it was admitted should be drawn in accordance with the finding of this fact.

It is true that the plaintiff's expert subsequently modified his view by the statement that, although there was a water connection between the annular water leg or water jacket and the floating water chamber or box, there might nevertheless be a circulation from the water chamber up through the long boiler tubes and down through the short boiler tubes back into the water chamber.

In addition, however, to the admission already pointed out, the witness had stated, and reiterated the statement, that the essential feature of the plaintiff's device consisted in the fact of the circulation being from the floating water chamber through the long pipes and back again through the short pipes, and that the merit of the combination which the plaintiff had patented was in a floating water chamber suspended by tubes, above which was the steam chamber, and that the introduction into the defendant's device of this annular water leg or jacket was a mere modification of the form, and not a difference in the construction, because the circulation must still be from the water chamber up through the long pipes and down again through the short pipes to the water chamber, and that the water in the jacket formed and could form no part in the operation of circulation, because the water in the water leg was absolutely dead water, having no means of communication with the water chamber, and therefore played no function in the operation of the boiler, beyond acting purely as a water jacket and absorbing some of the heat which would otherwise be conducted to the outside casing of the boiler; in other words, its whole function would be to keep the outside casing of the boiler cooler than it would otherwise be, thereby saving fuel.

As the feature, which is thus admitted to be an "essential" common feature of the two boilers to render the defendant's boiler an infringement of the plaintiff's patent, is now admitted to be absent from the defendant's boiler, we again cannot escape the compulsion to find no interference. How in weighing the evidence the scales might have inclined, had the plaintiff's evidence been different from what it was, cannot now be surmised. Taking the evidence which is before the court and the testimony as it was given, the weight is overwhelming with the defendant. Every element of construction in each of these makes of boilers is admittedly old. It is most vigorously asserted by the defendant that there is no invention in the way in which these old elements are brought together in the plaintiff's make of boiler. It is just as vigorously urged that, whatever merits the plaintiff's make of boiler may possess, the boiler construction not only possesses no

patentable novelty, but that the features of it which contribute to its success are not present in the make of boiler described in the application on which the letters patent were granted, and are not covered by the claims of the patent.

For the reason already stated, we have withheld going into either of these grounds of defense, and expressly refrain from making any finding as to whether defendant's make of boiler shows invention within the meaning of the patent laws, or whether the claims cover the features which are asserted to be patentable. The whole merit of the plaintiff's design is conceded to be in the combination by which the steam-producing results are achieved, and as this claimed combination does not exist in the defendant's make of boiler, no infringement can be convincingly asserted to have been committed.

The plaintiff's bill is accordingly dismissed, with costs to the defendant, and a decree for this purpose may be submitted.

CLOSZ & HOWARD MFG. CO. v. J. I. CASE THRESHING MACH. CO.

(District Court, D. Minnesota, Fourth Division. February 19, 1913.)

1. PATENTS (§ 46*)—PATENTABILITY—UTILITY OF DEVICE.

A device, to be patentable, must be useful, as well as new.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 54, 55; Dec. Dig. § 46.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SIEVE.

The Martien patent, No. 734,467, for a sieve, claims 1, 2, and 6, *held* void for lack of novelty, and claims 3, 4, and 5 valid and infringed.

3. PATENTS (§ 289*)—SUIT FOR INFRINGEMENT—EFFECT OF LACHES.

The owner of a patent, which failed to mark the articles made thereunder, and, with knowledge of its infringement by defendant, gave no notice of the fact for six years, which was the first that defendant knew of the patent, and afterward delayed bringing suit and the taking of testimony, *held* not entitled to an accounting for damages or profits, but not barred by such laches from the right to an injunction.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 467-469; Dec. Dig. § 289.*]

4. PATENTS (§ 325*)—SUIT FOR INFRINGEMENT—COSTS.

Where the complainant in an infringement suit prevails on some of the claims of the patent sued on, and defendant on others, the costs should be apportioned.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 607-612; Dec. Dig. § 325.*]

In Equity. Suit by the Closz & Howard Manufacturing Company against the J. I. Case Threshing Machine Company. On final hearing. Decree for complainant.

Williamson & Merchant, of Minneapolis, Minn., for plaintiff.

Pierce, Fisher & Clapp, of Chicago, Ill., and Clapp & Macartney, of St. Paul, Minn., for defendant.

WILLARD, District Judge. As indicated at the hearing, I hold now that claims 1, 2, and 6 show no patentable novelty.

[1] Claim 4 has raised portions on the concave or operating surface of the corrugated slats. This feature is a new one. It is true that the indentations on the under or convex surface, which Martien used for strengthening the fastenings of the rods to the slats, also make ridges on the upper or concave side; but claim 4 does not connect the ridges or raised portions in any way with the fastening of the rod to the slat. If Martien had fastened the rod in the same way that Hixson did, and had shown in his specification and drawings these raised portions, I think that claim 4 would have disclosed something that would amount to invention, provided that the improvement was a useful one, for it must be useful, as well as new. *Colorado Tent & Awning Co. v. Parks*, 195 Fed. 275, 115 C. C. A. 245 (8th Circuit).

The great utility now claimed for this improvement was evidently not apparent to the plaintiff when it bought the patent and property of the Ashland Sieve Company in 1903, judging from the price which it paid and the terms of the contract. Nor does it seem to have been apparent to it for many years after that, considering that it never marked its sieves which contained this improvement with the date of the Martien patent until 1910. A great deal of evidence has been taken upon this subject, and, after considering it, I am not able to say that the *prima facie* presumption of utility created by the granting of the patent has been overcome.

[2] Claim 3 is practically the same as claim 4, and the defendant classifies claim 5 with claims 3 and 4. I therefore hold that claims 3, 4, and 5 are valid. That they have been infringed by the defendant since 1901 is admitted.

[3] It is claimed, however, by the defendant, that the plaintiff, by reason of its failure to comply with the provisions of section 4900 of the Revised Statutes (U. S. Comp. St. 1901, p. 3388), is not entitled to recover damages or profits, and by reason of its laches is not entitled even to an injunction.

Section 4900 required the plaintiff to mark its sieves with the date of the patent. It appears that when the plaintiff bought the property of the Ashland Sieve Company it received from that company 110 sieves in all. Part of these, however, were of the Hixson type, and Closz, the president and general manager of the plaintiff, was unable to say how many were of the Martien type. He says that he re-marked the sieves with the date of the Martien patent, and as near as he can recollect sold between 30 and 40. Between 1904 and 1910 all of the sieves sold by the plaintiff contained the Martien ridges. The plaintiff sold during that time, not including those sold in 1910, 21,708 sieves. It marked upon a plate attached to those sieves the dates of three other patents, but it did not commence to mark its sieves with the date of the Martien patent until after this suit was commenced, and about two months before Closz gave his testimony. It cannot be said that plaintiff has complied with section 4900 when it has sold 21,738 sieves, and of these has marked 30, and failed to mark 21,708. *Matthews & Willard Mnf'g Co. v. National Brass & Iron Works* (C. C.) 71 Fed. 518.

The plaintiff claims, however, that it complied with the last part of section 4900 by giving the defendant actual notice of its infringement. This notice was given, if at all, in a conversation between Closz and Bull, the president of the defendant. Passing the question as to whether the conversation, even as claimed by Closz, would be sufficient as a notice of infringement under this section, I am satisfied that the burden of proof resting upon the plaintiff has not been met. Bull says that no notice was given him at all by Closz of the fact that the plaintiff owned the property of the Ashland Sieve Company. It is said in the brief, and was stated on the oral argument, that Closz went to Racine in 1903, and had this conversation with Bull, for the express purpose of giving to him the notice required by section 4900. It seems quite extraordinary that a person who knew as Closz evidently did know, the requirements of this statute, should have contented himself with an informal oral conversation. He would naturally have given notice in writing, if his purpose was as it is now claimed to be. His own testimony, however, shows that that was not his purpose in going to Racine. His only purpose was to ascertain if defendant had a license or shop right from the Ashland Sieve Company. He learned that it had one from Hixson, but with that he was not concerned.

It is claimed, however, by the plaintiff, that the defendant as early as the spring of 1901 commenced to deliberately pirate the Martien invention. If it did this, it must have known of the Martien invention. I have examined all the evidence in the case relating to this subject, and I cannot find any proof to show that the defendant knew anything about the Martien application or patent until it was given notice thereof on April 28, 1909. Bull, the president of the defendant, says (page 2) that he never heard of it until the commencement of this suit. Robinson, the vice president, says (page 14) that the first information the company had was the receipt of a letter from Mr. Williamson, which was on April 28, 1909. Norton, the general manager, says (page 162) that he never knew of the Martien patent before the letter from Mr. Williamson. Russell, who was assistant sales manager in 1900, went to Ashland in the fall of 1900. He then had a conversation with Mykrantz. Mykrantz says that Russell's sole business with him was to make a new contract for the next year for the purchase of the Hixson sieves.

There is no doubt but that all the sieves bought by the defendant from the Ashland people were of the Martien type. It would seem that there was no occasion for Mykrantz to give Russell any notice with reference to the Martien application. He says that Mr. Karth did most of the talking. It is true that Mykrantz testified (page 515) that Russell was told that the Martien patent was pending, but this was in answer to a leading question from the plaintiff's counsel. In any event, there is no evidence that Russell communicated this information to Norton, or to any one else connected with the company. This casual conversation cannot be considered as sufficient evidence of knowledge on the part of the defendant company of the Martien application, so as to convict it of deliberate piracy. Hixson could not remember whether or not he told Russell of the Martien application. The only interview

which he had with Russell was when Hixson still had an interest in the business, and Hixson says that Russell's business at Ashland at that time was to find out about the purchase of a shop right. Hixson said (page 414) that he did not tell Norton of the Martien application. His subsequent statement on page 427 that he possibly did tell Norton about it cannot overcome his previous statement and the statement of Norton that he heard nothing about the Martien application. There is nothing, therefore, in the oral evidence to show any knowledge on the part of the defendant company of Martien's rights prior to April 28, 1909.

Nor is there anything in the documentary evidence to show this. The correspondence which preceded the license contract of April 25, 1901, does not mention the Martien application. The license contract itself does not mention it. The chief object of this license contract was to give to the defendant a shop right on Hixson's improvements, which were set forth in Hixson's application No. 44,043. The number of this application and the date of its filing are given in the contract. This application described the new style of sieve which the defendant said in its letter of April 9, 1901, that it wanted. The last paragraph of the license contract is as follows:

"Said shop right shall include all further improvements made by said Hixson subsequent to the above applications covering improvements in adjustable sieves, as well as incompleated applications made on same by said Hixson subsequent to and including United States letters patent No. 624,333, now claimed to be owned by the Ashland Adjustable Sieve Company."

The plaintiff places great reliance upon this paragraph, as showing notice to the defendant of the adverse claim of the Ashland Company. The words "now claimed to be owned by the Ashland Adjustable Sieve Company" must refer either to patent No. 624,333, or to future improvements to be made by Hixson, or to incompleated applications made by Hixson. It is not necessary to inquire as to which one of these it does refer, for no one of them would cover the Hixson application, No. 44,043. It seems clear, however, that it refers to patent 624,333. This construction coincides with McCray's letter, which clearly indicates that what Hixson claimed to have been defrauded out of was "the old corrugated sieve."

The situation of the defendant, then, was this: In April, 1901, it bought from Hixson the right to manufacture sieves described in his application No. 44,043. The sieve therein described is, as both parties agree, identical with the Martien sieve. At the time it acquired this right it had no knowledge or notice that Hixson was not the inventor of the improvement, or that Martien had made an application for a patent for the invention, or that a patent was ever issued. It commenced the manufacture of sieves of this type in 1901, and it continued it until April 28, 1909, in the same belief as to Hixson's rights, and in the same ignorance as to Martien's rights.

It becomes important, now, to inquire as to what knowledge the plaintiff has of this infringement, and what action it took with reference thereto. Closz testified that at the time his company in 1903 bought the property of the Ashland Sieve Company, which included the Martien patent, he knew that the defendant was making that kind of a sieve, and that he knew as early as 1901 that it was doing so. Closz

also testified that the defendant had a warehouse in the town where he (Closz) lived, and that he was in that warehouse very frequently throughout all these years. He also testified that Robinson, the vice president, told him at the Minnesota Fair in 1902 that the defendant had made 11,000 sieves that year. Closz said that in the winter of 1908, or in January, 1909, he went to Racine to see Robinson, was taken all through the shops, and was told by the superintendent of the defendant that the company was making about 5,000 sieves each year. Yet during all this time he never objected to the manufacture of the sieves by the defendant, never told them that they were infringing a patent which his company owned, and, as has been seen, it never indicated upon the sieves which it was selling that they were manufactured under the Martien patent. The excuses that Closz gives for this inaction are too inadequate to be noticed.

It is very evident that one of two things is true: The plaintiff either thought that the Martien improvement was of no value, and its failure to mark the sieves with the date of the patent would indicate this, or there was a deliberate purpose on the part of the plaintiff to allow the defendant to continue the manufacture of these sieves in great quantities in ignorance of the plaintiff's claim, and then, after a large amount of damages and profits had accumulated, to bring suit therefor. The statement of Closz, as an excuse for his delay, that he knew that the Case Company was responsible, and the fact that when the plaintiff did give notice the six-year statute of limitations upon its claim for damages was within two months of expiring, would indicate the truth of the latter hypothesis. Under the circumstances of this case, the plaintiff is clearly not entitled to an accounting for profits or damages prior to April 28, 1909. *Layton Pure Food Co. v. Church & Dwight Co.*, 182 Fed. 35, 104 C. C. A. 475, 32 L. R. A. (N. S.) 274. (8th Circuit).

Is plaintiff entitled to an accounting for profits since April 28, 1909? Suit was not commenced until October 11, 1909. Plaintiff did not commence to take its testimony until July 14, 1910. The plaintiff having remained quiet for six years with knowledge of defendant's infringement, it was not unreasonable for the defendant to believe that, notwithstanding the notice of suit and its commencement, the plaintiff did not really intend to press its claim. Prior to the time when testimony was taken, which was July 14, 1910, sieves for the summer seasons of 1909 and 1910 had probably been distributed. There is some evidence to indicate that the defendant changed the construction of its sieves for the season of 1911, and did not use one of the Martien type. However this may be, I do not think that under the circumstances of this case, the plaintiff is entitled to any accounting at all.

The defendant claims that the plaintiff is not entitled even to an injunction. This claim, however, under the authorities, cannot be sustained. *Layton Pure Food Co. v. Church & Dwight Company*, 182 Fed. 35, 104 C. C. A. 475, 32 L. R. A. (N. S.) 274. In several of the cases cited by the defendant the bill was dismissed on final hearing, where the question of laches was raised. In some of these cases, however, the patent had expired at the time of the final hearing. In one the validity of the patent and the question of infringement were not consid-

ered. In several the court held that there was no infringement. No case has been cited where the court at the final hearing held that the patent was valid, that it had been infringed, and then dismissed the bill on account of laches, where the patent had some years to run. The nearest approach to such a case is *McLaughlin v. People's Railway Co.*, 21 Fed. 574, which was heard in the Circuit Court on a demurrer to the bill.

[4] Where the plaintiff prevails on some of the claims, and the defendant on others, the costs should be apportioned. *J. L. Owens Co. v. Twin City Separator Co.*, 168 Fed. 259, 93 C. C. A. 561 (8th Circuit). In this case, the plaintiff having prevailed on three claims and the defendant on three, each party should pay its own costs. The result is that a decree should be entered, and it is so ordered, declaring:

1. That claims 1, 2, and 6 are void for want of patentable novelty.
2. That claims 3, 4, and 5 are valid, and that they have been infringed.
3. That the plaintiff is not entitled to any accounting.
4. That the plaintiff is entitled to a permanent injunction, as prayed for in the bill.
5. That neither party recover costs of the other.

In re ARTI-STAIN CO.

(District Court, D. Massachusetts. July, 1914.)

BANKRUPTCY (§ 126*)—ELECTION OF TRUSTEE—MODE OF REVIEW.

The proper method of reviewing the proceedings in the election of a trustee is by a petition for review of the order of the referee approving the appointment made by the creditors, and such proceedings will not be reviewed for other alleged errors on a petition which does not question the legality or propriety of such order.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 182, 184, 187; Dec. Dig. § 126.*]

In *Bankruptcy*. In the matter of the Arti-Stain Company, bankrupt. On review of order of referee dismissing petition of creditors for review of proceedings at first meeting of creditors. Affirmed.

Jacobs & Jacobs, of Boston, Mass., for petitioners.
Goldmann Edmunds, of Boston, Mass., for trustee.

MORTON, District Judge. On February 14, 1914, the first meeting of creditors in this estate was held. Apparently there was a contest over the election of a trustee, at which the petitioners for review objected to the voting of certain claims. The referee seems to have ruled against the contention of the petitioners, to have allowed such claims to be voted, and to have approved the election of the trustee. Seven individual creditors thereupon filed this petition for a—

"review of all matters pertaining in and to the first meeting of the creditors held on the 13th day of February, 1914, and the election of trustee at said

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

meeting, and respectfully represent that the errors complained of are as follows:

"The court erred in making the following orders and rulings:"

Fifteen specifications of error follow, the first eight of which relate to the alleged action of the referee in permitting certain claims to be voted and certain persons to vote, and in not disfranchising certain claims; the next four specifications of error are for not disallowing certain claims; the next two relate to alleged rulings of the referee as to the rights and conduct of the officers of the bankrupt corporation; and the last, to an alleged error of the referee in not ruling that certain persons were colluding to place the administration of the bankrupt's affairs in the bankrupt's control.

No review was specifically requested of the order of the referee approving the choice of trustee, nor is there any specification that such approval was erroneous. It seems to me that the proper way to take review of the proceedings in the election of a trustee is by a petition for review of the order of the referee approving the appointment of the trustee by the creditors. General Order XIII; † *Collier on Bankruptcy* (10th Ed.) p. 1064. And this seems to be the general practice. See *Re McGill* (C. C. A., 6th Cir.) 5 Am. Bankr. Rep. 155, 106 Fed. 57, 45 C. C. A. 218; *Re Sitting* (D. C., N. Y.) 25 Am. Bankr. Rep. 682, 182 Fed. 917; *Re Dayville Woolen Co.* (D. C., Conn.) 8 Am. Bankr. Rep. 85, 114 Fed. 674; *Re Gordon Supply & Mfg. Co.* (D. C., Pa.) 12 Am. Bankr. Rep. 94, 129 Fed. 622. The referee was right in holding that this petition for review did not request a review of his order approving the appointment of the trustee. There is no specific reference in the petition to that order, and the broad request for review above quoted from the first part of the petition, if sufficiently definite to stand alone—of which, as it does not refer to any order of the referee, there is great doubt (see General Order XXVII; ‡ *Collier on Bankruptcy* [10th Ed.] p. 1077)—is plainly limited by what follows it to the "orders and rulings" specifically set out, which do not include the order approving the appointment of the trustee.

It is not necessary to decide whether individual creditors have the right to take review in their own names of an order of approval.

Order of referee affirmed.

IN re HENRY SIEGEL CO.

(District Court, D. Massachusetts. June, 1914.)

1. BANKRUPTCY (§ 357*)—ORDER DECLARING DIVIDEND—REVIEW.

The correctness of an order declaring a dividend is to be determined with reference to the time when it was made, and if proper at that time the subsequent filing of further claims does not afford ground for subjecting it to review.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 541-544; Dec. Dig. § 357.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† 89 Fed. vii, 32 C. C. A. xvii.

‡ 89 Fed. xi, 32 C. C. A. xxvii.

2. BANKRUPTCY (§ 357*)—ORDER DECLARING DIVIDEND—REVOCATION—DISCRETION OF REFEREE.

Whether an order declaring a dividend, which was right when made, should be revoked because of the subsequent filing of a new and large claim, is a matter within the discretion of the referee, the exercise of which is not reviewable, except so far as it proceeds on erroneous principles of law; but where the petition of the new claimant for such revocation is denied, on the ground that the claim is not allowable as a matter of law, and the question may be doubtful, and the payment of the dividend will probably leave insufficient assets to pay the same dividends on the claim if finally allowed, the court may properly stay such payment until the matter can be determined by the appellate court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 541-544; Dec. Dig. § 357.*]

In Bankruptcy. In the matter of the Henry Siegel Company, bankrupt. On review of two orders of referee. Affirmed.

The opinion by Olmstead, Referee, on the first petition, is as follows:

On May 5, 1914, the Department Store Trust, a creditor of said estate, which had proved a claim for accrued rent on the 7th day of April in the sum of \$29,301.70, filed a petition to stay an order entered by me on the 27th day of April, 1914, declaring a second dividend of 10 per cent. to the creditors of said estate whose claims had been allowed. Subsequently, on the 7th day of May, an amendment was allowed to said petition. On the 6th day of May, 1914, said creditor filed a claim against said estate for damages sustained by it for the breach of its lease, or for the breach of leases in the nature of a claim for damages for future rent, in the sum of \$1,920,350.43.

On March 31, 1914, Messrs. Tyler, Corneau & Eames, counsel for said creditor, filed a statement to the effect that it had a claim for future rent in the neighborhood of \$1,000,000. The first dividend of 10 per cent. was declared on the 21st day of March. A first account of the trustees was filed on the 9th day of April, shortly after a month succeeding their appointment; and another account, according to section 47a (10) of the act, is not due from them until the expiration of two months from that time. On or about the 21st of April, I was informed by Mr. Charles B. Jopp, one of the three trustees, that he had on hand the sum of \$242,000 in cash, and good accounts amounting to \$198,000. I was also informed by counsel who are collecting these accounts, part of which are secured by conditional sales, that they are the best accounts they have ever handled, and practically the equivalent of cash. In my conference with Mr. Jopp as one of the officers of the court he also informed me that he had learned from the office of Messrs. Tyler, Corneau & Eames that their claim for future rent amounted to about \$750,000. In a communication with Mr. Wright, a member of the firm of Tyler, Corneau & Eames, had by Miss May MacCarthy, the referee's clerk, Mr. Wright stated to her that their claim amounted to about the sum of \$750,000.

Accordingly the sum of \$150,000, which would be 20 per cent. of a claim of \$750,000, was set aside for the possible proof of this claim. To pay a second dividend of 10 per cent., \$110,000 was required on proofs of claims in the sum of \$1,100,000. The sum of \$260,000 was therefore set aside to pay this second dividend of 10 per cent.

The accounts, amounting to \$198,000, were estimated by Mr. Jopp to be worth at least \$75,000 in money, which, added to the \$242,000 cash, amounted to \$317,000 as available for dividend purposes. Taking from this the sum of \$260,000, there was left a balance of \$57,000 with which to meet further expenses of administration. At the same time, another computation, assuming that the claim of said creditor amounted to \$1,000,000, and assuming that the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

accounts of \$198,000 were absolutely good, as in all probability they are, is as follows:

Cash	\$242,000 00	
Accounts	198,000 00	
Total	\$440,000 00	
Dividend of 10 per cent.....		\$110,000 00
Twenty per cent. for Department Store Trust Claim.....		200,000 00
Required for second dividend.....		\$310,000 00

Deducting \$310,000 from the \$440,000, leaves a balance of \$130,000, of which, with a most liberal allowance for shrinkage, there ought to be an ample balance left for further dividends and expenses of administration.

The desire to pay the dividend at this time was concurred in by Mr. Charles F. Weed and Hon. Louis A. Fronthingham, the other two trustees, with whom as officers of the court I have had frequent conferences. The contention of the creditor is that the dividend to the merchandise creditors was improvidently declared. From the above explanation it will be seen that the subject and figures were carefully considered. Section 65 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448]), relating to "Declaration and Payment of Dividends," provides the *modus operandi* of distribution. Probably no bankruptcy act ever contained such minute provisions for speedy distribution as the present act. Subdivision "b" contemplates that dividends shall be paid frequently, and as often as the condition of the estate will warrant. After the payment of the first dividend, when the amount of funds shall equal 10 per cent., a second dividend "shall be declared." It is certainly a great merit of the present act that dividends shall be declared often and speedily. Section 39a (1), under "Duties of Referees," imposes upon the referee the obligation to "declare dividends." Section 47a (9), under "Duties of Trustees," makes it incumbent on the trustees to "pay dividends within ten days after they are declared by the referee."

The next prerequisite to the payment of dividends imposes upon the referee the duty of determining "such claims as have not been, but probably will be allowed." As at the time of the declaration of the dividend, no information was possessed by me except the statement on file above alluded to, and the oral statement of Mr. Wright, I am of the opinion that a liberal provision was therefore made for any possible future allowance of the claim of this creditor subsequently filed on the 6th day of May, 1914, in a much larger amount than had been theretofore stated.

2. Acting upon the duty imposed upon me of determining whether this subsequently filed claim of \$1,920,350.43 will probably be allowed I dismissed the petition for stay on the ground that in my opinion this claim would not be allowed in this largely increased sum, or in fact in any sum, and am of the opinion that this view is a further justification of the declaration of the dividend of April 27th. After a consideration of the claim itself, which is now a part of the record, and the record may always be considered, and after the consideration of the offers of proof by counsel and their arguments, I am of the opinion that the law governing the allowance of this claim is to be found in the case of *Slocum v. Soliday*, a decision by the Circuit Court of Appeals of this circuit, in an opinion rendered by Judge Putnam, 25 Am. Bankr. Rep. 460, 183 Fed. 410, 106 C. C. A. 56.

There are numerous allegations in the petitions and motions which are not supported by the evidence, and certainly no protest was made against the dividend by said creditor before its declaration.

I accordingly, for the above reasons, denied the motion to stay the payment of said dividend.

The opinion by Olmstead, Referee, on the second petition, is as follows:

This was a petition and amended petition filed May 7, 1914, by a creditor, the Department Store Trust, to review an order entered by me on the 27th

day of April, 1914, declaring a dividend of 10 per cent. to the creditors whose claims had been allowed in said estate. Before filing said petition, said creditor had made a request of the trustee and their counsel, Mr. Nutter, that they, as the representatives of the creditors, should take a review from said declaration of a dividend, which request the trustees refused to comply with. Thereupon said creditor, through its counsel, Mr. Wright, of the firm of Tyler, Corneau & Eames, and Mr. Albert S. Woodman, filed said petition for review, requesting that the trustees be ordered to take a review, or that it be allowed to prosecute a review in the name of the trustees. After an extended hearing, and arguments of counsel, I denied said petitions. Thereupon said creditor filed this petition to review my exercise of discretion in denying the creditor the right to either take a review for itself, or to order the trustees to take a review, or to allow it to take a review in the name of the trustees.

My reason for denying these petitions is based upon the principle and practice established by the weight of authorities, that the creditor must work out his remedy through the agency of the trustee, who is the representative of all the creditors. It is true that General Order XXVII,¹ by the use of the word "creditor," would appear to authorize a creditor to act in the first instance. But this General Order is to be construed in connection with General Order XXI, 6.² The decisions under these two General Orders hold that a creditor under these circumstances has not the right to take a review, but must appeal to the trustee, or the court to order such review. *Foreman v. Burleigh* (C. C. A., 1st Cir.) 6 Am. Bankr. Rep. 230, 109 Fed. 313, 48 C. C. A. 376; *Chatfield v. O'Dwyer* (C. C. A., 8th Cir.) 4 Am. Bankr. Rep. 313, 101 Fed. 797, 42 C. C. A. 30; *In re Lewensohn* (C. C. A., 2d Cir.) 9 Am. Bankr. Rep. 368, 121 Fed. 538, 57 C. C. A. 600; *In re Mexico Hardware Co.* (D. C., N. M.), 28 Am. Bankr. Rep. 736, 197 Fed. 650, in which latter case the authorities and reasons for the rule are reviewed and considered. The procedure was the same under the former bankruptcy law. *Glenny v. Langdon*, 98 U. S. 20, 28, 25 L. Ed. 43.

In support of the same view I may be permitted to cite the case of *Artl-Stain Co.* (D. C., Mass., Ref.) 32 Am. Bankr. Rep. 640, No. 20,344, recently decided by me, and now pending on review [affirmed 216 Fed. 942], in which latter case an attempt was made to set forth somewhat fully the grounds and reasons for this rule of practice and procedure.

Tyler, Corneau & Eames, of Boston, Mass., and Albert S. Woodman, of Portland, Me., for petitioners.

Brandeis, Dunbar & Nutter, of Boston, Mass., for trustees.

MORTON, District Judge. The questions certified involve two petitions. In each the petitioners are the trustees of the Department Store Trust. As such trustees, they leased the store occupied by the bankrupt to Siegel & Vogel, by whom the lease was duly assigned to the bankrupt. The rent was about \$300,000 per year. Subsequent to the bankruptcy the lessors retook possession of the property and leased it to other persons at a reduced rental.

The first dividend, 10 per cent., was declared on March 21, 1914, and was duly paid. On March 31, 1914, counsel for the petitioners wrote to the referee that the petitioners had a claim for damages on account of the failure of the bankrupt to carry through the original lease "in the sum of \$1,000,000." This letter was not sworn to and was in no sense a proof of claim. A few days before April 27, 1914, the referee informed counsel for the petitioners that another dividend would shortly be declared, and understood that the counsel for the petitioners said that the claim would probably be about \$750,000. No proof of it was promptly filed, and on the 27th of April the referee declared a second dividend of 10 per cent. on claims then proved and allowed. Notices

¹ 89 Fed. xl, 32 C. C. A. xxvii.

² 89 Fed. x, 32 C. C. A. xxiii.

of the declaration of this dividend were sent to creditors immediately after it had been declared.

On May 5th the first of these petitions was filed, which was subsequently amended, praying, in substance, that the referee would revoke the dividend order to allow the petitioners to file their proof of claim. On the next day they filed a proof of claim in the sum of \$1,920,350.43 for damages which they claim to have suffered by reason of the bankrupt's failure to carry through the original lease. On the next day, May 7th, they filed the second of the petitions now before the court, praying, in effect, that the trustee in bankruptcy be directed to take a review of the dividend order, or that the petitioners themselves be authorized to take a review of that order in the name of said trustees. The referee declined to revoke or stay the dividend ordered, or to allow a review of the dividend order, and denied both petitions. The petitioners thereupon brought these proceedings to review his decisions. No defect or insufficiency in the formality of the proceedings before the referee is alleged. Two principal questions are presented:

(1) Whether the referee was right in refusing to direct the trustees to take a review of the order declaring a dividend, or to allow the petitioners to take such review in the name of the trustees.

(2) Whether the referee was right in refusing to stay and revoke the dividend in order to give the petitioners an opportunity to prove their claim, so that it could, if allowed, participate in the dividend.

[1] As to (1). The dividend order was right at the time when it was made. The claim in question was not scheduled; it had not been proved; no information whatever had reached the referee that it would be over \$1,000,000. He reports that he has reserved sufficient assets to pay both dividends on that amount. The petitioners deny this. The matter is one as to which the judgment of the referee under whose immediate control the estate is being administered, and who is familiar with the property, is entitled to much weight. I cannot say upon the record before me that he erred on this point. Upon the facts stated in his certificate, he appears, in declaring the second dividend, to have acted with all due consideration for the petitioners' rights.

As the correctness of the dividend order is, of course, to be determined with reference to the time when it was made, not by what occurred thereafter, a review of it would not have brought before the court the subsequent proof of claim, and would plainly have been a futile proceeding. It therefore seems to me that the referee was right in refusing to direct or permit review of the dividend order in the name of the trustees.

[2] As to (2). Whether the dividend order, which was right when made, should be revoked, and the case reopened upon that point, was a matter which lay within the discretion of the referee, to the exercise of which no review lies, except so far as it proceeded upon erroneous principles of law. For somewhat analogous questions under Massachusetts practice, see *Buswell v. Walcott*, Mass. Practice, p. 119, et seq.; Fuller's Mass. Probate Law (3d Ed., by Alger) pp. 475 and 476. In denying the petition the referee may well have found that the petitioners had not been diligent in proving their claim, that the allowance of the petition meant litigation and long delay before the second dividend

could probably be paid, that sufficient assets had been reserved to protect the petitioners' claim to the amount originally stated, that the claim proved was over \$900,000 in excess of that amount, and that it apparently rested upon principles of law which had been declared unsound by the Court of Appeals for this circuit. He may, not unreasonably, have suspected that such a large and late claim was made by the petitioners in the hope that the trustees in bankruptcy would see fit to compromise it, rather than to delay the settlement of the estate until the matter could be decided in the courts. I certainly do not think such views of the case were so erroneous and unfounded that action based upon them amounted to an abuse of judicial discretion.

The referee was bound to exercise his discretion upon correct principles of law. His opinion that the petitioners' claim was unfounded in law and was fully met by *Slocum v. Soliday*, 25 Am. Bankr. Rep. 460, 183 Fed. 410, 106 C. C. A. 56, decided by the Court of Appeals for this circuit, entered so fundamentally into his decision upon this petition that if he is in error concerning it, his discretion was improperly exercised and his action ought to be reversed. *Richardson v. Lloyd*, 99 Mass. 475. It seems to me, however, that in so holding the referee was right, and that the petitioners' claim is met and covered by the case just referred to. There is the possibility that the referee was mistaken upon that point, and the further possibilities that *Slocum v. Soliday* may be overruled, or that the law may be declared otherwise by the Supreme Court of the United States. Neither of these contingencies seems to me sufficiently probable to justify me in holding that the referee abused his discretion in disregarding them.

The payment of the second dividend will so reduce the assets of the estate that, in all probability, not enough will remain to pay both dividends on the petitioners' claim if it should hereafter be allowed for the full amount of \$1,920,350.43. Money once paid out as dividends cannot be recovered from the creditors who receive it. Bankruptcy Act, § 65c. So that the referee's refusal to revoke and reopen the dividend amounts to a final judgment against the petitioners possibly involving a large sum of money. In view of these facts, the petitioners ought to be allowed to submit the questions raised by these proceedings to the Court of Appeals, and the dividend ought not to be paid out until there has been an opportunity for the petitioners to take a review or appeal from this decision.

The orders of the referee denying both petitions are affirmed. The dividend declared is not to be paid within ten days from the date hereof. If within that time the petitioners take and perfect a review or an appeal from this decision, the dividend declared is not to be paid out while said review or appeal is pending, and is being prosecuted by them, with all possible diligence and dispatch.

In re KATZ.

(District Court, D. New Jersey. June, 1914.)

BANKRUPTCY (§ 136*)—CONCEALMENT OF ASSETS—ORDER AGAINST BANKRUPT.

A bankrupt, who conducted a mercantile business, within 60 days prior to the bankruptcy bought goods on credit to the amount of \$20,700. The amount paid to creditors during the same time and the value of the stock on hand aggregated \$7,900. It was also shown that during that time bankrupt drew from the bank and received from collections cash to the amount of about \$12,000, which was wholly unaccounted for, except by testimony that he paid various sums to different relatives from whom he claimed to have borrowed money. Such testimony was, however, directly contrary to prior statements made by the bankrupt to mercantile agencies and inconsistent with other proven facts, and in many respects improbable and unreasonable. *Held*, that the evidence warranted a finding by the referee that the bankrupt had concealed and had in his possession or under his control money to the amount of about \$12,000, and an order requiring him to turn over such sum to his trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

In Bankruptcy. In the matter of Harry L. Katz, bankrupt. On review of order of referee requiring bankrupt to turn over to his trustee the sum of \$12,007.43. Affirmed.

Referee Chandler stated the facts and filed his opinion, as follows:

An involuntary petition was filed against the bankrupt August 28, 1912, accompanied by a petition for a receiver. W. L. Moise was appointed receiver, and subsequently he was appointed trustee. Katz was adjudicated a bankrupt on September 16, 1912. On October 5, 1912, the attorneys for the bankrupt filed schedules setting forth liabilities to creditors holding securities for \$2,875 and a list of 140 unsecured creditors unaccompanied with any information as to the amounts respectively or in the aggregate due them; subsequently 145 creditors filed claims for \$29,878.37; total proven liabilities, \$32,753.37. A number of creditors for an aggregate of several thousands of dollars neglected to file their claims within a year and their claims were disallowed. The schedules showed assets: Stock in trade, \$2,700; vehicles, \$500; machinery, tools, etc., \$1,500; debts due on open account, \$4,025.29. Total \$8,725.29. The receiver and trustee sold the personal property for \$3,075.30, and collected \$1,333.04 of the debts due on open accounts. Total \$4,408.34.

The bankrupt came to Atlantic City, N. J., from New county, Pa., in 1906, accepted employment in one of the large hotels as a steward at a salary of \$800 a year, which was increased from time to time until March, 1912, when his salary was \$2,100 per annum. During this period out of his salary, he saved(?) so he testified, about \$14,000. In October, 1911, he purchased a fruit store in Atlantic City, for an agreed price of \$5,800, paying therefor \$3,000 in cash and securing the remainder by a chattel mortgage for \$2,800. He placed his brother in charge of the store and employed A. Frugoli as an assistant. From the latter he borrowed \$1,000. The bankrupt is an expert bookkeeper. At the opening of business he kept a cash book, ledger, sales book, and purchase book. On May 14, 1912, he made a signed statement to the Fruit & Produce Trade Association of New York. This was an exhibit produced at his examination. In this report he claimed his assets consisted of "cash, value of stock on hand, \$5,500; outstanding accounts, considered good, \$10,000; plant, fixtures, improvements, \$8,750; savings bank accounts, \$5,500; horses, wagons, trucks, etc., \$1,800; cash on hand, \$2,275.84; total, \$28,325.84." Liabilities: "For merchandise, \$2,000; chattel mortgage, \$2,875; total, \$4,875." On August 9, 1912, the bankrupt verbally stated to Brad-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

street's that his assets were \$29,475, with liabilities of \$7,375. During the period between July 1 and August 28, 1912, the bankrupt purchased on credit merchandise aggregating \$20,700, and paid to creditors \$5,200.

After several examinations of the bankrupt the referee and the general body of the creditors entertained the belief that the bankrupt was fraudulently concealing a large sum of money. The creditors organized, appointed a creditors' committee, and contributed the sum of \$1,150 to prosecute a complete investigation into the past history of the bankrupt, his family's and relatives' business connections with him, and his business methods. This committee employed able counsel and detectives, with the result that the committee was able to submit evidence of fraudulent transactions upon which an order was entered by the court on the recommendation of the referee, requiring the bankrupt to surrender \$12,007.43 of concealed assets. The balance of the principal facts in the case appear in the following conclusions and reports of the referee and the opinion of the court:

The stock in the store on the day it was turned over to the receiver was estimated to be worth \$2,700, as appears by the sworn schedule filed by the bankrupt, and assuming that this stock was entirely represented by a portion of the \$20,500 worth purchased between the dates above mentioned, and that \$5,200 had been paid to creditors, the total sum of the value of the stock plus the amount paid to creditors would be \$7,900, leaving an apparent discrepancy of \$12,800 worth of merchandise sold during the 60 days or less that intervened between the day it was purchased and the date of closing the bankrupt's store, and the bankrupt has in no wise accounted for the disposition of this large sum of money. Additionally to this it was testified by the bankrupt and his employees that they were purchasing from \$100 to \$200 worth of goods a day for cash from local dealers, which goods were presumably being sold at a profit. From August 19th to August 26th the testimony of the bankrupt and his brothers was to the effect that \$6,300 was drawn from the bank account of the bankrupt and turned over to the bankrupt in cash.

It was proven, and not denied, that during the last few days prior to the closing of the place of business the bankrupt collected from his customers who were indebted to him \$5,707.43 in cash, which sum was not turned into his bank account; and I think it fair to assume that an additional large sum of money, probably aggregating some thousands of dollars, was similarly collected by the bankrupt and appropriated to his own use, and it is a significant fact that the aggregate of these two sums is within a few hundred dollars of the difference between the amount of goods purchased from the bankrupt's creditors during July and August, and the amount paid to these creditors plus the estimated value of the stock on hand at the time of the failure, so that it seems to me to have been conclusively proven that the bankrupt appropriated and is withholding from his creditors the sum of \$12,007.43.

Testimony was offered on the part of the bankrupt to establish a payment to Samuel Katz, a relative living at York, of \$1,500, which the bankrupt claimed he had borrowed from this relative and had repaid. In view of the fact that the signed and verbal statement made by the bankrupt both before and after this alleged loan was made to him by his relative, Samuel Katz, to the effect that he owed no borrowed money, coupled with the further very indefinite and evasive manner in which all of the testimony concerning this loan was produced before the referee, is convincing to the referee that no such loan as alleged was ever made to the bankrupt by his relative Samuel.

The bankrupt further claims to have borrowed from his brother, Moses, \$2,087.45, and it is alleged that this money was paid to Moses in August, 1912, just prior to the bankruptcy. If the bankrupt borrowed any such sum from Moses, he did not deposit it in any of his various bank accounts, and at the time of the alleged loan there was no apparent concealment or effort made on the part of the bankrupt to withhold any moneys from deposit in one or the other of his various accounts. Another significant fact with relation to this alleged transaction is that both the bankrupt and Moses testified that the \$1,200 that the bankrupt borrowed from Moses was repaid to Moses in April, 1912. This alleged loan would be subject to the same charge of not having been disclosed in the signed and verbal statements above referred to,

if any such loan ever existed. The referee concludes from the testimony as submitted that this alleged loan on the part of Moses was not in fact a loan, and, while the check shows that it was cashed by the bankrupt, the referee believes that, when so cashed, the cash was turned over to Moses by his brother, Harry.

This bankrupt claims to have borrowed \$1,200 from his brother, Emanuel Katz. The referee, the creditors' committee, and the trustee, accompanied by the attorneys for the bankrupt, and the trustee, went to Hanover, Pa., the former residence of Emanuel Katz, to endeavor to ascertain the truth with respect to this transaction. In his original examination the bankrupt claimed that he paid this money to Emanuel in April or May. If he did not pay it until June, the signed statement he made in May was a false statement. When cross-examined, Emanuel Katz could not tell where he procured this money which the bankrupt claimed was loaned to the bankrupt, could not tell whether his wife got it from the bank or whether she had it on her person, and the testimony of both Harry and Emanuel with relation to this transaction was conclusive to the referee that neither of them was telling the truth, and on the testimony taken on the rule to show cause no effort was made on the part of the attorney for the bankrupt to corroborate the testimony of the bankrupt with relation to the facts concerning this transaction if there ever was such a transaction.

The bankrupt sought to explain discrepancies in his testimony by alleging that he had borrowed \$2,200 from one Abe Cooper, of Harrisburg, Pa., a relative, and that he repaid this sum to Cooper personally in cash in Atlantic City in January or February of 1912. Cooper was not produced to substantiate these statements, and it is unbelievable that the bankrupt ever had any such negotiation with Cooper, especially in view of the fact that at the time he alleged he was borrowing money he also alleged that he had ample cash resources on hand.

The bankrupt also claims that he borrowed \$2,800 from his father; this sum being the proceeds of a sale of a stock of furniture at Hanover and the loan having been made by the father to him in cash. The testimony shows that during the entire period of his business career the bankrupt was sending money to his father, and there is no testimony to corroborate any such loan by the father to the bankrupt and of such a character as is entitled to the slightest credence.

The aggregate of these loans which he claims to have borrowed from relatives and to have repaid are as follows:

Samuel Katz, cousin.....	\$1,500 00
Moses Katz, brother.....	2,087 45
Emanuel Katz, brother.....	1,200 00
Abe Cooper, relative.....	2,200 00
Father	2,800 00

The referee has found it an exceedingly difficult matter to arrive at a specific sum which he can conclude has been positively secreted by the bankrupt and withheld from his creditors, but is of the opinion that the sums represented by:

Withdrawn by the bankrupt from August 19th to August 26th, inclusive	\$6,300 00
Moneys collected from debtors of the bankrupt during August, in cash.....	5,707 43
	<hr/>
	\$12,007 43

—have been established beyond any reasonable doubt.

The referee is also convinced that all of the alleged transactions concerning loans from the bankrupt's relatives are fictitious, and that the sum of \$1,500 claimed to have been paid to Samuel Katz, of York, and by Samuel Katz, acknowledged to have been repaid to him, should be returned to the creditors; that the sum of \$2,087.45 claimed to have been paid to Moses Katz in August, 1912, and by Moses Katz acknowledged to have been paid, should be returned to the creditors; that the sum of \$1,200 claimed to have

been borrowed from the bankrupt's brother, Emanuel Katz, and subsequently repaid to Emanuel and acknowledged by him to have been repaid, should be returned to the creditors; and that the sum of \$2,800 alleged to have been borrowed from the father was not in fact borrowed from him, but was furnished to the father by the bankrupt for the purpose of taking an assignment of the chattel mortgage for this sum, and which mortgage was held by Michael Georgetti and subsequently assigned to the father of the bankrupt.

I therefore conclude that at least \$4,787.45, which represents the sums alleged to have been borrowed from Samuel, Moses, and Emanuel Katz, and by them admitted to have been paid to them, should be returned to the creditors; but I cannot determine positively that these sums are now under the control of the bankrupt, and, in view of the decisions holding that an order to return assets may only include assets under the control of the bankrupt, I am of the opinion that these sums cannot be reached by this procedure, although I am convinced, if the bankrupt paid them to his relatives, which I do not believe to be the case, this method of disposing of these moneys was a mere subterfuge to evade payment to his creditors, and that they have been returned to him or are still held for his benefit.

The testimony of the bankrupt in many particulars, as well as the testimony of the members of his family brought to corroborate his testimony, was proven to be false and untrustworthy in many particulars and entirely unworthy of belief. The attitude of the bankrupt, and his testimony concerning his books, and the efforts made by him to suppress the books, and to doctor them, by substituting new books, is indicative of his entire business career. All of his books, except the bank deposit books, have disappeared, and it is significant that the books of account were in his place of business up to within a few days of the day of the closing, so that this disappearance of the books has effectually destroyed all opportunity to verify or deny both his probable and improbable statements.

The testimony taken on the original examination of the bankrupt and that subsequently taken on the rule to show cause does not harmonize in many particulars, and indicates an effort on the part of the bankrupt to explain discrepancies which were not fairly or fully explained. The attitude of the witnesses on behalf of the bankrupt, as well as his own attitude, was such as to be convincing to the referee that a studious effort was being made to conceal the truth with regard to the bankrupt's affairs, and this attitude was particularly apparent and to such an extent as to elicit comment from persons who were in attendance during the whole proceedings.

A fair preponderance of evidence is convincing to the referee that the bankrupt has fraudulently withheld from his creditors at least \$12,007.43, and that the sum is now in the possession and control of the said Harry L. Katz, bankrupt, and that it should be surrendered to the trustee for the benefit of the creditors of the estate, and upon presentation an order will be signed directing the bankrupt to turn over to the trustee this sum.

The bankrupt filed exceptions to the foregoing report of the referee, and these were argued by the respective attorneys.

Clarence L. Goldenberg, of Atlantic City, N. J., for trustee.
Bolte & Sooy, of Atlantic City, N. J., for the bankrupt.

CROSS, District Judge. The petition for review brings before the court an order of the referee to whom the cause was referred, dated April 15, 1913, directing the bankrupt to account for and pay over to the trustee within ten days the sum of \$12,007.43 belonging to the bankrupt's estate, and found by the referee to be in his possession and under his control. The petitioner excepted to that order in six respects, the first two of which relate to the form of the trustee's petition. The petition excepted to, however, was the original and not the amended one, as appears by reference made to its filing date in the

petition for review. To the trustee's amended petition no specific exceptions appear; but if the exceptions are so directed that they could be held to apply to the amended petition, they would nevertheless have to be overruled, since its allegations are deemed sufficiently certain and specific to apprise the respondent of the claim made against him. The remaining four exceptions relate to matters upon which the referee has passed, with result unsatisfactory to the bankrupt, hence his appeal. Of that concerning the admission of testimony, it may be said that such testimony, if any, as was improperly admitted, was relatively immaterial and did not affect the referee's decision; in other words, there was legal testimony amply sufficient to support his findings of fact.

In compliance with Order 27 of General Orders in Bankruptcy,¹ the referee by his certificate states that he has certified to this court the question presented, a summary of the evidence relating thereto, and the findings and order of the referee thereon. The summary of the evidence thus certified has not, so far as appears, been attacked in such manner as to bring to the attention of the court, for correction, any particular misstatement, defect, insufficiency, or error therein. However, and apart from that fact, all of the testimony taken by the referee was sent up by him and has been read and considered by the court upon this appeal, and the conclusion reached, without difficulty, that the order appealed from is supported by a preponderance of such evidence. Many glaring discrepancies and inconsistencies, and improbable and unreasonable statements, appear in the bankrupt's proofs, a considerable number of which have been pointed out by the referee. When these are considered, and the fact kept in mind that he saw the witnesses and heard them give their testimony, the court would be loath to set aside, and indeed, under the authorities, would not be justified in setting aside, his order, except for gross and manifest mistake of law or fact, neither of which appears. I am not at all sure that, had I dealt with the case in the first instance, I would not have ordered the bankrupt to restore to the estate, a considerably larger amount than the referee has.

However, I am not called to pass upon that question. It is sufficient to say that in my judgment the order under review is supported by the clear weight of the testimony, and it will accordingly in all respects be affirmed.

The attorneys for the bankrupt appealed from the judgment entered on the foregoing opinion to the Circuit Court of Appeals for the Third Circuit. They failed to prosecute the appeal within the time required by the rules, and, on motion of the attorney for the trustee, the appeal was dismissed. A petition was then filed with the referee by the trustee, praying for an order to require the bankrupt to turn over to the trustee the sum of \$12,007.43, and the referee allowed this order. The bankrupt disregarded the order, whereupon the trustee filed with the referee a petition asking that the bankrupt be certified to the District Court for contempt for failure to obey the order to surrender. The referee so certified. As a result of this certificate the court entered an order that the proceedings be referred to the referee as special master, to ascertain "what, if any, disposition the bankrupt has made of the moneys found to have been in his possession and under his control on April 13, 1913, and if any disposition has been made of such moneys, or if the condition of the bankrupt has changed financially since that time, then, if

¹ 89 Fed. xl, 32 C. C. A. xxvii.

changed, in what way, and what are the reasons therefor, and to report the result of his examination and findings to this court." After the usual recitals, and a summary of the specific issues raised by the petition and answer, upon which the order of reference was based, the following additional report was filed by Chandler, Special Master:

Findings of Fact.

The only witness produced was the bankrupt, who testified that he did not desire to change any of the testimony given by him at former hearings; that he has not in his possession the amount of money specified in the order or any part thereof; that he did not have the amount of money specified in the order, or any part of it, in his possession at the time the order was made; and that he has made efforts to comply with the order.

The order of reference to me is specifically directed to ascertain what dispositions the bankrupt has made of the moneys in his possession or under his control. He denied the money was in his possession when the order was made. He offered no testimony whatever concerning the moneys under his control.

Neither did he offer any testimony to show that his financial condition has changed, except that he is earning a salary of \$2,100 per annum.

My conclusions, as a result of this examination, are that the bankrupt has failed to show any reasons why he should not surrender the money, or sufficient reason why he should not be committed for contempt for his refusal to obey the order.

Conclusions of Law.

In his opinion filed in this case Judge Cross found that the bankrupt had in his possession or under his control the sum of \$12,007.43, which he was fraudulently withholding from his creditors on the 15th day of April and 16th day of June, 1913, and ordered this sum to be surrendered to the trustee. This question is therefore *res adjudicata*, and any testimony of the bankrupt to the effect that he did not have or control this money when the order was made is irrelevant. "Where, after a hearing upon a petition by the trustee to compel bankrupt to turn over assets, the referee ordered him to deliver to the trustee goods in a specified sum, and upon review the District Court approved and confirmed the order of the referee and ordered bankrupts to turn over the goods or pay a specified sum before a day certain, or if he did not to show cause on that day why he should not be punished for contempt, the District Court is not bound to make a new and independent investigation of the fact of the concealment of assets and of bankrupt's present ability to comply with the order to turn over such assets to his trustee." *Kirsner v. Taliaferro* (C. C. A., 4th Cir.) 29 Am. Bankr. Rep. 832, 833, 202 Fed. 51, 120 C. C. A. 305.

The bankrupt testified that he has been unable to earn or borrow a sufficient amount to comply with the order of the court. I am of the opinion that these facts, if they are facts, have no relevancy to the question of his ability to surrender money in his possession or under his control. The bankrupt's testimony concerning his ability to raise money impresses me with the belief that he is endeavoring to make terms with the court, favorable to himself, in order to escape a full compliance with the order.

DE KOVEN et al. v. LAKE SHORE & M. S. RY. CO. et al.

(District Court, S. D. New York. September 5, 1914.)

1. MONOPOLIES (§ 24*)—STATE ANTI-TRUST LAWS—SCOPE.

A bill does not state a cause of action for an injunction to restrain the consolidation of two railroad companies as being in violation of the anti-trust laws of certain states, where it alleges no facts showing any restraint upon transportation exclusively in any one of such states.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.*]

2. MONOPOLIES (§ 24*) — CONSOLIDATION OF CORPORATIONS — INJUNCTION — STOCKHOLDERS' SUIT—EQUITY JURISDICTION.

A suit by minority stockholders of a railroad company to restrain the majority stockholders from effecting a consolidation with another company on the ground that it will be illegal as in violation of the Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), is not one brought under the provisions of such act, but one invoking a remedy which existed before its passage, and is within the general equity jurisdiction of a federal court.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.*]

3. MONOPOLIES (§ 24*) — CONSOLIDATION OF CORPORATIONS — STOCKHOLDERS' SUIT—ENJOINING CONSOLIDATION.

Minority stockholders of a railroad company *held* not entitled to a preliminary injunction to restrain its consolidation with another company on the alleged ground that it would be illegal as in restraint of competition and in violation of the anti-trust act, where, through ownership of a majority of the stock of one company by the other, they were, and had been for a number of years, as completely under one management and control as though consolidated, and during all such time the United States had acquiesced therein.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.*]

4. INJUNCTION (§ 135*)—PRELIMINARY INJUNCTION—DISCRETION OF COURT.

The granting of a preliminary injunction is discretionary with the court; the discretion to be exercised according to the circumstances of each case and the comparative injury that may result to the interested parties from its granting or denial.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 304; Dec. Dig. § 135.*]

5. RAILROADS (§ 123*)—STOCKHOLDERS' SUIT TO RESTRAIN CONSOLIDATION—PRELIMINARY INJUNCTION.

The plan of consolidation of two railroad companies proposed by one, which owned a majority of the stock of the other, *held* on its face and on the showing made not so clearly unfair or inequitable to the minority stockholders of the latter as to justify the granting of a preliminary injunction restraining the consolidation; their objection being only to the amount of stock to be allotted to them in the consolidated company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 389; Dec. Dig. § 123.*]

In Equity. Suit by Annie L. De Koven and Cecil Barnes, as trustees, etc., against the Lake Shore & Michigan Southern Railway Company and the New York Central & Hudson River Railroad Company. On application for preliminary injunction. Denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Cadwalader, Wickersham & Taft, of New York City (George W. Wickersham, of New York City, Otto Kirchner, of Detroit, Mich., H. M. Daugherty, of Columbus, Ohio, and Edwin P. Grosvenor, of New York City, of counsel), for plaintiffs.

Charles C. Paulding, of New York City (Walter C. Noyes, of New York City, Alexis C. Angell, of Detroit, Mich., and Albert H. Harris, of New York City, of counsel), for defendant Lake Shore & Michigan Southern Ry. Co.

Alexander S. Lyman, of New York City (Walter C. Noyes, of New York City, Alexis C. Angell, of Detroit, Mich., and Albert H. Harris, of New York City, of counsel), for defendant New York Cent. & H. R. R. Co.

GRUBB, District Judge. This is an application by the plaintiffs for a preliminary injunction, restraining the defendant from completing a projected consolidation of the two railroad companies who are the defendants in the bill of complaint. The bill is filed by one of the minority stockholders of the defendant the Lake Shore & Michigan Southern Railway Company, owning 500 shares of its capital stock, on behalf of the plaintiffs and all other of its stockholders, who may after its filing desire to unite with plaintiffs therein.

The proposed consolidation is attacked by the plaintiffs and its completion asked to be restrained upon three separate grounds: (1) Because it is alleged that the proposed consolidation will be in violation of the anti-trust laws of the states of Michigan, Ohio, and Pennsylvania. (2) Because it is alleged that the proposed consolidation will be in violation of the act of Congress, approved July 2, 1890, known as the Sherman Anti-Trust Law. (3) Because it is alleged that the terms of the proposed consolidation are unfair and inequitable to the minority and dissenting stockholders of the defendant the Lake Shore & Michigan Southern Railway Company.

[1] First. While the bill alleges that the proposed consolidation will violate the anti-trust laws of the states of Ohio, Michigan, and Pennsylvania, it avers no facts showing a restraint of anything but interstate commerce, between the city of Buffalo, in the state of New York, and the city of Chicago, in the state of Illinois. The restraint or monopoly of interstate transportation is provided for by the Sherman Anti-Trust Law, and it displaces the jurisdiction of the states to regulate or prohibit with regard to that subject-matter. There is no averment of any restraint upon any transportation exclusively within any one of the states mentioned, to which the anti-trust laws of any one of those states might apply, even if it be conceded that the regulation or prohibition of such restraints or monopolies would still be held to be within the competency of the states, in view of the existing legislation of Congress upon the subject of restraints and monopolies in transportation.

Second. It is alleged that the proposed consolidation will be in violation of the Sherman Anti-Trust Law. The lines to be consolidated are neither competing or parallel lines. The defendant the New York Central & Hudson River Railroad Company, however, is the owner

of a controlling interest in the capital stock of the Michigan Central Railroad Company, which, by virtue of its controlling stock ownership in the Canada Southern Railway Company, forms a line from Buffalo to Chicago, which, separately owned, would compete with the line from Buffalo to Chicago, which will be formed by the consolidation of the two defendants. It also appears that the defendant the New York Central & Hudson River Railroad Company is the owner of the capital stock of the Western Transit Company, which owns a line of steamships operating between Buffalo and Chicago, and which would, separately owned, compete with the consolidated line. The defendant the Lake Shore & Michigan Southern Railway Company also owns the New York, Chicago & St. Louis Railroad Company, which is a practically parallel line to it from Buffalo to Chicago. It is by virtue of this situation that the plaintiffs contend that the proposed consolidation will continue and perpetuate the existing control of all four lines in the consolidated company, and so operate in violation of the Sherman Law.

The defendants' reply to this contention that: (a) It is the well-settled rule in the Second Circuit that a suit in equity under the Sherman Law will only lie at the instance of the United States; (b) that the bill and affidavits fail to show any restraint or monopoly of interstate transportation arising out of the proposed consolidation; (c) that the control, which is alleged to be in violation of the law, already existed for many years before the plan of consolidation was considered, and would not be intensified by the completion of the plan; and (d) that the former control is changed by the plan of consolidation in form only, and not substantially in degree, and that the United States has for years acquiesced in that control, through failure of the department of justice to act, and affirmatively through the approval of the Interstate Commerce Commission.

[2] (a) The plaintiffs contend that the bill is not a suit in equity under the Sherman Act, and that the decisions from the Second Circuit, relied upon by the defendants, do not therefore apply. It seems to me that the plaintiffs' contention is correct. The present suit is one by a dissenting minority stockholder to restrain the majority stockholders from accomplishing what is asserted to be an illegal or ultra vires act. It is, therefore, a well recognized species of general equity jurisdiction, and not a mere statutory remedy, conferred by the Anti-Trust Law. The plaintiffs would be entitled to resort to this remedy if the Sherman Law had provided no equitable remedy for its enforcement, and the fact that it did provide one, available only to the United States, cannot be held to deprive an individual of an equitable remedy which was open to him before and independent of the statute. The fact that the relief granted to the government in an equity suit, instituted by it under the Sherman Law, might be of the same nature as that granted an individual plaintiff cannot change the result. Nor can the fact that the illegal or ultra vires act is made so only by the statute, which creates the equitable statutory remedy, do so. If it be an illegal or ultra vires act, however made so, a minority stockholder had, under the general principles of equity juris-

prudence, a remedy to restrain the corporation and the majority stockholders from accomplishing it, of which he is not deprived by the creation of a statutory equitable remedy in favor of the government alone, and of which he is not permitted to avail. It seems clear that if the Sherman Law had declared combinations in restraint of trade illegal and *ultra vires*, and provided no equitable remedy in favor of the government or any one else, the interest of a minority stockholder that his shares should not be involuntarily transferred from a lawful to an unlawful enterprise would entitle him to complain of the proposed action of the corporation, through the majority stockholders, in a suit in equity. The providing of such a statutory remedy, which could be availed of only by the government, ought not to be construed to take away by implication the existing remedy of the individual stockholder under general equity principles. A dissenting stockholder would have a standing in equity to enjoin a proposed consolidation of competing parallel lines, in violation of a state constitutional provision prohibiting such consolidations, upon the ground that it was *ultra vires*. I can see no distinction between the effect of such a constitutional provision and that of the Sherman Law in this respect.

(b) The averments of the bill are sufficient to put in issue, as a matter of pleading, the illegality of the proposed consolidation under the Sherman Act, and the affidavits of plaintiffs to the bill and of Mr. Rowland are some evidence tending to support the allegations of the bill. The affidavits of Messrs. Smith and Kallman qualify or deny the facts contained in those of the plaintiffs. The issue is presented for decision upon an application for a preliminary injunction. It is clear that so important and complicated an issue cannot be satisfactorily determined, except upon final hearing, and would be best determined in a suit in which the government was the complaining party, since a decision in this case would not be binding upon the United States, but, on the contrary, a decision in a suit instituted by the United States would be controlling as to all parties.

[3] (c) The defendants assert that the consolidation would affect the form, but not the fact of control, which would remain after consolidation just as it did before, and with no greater force or effect. This seems to have been the view taken by the Interstate Commerce Commission as justifying its report in favor of the consolidation. It is quite clear that the New York Central Company, through its stock ownership in the Lake Shore Company and the identity of managements, has since 1898 exercised as complete a control over the latter as it could have done by a legal consolidation. The proposed consolidation can, at most, only make easier the perpetuation of that control. It cannot add anything to the control, since it was complete already. If the control is hereafter determined to be illegal, it does not follow that the proposed consolidation of the two defendants would be found obnoxious to the statute. Before consolidation the New York Central, if the combination was found to be illegal, would have been compelled to part either with its interest in the Michigan Central Company and in the Western Transit Company, or both, or with its interest in the Lake Shore Company, and the Lake Shore with its

interest in the New York, Chicago & St. Louis Company. The same alternative would be presented to the consolidated company after the consolidation, in the event the consolidation should be successfully assailed. Confronted with the necessity so created, the consolidated company might well elect to part with its interest in the Michigan Central and in the steamship company and retain its interest in the Lake Shore. If it did so, a consolidation, such as is proposed between the defendants, would be beyond criticism. Its proposal to consolidate the two defendants without including the Michigan Central and the steamship company would indicate such an election on the part of the New York Central Company in advance of a requirement to exercise it. If the stock ownership of the New York, Chicago & St. Louis Company by the Lake Shore Company is in violation of the law, it is because the two lines are parallel and competing, and this is as true before as after the proposed consolidation. The status would therefore in no way be affected by the proposed consolidation. The illegality of the plaintiffs' ownership of stock in that company would exist before and after consolidation in exactly the same degree. It is true that a future forced separation of the Michigan Central Company or the steamship company, or both, from the consolidated company might lessen the value of the consolidated company's stock, as compared with the Lake Shore Company's stock, and so make necessary, to accomplish equity to the Lake Shore Company's minority stockholders, a more favorable ratio than is now proposed to be accorded them in the consolidation. The necessity for such a separation and the probable terms of disposition of the interest of the consolidated company in the Michigan Central Company and the steamship company, in the event thereof, are too conjectural, so far as causing injury to the minority stockholders of the Lake Shore Company is concerned, to justify the interposition of the court to stay the consolidation, at least at this stage of the proceeding. The enforced separation of the Western Transit Company depends upon the decision of the Interstate Commerce Commission under the Panama Canal Act, and the probable result of the exercise of its discretion is entirely conjectural.

(d) The acquiescence of the United States in the control hitherto exercised by the New York Central Company in the Lake Shore Company, the Michigan Central Company, and the steamship line, and of the Lake Shore Company in the New York, Chicago & St. Louis Company, would probably not prevent the government from hereafter seeking a dissolution of the combination, if it be a combination in restraint of interstate transportation, in violation of the Sherman Law. *United States v. International Harvester Co.* (D. C.) (Eighth Circuit, decided August 12, 1914) 214 Fed. 987.

[4] The granting of a preliminary injunction is discretionary with the court; the discretion to be exercised according to the circumstances of each case and the comparative injury that may result to the interested parties from its granting or denial. In view of the long period of acquiescence on the part of the United States in the identical control exercised by the New York Central Company; in view of the unsatisfactory opportunity of determining the issue on a preliminary

motion, and the very great advantage of having the legality or illegality of this control determined once for all, which can only be done at the suit of the United States; in view of the fact that the illegal control, if it be illegal, existed before as well as after consolidation, and, so far as the ownership of the New York, Chicago & St. Louis Company is concerned, with the acquiescence of the plaintiffs and the other minority stockholders of the Lake Shore Company, and in view of the fact that the illegality in the combination, if any exists, can be removed without disturbing the consolidation of the two defendants, and upon terms fraught with only conjectural injury to the plaintiffs, it seems to me that the discretion of the court would be properly exercised by denying the motion for an injunction pending final hearing, leaving the plaintiffs to seek redress in the interim, if entitled to any on this line, through the United States in a suit brought by it, or upon final hearing in this cause. If the United States should take action pending final hearing, it would be time enough for the plaintiffs to apply to stay the consolidation pending the result of such action. If the consolidation should be completed pending final hearing, in the absence of governmental action, and the control of the consolidated company be held thereafter illegal, it would not follow that the consolidation would be set aside, since the illegality could be corrected by the separation of the companies subject to such control, other than those consolidated.

[5] Third. The plaintiffs also attack the proposed consolidation upon the further ground that the basis of exchange of the Lake Shore shares for those of the consolidated company is unfair and inequitable to the minority stockholders of the Lake Shore Company. The plan of consolidation can be carried out only by the New York Central Company voting its shares in the Lake Shore Company in favor of it. It must therefore affirmatively appear that the plan is fair and just to the minority stockholders, or it cannot be sustained. The New York Central Company, as a majority stockholder in the Lake Shore Company, occupies to its minority stockholders a quasi fiduciary relation, which imposes the obligation of perfect good faith in its dealings towards the minority. If the agreement of consolidation is shown to be fair and equitable to the minority, it should be permitted to be proceeded with, otherwise not.

The agreement of consolidation provides that the minority stockholders of the Lake Shore Company shall receive five shares of the capital stock of the consolidated company for each share of Lake Shore stock owned by them; that the stockholders of the New York Central Company shall receive one share of stock in the consolidated company for each share of their stock in the original company; that the Lake Shore stock owned by the New York Central Company shall be canceled; and that the consolidated company shall assume the debts of, and its entire property be liable for, the obligations of the constituent companies. The effect of the agreement, as it relates to the minority stockholders of the Lake Shore Company, is to give them a one-tenth interest in the properties of the Lake Shore, which is the proportion of their ownership in that property at present, and in ad-

dition a one-tenth interest in the properties of the present New York Central Railroad Company. This would be represented by their stock interest in the consolidated company. As they retain the same quantum of interest in the Lake Shore properties after as before consolidation, it is clear that the agreement of consolidation deals fairly with them, unless it be that the addition of the properties of the present New York Central Railroad Company, subject to its obligations, will make their proportionate interest in the consolidated property of less value than their present like proportionate interest in the present properties of the Lake Shore alone. This would seem to depend upon whether or not it is likely that the present properties of the New York Central Railroad Company, when taken in connection with its present and prospective indebtedness, will prove of advantage to the Lake Shore or be a burden upon it. So long as the net earnings of the present New York Central properties, applicable to the payment of dividends, amount to a substantial sum, it is clear that the consolidation will be an advantage to the Lake Shore minority stockholders, since their dividends upon the consolidated properties, in that event, will exceed those from the Lake Shore properties alone. It is conceivable that the New York Central properties might fail to earn net sufficient to more than pay the fixed charges to which they are subject, or that the burden of its indebtedness assumed by the consolidated company might at some time be such as to depress the value of the interest of the minority stockholders of the Lake Shore in the joint properties below that of their interest in those of the Lake Shore alone. This is the plaintiffs' contention.

An examination of the affidavits presented upon the hearing of the motion convinces me, as far as affidavits can, that there is no reasonable ground to apprehend that the net earnings of the present properties of the New York Central Railroad Company, applicable to the payment of dividends, will reach the vanishing point, so far as it is possible to foresee at the present time, or that these properties are at all likely to become a burden and a disadvantage to the consolidated company. It is true that the proportion of net operating income, necessary to take care of interest and rentals, is much higher for the New York Central than for the Lake Shore, and that this fact is to be reckoned with as one of the factors in fixing a fair proportionate value between them. It is, however, not the sole factor, and it seems to me undue emphasis is given to it by the method used by Mr. Thompson in his affidavit in support of plaintiffs' motion. That some weight has been given to it, upon the basis of the proposed consolidation, is evident from the fact that, based upon the proportionate contribution of each road to the dividend fund according to the average net earnings of each for the last five years, the ratio of value would be less than $3\frac{1}{2}$ to 1, instead of 5 to 1, as in the proposed consolidation. It is possible that, upon a fuller presentation upon final hearing, a different conclusion may be reached. It is difficult to reach a satisfactory conclusion upon the affidavits of experts and in the absence of cross-examination. If the attitude of the plaintiffs was that of resisting consolidation upon any terms, irreparable injury might result from

the denial of the preliminary injunction. Their objection is not to the fact of consolidation, but to the proportion of values on which the exchange of stock is to be had according to the proposed agreement. A ratio of $7\frac{3}{4}$ to 1 would, it appears, not be unsatisfactory to them. Upon final hearing, if plaintiffs sustain their contention that their minority stock should receive a larger proportionate interest in the consolidated company, it will not be too late to correct the mistake, and this can be done without necessarily setting aside the consolidation, if it has then been completed. A court of equity could decree the setting aside of the consolidation conditionally upon the plaintiffs not being accorded the increased share in the consolidated company or its equivalent in money, which the court may find the plaintiffs entitled to, in addition to what they receive under the agreement of consolidation. In that way the interest of the plaintiffs would receive the proper protection, the plan of consolidation would not be unduly delayed pending the final hearing, and any injustice ascertained upon final hearing to have been done the plaintiffs or other dissenting minority stockholders could then be rectified without necessarily upsetting the consolidation. The pendency of the litigation would charge those dealing in the securities affected by the consolidation with notice of the rights of the plaintiffs and other minority stockholders and preserve the plaintiffs' rights unimpaired as to such persons.

In view of the fact that the complaint of the plaintiffs relates to the amount of stock in the consolidated company to be allotted to them by the proposed agreement and is not directed against a consolidation upon any terms, and in view of the fact that the consolidation may be allowed to proceed, pending final hearing, and no irreparable injury result to the plaintiffs, whose additional interest in the consolidated company, if any there be, can be provided for in the final decree, or by setting aside the consolidation, in the event it is not provided for, and in view of the probable injury to defendants by delaying the accomplishment of the consolidation until final hearing, an injury not admitting of computation upon a basis that would justify compensation in the way of damages, it seems to me that the motion for a preliminary injunction should be denied upon this ground also, and the rule to show cause discharged, at the costs of the plaintiffs.

In re HELEKER BROS. MERCANTILE CO.

(District Court, D. Kansas, First Division. March 28, 1914.)

No. 1701.

1. BANKRUPTCY (§ 81*)—INVOLUNTARY PROCEEDINGS—SUFFICIENCY OF PETITION.

A petition in involuntary bankruptcy against a corporation *held* to sufficiently charge that a transfer of property by the corporation was made when it was insolvent, and with intent to hinder, delay, and defraud creditors, to constitute such transfer, if the allegations were proved, an act of bankruptcy, under Bankr. Act 1898, c. 541, § 3a(1), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 59, 113-118, 125; Dec. Dig. § 81.*]

2. BANKRUPTCY (§ 101*)—EXCLUSIVE CHARACTER OF ACT—RIGHT OF CREDITORS TO ENFORCE.

By reason of the exclusive nature of the Bankruptcy Act, the manner of its enforcement, and the forum in which it is enforced, creditors obtain rights in the assets and property of their insolvent debtors, of which they may not be deprived by the voluntary action of the debtors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 163; Dec. Dig. § 101.*]

3. BANKRUPTCY (§ 60*)—ACTS OF BANKRUPTCY—"GENERAL ASSIGNMENT."

Bankr. Act 1898, c. 541, § 3a(4), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), which makes it an act of bankruptcy if a debtor shall have "made a 'general assignment' for the benefit of his creditors," does not refer to such acts only as constitute such an assignment under laws of the state, nor concern itself with the form of the written instrument employed, but contemplates any act of a debtor, regardless of the manner or form of its accomplishment, by which he parts with the title and possession of all of his property for the benefit of his creditors, to be disposed of by the trustee or assignee selected by him independent of the Bankruptcy Act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*]

For other definitions, see Words and Phrases, First and Second Series General Assignment.]

4. BANKRUPTCY (§ 60*)—ACTS OF BANKRUPTCY—GENERAL ASSIGNMENT.

An instrument executed by a corporation, which, while denominated and in form a mortgage, with a defeasance clause, in fact conveyed all of its property to trustees, with the right of immediate possession, to be by them converted into money and the proceeds distributed among all of its creditors, and under which they took such possession, *held* in effect a general assignment, and to constitute an act of bankruptcy under Bankr. Act 1898, c. 541, § 3a(4), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*]

In Bankruptcy. In the matter of the Heleker Bros. Mercantile Company, bankrupt. On motion to dismiss amended petition. Denied.

McClintock & Quant, of Topeka, Kan., for petitioning creditors.

Gregg & Gregg, of Frankfort, Kan., and Ellis & Yale, of Kansas City, Mo., for respondent.

POLLOCK, District Judge. On September 19, 1913, the bankrupt made, executed, and delivered the following instrument in writing,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

thereby conveying in trust, for the purposes therein stated, all of its property and assets, to wit:

Trust Mortgage.

Know all men by these presents, that this mortgage, made and entered into this 19th day of September, 1913, by and between the Heleker Bros. Mercantile Company of Frankfort County, of Marshall, state of Kansas, party of the first part, and E. D. Plummer, Wm. J. Gregg, and Frank W. Yale (hereinafter referred to as trustees), parties of the second part, and the persons, firms, and corporations (hereinafter referred to as creditors), named in Schedule A hereto attached and made part hereof, parties of the third part, witnesseth: That the party of the first part, for and in consideration of the indebtedness due said creditors as set forth in said Schedule A opposite their respective names, the trust hereinafter mentioned and created, and of the sum of one dollar to it paid by the said parties of the second part, the receipt whereof is hereby acknowledged, does by these presents sell, assign, transfer, and mortgage to the said part....of the second part,.....successors and assigns, the following described property situated in the county of Marshall, state of Kansas to wit:

1. *All its stock of goods, wares, and merchandise, consisting chiefly of clothing, furnishing goods, hats, caps, shoes, dry goods, hosiery, ready-made garments, etc., contained in the two storerooms joining each other at right angles located on lots 9 and 10, block 86, Frankfort, Kansas, wherein it has been conducting the business of retail dealer in merchandise in the town of Frankfort, Kansas.*

2. *All furniture, fixtures, safe, showcases, and appliances of trade used in connection with said business and contained in said building.*

3. *All books of account, book accounts, notes, and other evidences of debt due or to become due to said corporation.*

4. *All policies of insurance upon or appertaining to said property, and possession of said property is now delivered unto said parties of the second part.*

To have and to hold the same to said parties of the second part, and to their successors and assigns forever; in trust, however, upon the conditions and for the purposes following, to wit:

Whereas, the said party of the first part is indebted to the said creditors in the amounts set opposite their respective names in said Schedule A hereto attached:

Now, therefore, if said party of the first part shall pay or cause to be paid to the said creditors all of the indebtedness due as aforesaid to them, and to each of them, with the accrued interest thereon, before the 19th day of October, 1913, then this instrument shall be void; otherwise, it shall remain in full force and effect.

In the meantime, the said trustees shall take and is hereby given immediate and exclusive possession of the property hereinbefore conveyed, and shall make or cause to be made a correct inventory of the same; and if default be made in payment of said indebtedness in the time aforesaid, the trustees shall sell the merchandise, fixtures, and other property, at public or private sale, with or without notice, in bulk or at retail, as to him may seem best for all concerned: Provided, however, that upon demand in writing of a majority in number of said creditors representing a majority in amount of said indebtedness, it shall be the duty of said trustees to sell all or any portion of the property hereinbefore conveyed at public auction to the highest bidder for cash, after having mailed to all creditors named in said Schedule A, to their respective addresses as therein stated, written notices of the time and place of said sale at least ten days prior thereto, and advertising said sale in such other manner as said trustee may elect; and the affidavit of said trustees of the mailing of said notices to said creditors shall be conclusive evidence thereof. And provided further, that no sale of said property in bulk at public auction shall be made by said trustees, except upon notice given as above prescribed.

In the event the trustees do not agree upon any question arising in the administration hereof a majority shall govern: Provided, that no private sale

shall be made, except on joint consent of all trustees; and provided, that any public sale shall be held at Frankfort, Kansas.

And said trustees shall proceed to collect the notes and accounts, or to sell or dispose of the same in such manner as to him shall seem best for the interests of all concerned; and in case said trustees shall find that any of said notes and accounts are disputed or are against persons of doubtful solvency, he is hereby authorized to settle, compromise, or extend the same on such terms as he may deem best.

Out of the proceeds of such sales and collections the said trustees shall pay: First, the expenses of administering this trust, including taxes, if any, insurance, rents, fuel, lights, advertising, clerk hire, attorney fees, etc. *Second, wages that would be entitled to priority under the laws of the United States relating to bankruptcy and reasonable compensation to the trustees for their service. They shall next pay to said creditors the amounts so due them, and each of them as aforesaid; but in case such proceeds shall not be sufficient to pay said indebtedness in full, then they shall pay said creditors pro rata in the proportion that the amount due to each of them bears to the whole of said indebtedness.*

Nothing herein contained shall be construed as releasing O. H. Heleker from any liability on any unpaid indebtedness due from Heleker Bros. After said indebtedness to said creditors and each of them is paid in full, then said trustees shall return to said party of the first part any and all surplus money or property remaining in their hands.

Said Schedule A is intended to be a full and correct list of all the..... creditors of said party of the first part, with the correct address and the amount due to each; but if through error or oversight the name of any..... creditor of said party of the first part has been omitted from said Schedule A, said trustees upon ascertaining the facts may, and it shall be (their) his duty to add the name of such creditor, his address and the amount due thereto; and in case said trustees shall find any error has been made in stating the address of any creditor named in said Schedule A, or that the amount specified as due to any creditor is erroneous in amount, then it shall be the duty of said trustees, upon ascertaining the facts, to so correct such Schedule A as to make it state the truth in that regard; and for the purpose of ascertaining the facts regarding the amount due any of said creditors, said trustees are authorized to require of them itemized and verified statements of their accounts, exhibition to him of original notes or contracts where such indebtedness is evidenced by such notes or contracts, and to demand from them such additional legal and proper evidence as he shall deem necessary; and said Schedule A, when so amended and corrected by said trustees, shall stand and remain as the basis for payment to creditors hereinbefore provided for and for all other purposes of this trust.

The trustees shall not be liable for any omissions from or errors in said Schedule A unless their attention is called to the same in writing before the distribution of the funds obtained hereunder.

In witness whereof, the said party of the first part has set its hand by its duly authorized officers and seal this 19th day of September, 1913.

[Seal] The Heleker Bros. Merc. Co.,

By A. A. Heleker, Prest.

Attest: Howard F. Heleker, Secretary.

Executed and delivered in the presence of

.....
.....

Witnesses.

State of Kansas, County of Marshall—ss.:

On this 19th day of Sept., 1913, before me, J. D. Gregg, a notary public, personally appeared A. A. Heleker and Howard F. Heleker, president and secretary, respectively, of the Heleker Bros. Merc. Co., to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

J. D. Gregg, Notary Public.

My commission expires Jany. 21st, 1917.

Schedule A.

Richardson Dry Goods	St. Joseph, Mo.	\$3,209.60
Bush Hat Co.	Chicago, Ill.	969.24
Buttrick Pattern Pub. Co.	New York	20.00
Marks Tailoring Co.	Chicago	15.50
Perfection Mfg. Co.	Cedar Rapids, Ia.	96.00
Tootle Campbell D. G. Co.	St. Joseph, Mo.	4.89
S. Galewski	New York	11.50
Omaha Rubber Co.	Omaha, Neb.	126.73
Topeka Woolen Mfg. Co.	Topeka	676.50
Otto Rundberg Co.	Chicago	7.39
Geo. P. Ide & Co.	Troy, N. Y.	76.91
F. J. Holzer Emb. Works	St. Louis, Mo.	49.85
W. S. Peck & Co.	Syracuse, N. Y.	2,404.12
Royal Worcester Corset Co.	Chicago, Ill.	62.32
McCord-Donovan Shoe Co.	St. Joseph, Mo.	880.75
Jas. F. Coyle & Co.	St. Louis, Mo.	34.88
Central Topeka Paper Co.	Topeka	16.04
Wolf Bros. & Co.	Omaha, Neb.	16.00
North Western Knitting Co.	Minneapolis	130.59
S. Delches & Co.	Chicago	25.90
Beloit Glove & Mitten Co.	Beloit, Wisc.	43.57
Jacob David Sons Co.	New York	88.00
Morris, Mann & Reilly	Chicago	25.00
Combs Printing Co.	St. Joseph, Mo.	17.50
Bradley Metcalf Co.	Milwaukee	14.50
J. Rothschild Hat Co.	Kansas City, Mo.	19.50
Fred S. Todd Shoe Co.	Rochester, N. Y.	219.65
Outcault Advertising Co.	Chicago, Ill.	42.50
F. Stegel & Bros.	Chicago, Ill.	55.07
A. Rolowski	New York	34.75
Citizens Bank	Frankfort, Ks.	2,800.00
T. F. Rhoades	" "	500.00
Frank Hartman	" "	180.00
Frank Bliss	" "	
John B. Auld	" "	
Christine A. Heleker	" "	100.00
Georgia A. Heleker	" "	25.00

Indorsed as follows:

Trust Mortgage, Long Form. From Heleker Bros. Mercantile Co., Frankfort, Kansas, to Gregg, Plummer & Yale, Trustees for Creditors.

Filed for record this _____ day of _____, A. D. 190—, at _____ o'clock, _____ minutes, _____ M.

Recorded in Book _____ at page _____.

_____, Recorder.

By _____, Deputy.

Recorder's fee, \$_____.

The trustees named therein accepted the trust and took possession of all and singular the property and assets of the bankrupt and proceeded to the sale and disposition of the same in pursuance of the authority conferred by the trust agreement. Certain of the creditors named in Schedule A attached to the agreement for whose benefit the same purported to have been made, refused to accept the provisions therein made for their benefit, or to consent to the plan adopted by the bankrupt for the settlement of its estate and its distribution among its creditors. On the contrary, after the making of said instrument and after possession of the property thereunder passed to the trustees there-

in named, and as they were proceeding with the sale and distribution of the property, on October 13, 1913, this proceeding in bankruptcy against the corporation was instituted. The only act of bankruptcy charged in the petition relates to the making by the corporation, when insolvent, the foregoing conveyance of all its property and assets to trustees of its own selection, and the turning over possession and control of all its property and assets to be by them sold and disposed of, and the proceeds derived therefrom distributed among its creditors, in accordance with the provisions of the agreement.

To an amended petition charging the making of this agreement, the surrender by the bankrupt corporation of possession of all its assets and property to the trustee named therein for administration and distribution among creditors, to constitute an act of bankruptcy under clauses 1, 3, and 4, subdivision "a," section 3, of the Bankruptcy Act, certain creditors participating in the plan have answered, demanding a trial by jury. The bankrupt corporation has moved to dismiss the proceeding for want of equity, or want of the averment of sufficient facts in the amended petition of creditors to uphold an adjudication in bankruptcy. This motion stands submitted for decision on voluminous briefs of the respective parties.

The position taken by the alleged bankrupt corporation in support of its motion to dismiss, as I understand from the argument made, is based on two propositions: (1) That the instrument in controversy is in legal effect a mortgage, and not an instrument of general assignment for the benefit of creditors; therefore its making does not constitute an act of bankruptcy, within the purview of clause 4 of subdivision "a," section 3, of the Bankruptcy Act. (2) That the phrase, "with intent to hinder, delay or defraud creditors," as employed in clause 1, subdivision "a," section 3, of the act, is used in the same sense and with like effect by the lawmaking power as is the same expression in subdivision "e" of section 67 of the act relating to fraudulent conveyances, and as employed in the last-mentioned connection the term implies actual fraud, involving moral turpitude, or what is called fraud in fact, and from the very nature of the written instrument involved herein, it being, as contended, a mortgage by the bankrupt, it had the right to make and deliver it, and the possession of its property, as was done in this case, for that no actual fraud or evil intent in making such disposition of its property is or can be shown.

[1] In considering questions thus presented, it is to be borne in mind the office of the motion here interposed is like unto that of a demurrer, which confesses all the matters well pleaded in the petition. Turning to the amended petition, to which the motion is directed, in paragraph 5 it is found charged, as follows:

"(5) First act of bankruptcy: On September 19, 1913, and while insolvent, the company committed an act of bankruptcy, in that it transferred all of its assets with intent to hinder, delay, and defraud its creditors. The nature of said transfer is as follows."

While in the following paragraph the instrument in dispute is by reference adopted by the pleader and different intents in its making are charged, yet, as the specific fraudulent intent in the mind of the maker of the instrument is charged to have been present at the time it was

made in such manner as to constitute an act of bankruptcy, it is to my mind sufficient to render the petition attacked invulnerable to the motion interposed, and this, although the instrument may be held to be in legal effect a mortgage, and not an instrument of assignment. And this, for the reason the charges of fraudulent intent alleged in the amended petition of creditors against which the motion is levied are sufficient in my judgment to warrant the admission of actual fraudulent intent in the minds of the parties thereto, such as would show, if any such facts are in existence and may be shown, that notwithstanding the form and legal effect of the paper executed, all the parties thereto, while pretending to act in pursuance thereof, yet in truth and in fact intended to appropriate the entire assets of the estate to their own use, and not to the use of any of the creditors, or to the use of a portion only of the creditors. On this ground alone I am of the opinion the motion interposed must be denied, and the bankrupt ruled to answer.

However, it is quite evident the parties to this litigation much desire an expression of opinion as to the legal effect of the trust agreement made by the bankrupt, and whether the making of such an instrument of conveyance of the entire estate and property of an insolvent debtor constitutes an act of bankruptcy, within the meaning and intent of clause 4, subdivision "a," of section 3 of the Bankruptcy Act. In this regard it may be observed, manifestly, the instrument in question, judging from its structure, was prepared with much care and thought, and with the evident intent in the mind of its framer its legal effect would be construed as that of a mortgage, and not an instrument of assignment for the benefit of creditors, and that its making by an insolvent debtor on the verge of bankruptcy would not constitute an act of bankruptcy; hence courts of bankruptcy would have no jurisdiction over an estate thereby conveyed, and the intending bankrupt could thus direct the course and manner of the administration of his estate, regardless of the Bankruptcy Act or the wishes or acquiescence of his creditors.

[2, 3] However, in my opinion, this plan of conducting the administration of the estate of an insolvent debtor overlooks matters of much moment to creditors not assenting thereto. The Bankruptcy Act was designed to be, and is, in its operation, exclusive not only of the state insolvency, assignment, and bankruptcy laws, while it is continued in force by the Congress, but the method of its application and enforcement through courts of bankruptcy is also exclusive of all other tribunals; hence, in pursuance of the exclusive nature of the act and the manner of its enforcement, and the forum in which it is enforced, creditors obtain rights in the assets and property of their insolvent debtors of which they may not by the voluntary or concerted action of their debtors be deprived. Not only so, but if their debtor, although he be not insolvent, assigns or conveys to a trustee all his property for the benefit of his creditors, retaining nothing in his hands with which to meet the demands of his creditors upon him, creditors have the right to object to such disposition of his property, and to resort to the bankruptcy court in the assertion of their rights, and this entirely regardless of the ordinary legal nature or effect of the formal instrument by which

the debtor seeks to accomplish his purpose. That is to say, the term "general assignment for the benefit of creditors" as employed in clause 4, subdivision "a," section 3, of the Bankruptcy Act, does not concern itself merely with such acts of a debtor as would constitute an assignment for the benefit of creditors under the laws of the state in which it is made or, merely with the form of the written instrument employed to effectuate such purpose; on the contrary, the act does concern itself with, and does contemplate, all acts of a debtor, regardless of the manner or form of their accomplishment, by which he parts with the title and possession of all his property of every kind and nature for the benefit of his creditors, to be disposed of as his trustee or assignee by him selected and named may employ, independent of the Bankruptcy Act.

Mr. Collier, in his work on Bankruptcy (9th Ed., p. 98), in defining what constitutes a general assignment, says:

"A general assignment, to constitute an act of bankruptcy under this subsection, must be for the benefit of creditors. A direct transfer to creditors after the intervention of a trustee duly appointed is not such an assignment. A formal deed of assignment is not required. A debtor may have prepared a deed of assignment with intent to execute it, but, so long as he has left it unexecuted or in escrow, the general assignment contemplated has not been made. But it is not essential that all the creditors accept the terms imposed by the instrument, if it appears on its face to have been a disposition of all the property of the assignor for the benefit of his creditors. As already indicated, the insolvency of debtor is not an essential fact. *Whatever may be the form of the conveyance in trust of the debtor's property, if it cover all his property and be for the payment of his debts, it operates in law as a general assignment for the benefit of creditors.*"

In *Missouri Elec. Co. v. Hamilton Brown Co.*, 21 Am. Bankr. Rep. 270, 165 Fed. 283, 91 C. C. A. 251, Sanborn, C. J., delivering the opinion for the Court of Appeals for this Circuit, defines a general assignment as contemplated by the Bankruptcy Act, as follows:

"A general assignment for the benefit of creditors is ordinarily a conveyance by a debtor without consideration from the grantee of substantially all his property to a party, in trust to collect the amounts owing to him, to sell and convey the property, to distribute the proceeds of all the property among his creditors, and to return the surplus, if any, to the debtor."

[4] A reading of the instrument involved in this case will show it to be in every essential particular within the definition of a general assignment as above set forth.

In *re Thomlinson Co.*, 154 Fed. 834, 83 C. C. A. 550, involved an instrument of conveyance in every essential particular identical in legal aspect with that involved in this case, as will be seen from a reading of the same set forth in the statement of facts in that case. There, as in this case, the contention was made the instrument did not create a general assignment but was in legal effect a mortgage. Adams, Circuit Judge, in delivering the opinion for the court, says:

"In our opinion the instrument in question was a general assignment for the benefit of creditors within the true meaning of the Bankruptcy Act, and was an act of bankruptcy warranting the adjudication. The 'general assignment' there contemplated is to be taken in its generic sense, and embraces any conveyance at common law or by statute by which the parties intend to make an absolute and unconditional appropriation of the property conveyed to raise funds to pay the debts of the vendor, share and share alike. Ap-

polos v. Brady, 1 C. C. A. 299, 49 Fed. 401; Bartlett v. Teah (C. C.) 1 Fed. 768; In re Gutwillig (D. C.) 90 Fed. 475; Id., 34 C. C. A. 377, 92 Fed. 337; In re Sievers (D. C.) 91 Fed. 366; Davis v. Bohle, 34 C. C. A. 372, 92 Fed. 325. Such a conveyance inevitably thwarts operation of the Bankruptcy Act. The instrument now under consideration conforms fully to the above definition. It makes an absolute and unconditional conveyance of the debtor's property to a trustee of its own choosing, to be sold to raise a fund for the payment of all its creditors, share and share alike. It is therefore obnoxious to the provisions of the Bankruptcy Act, which confers the right of administering an insolvent debtor's estate upon a trustee to be chosen by and in the interest of the creditors, and constitutes an act of bankruptcy. Rumsey & Sikemier Co. v. Novelty & Machine Mfg. Co. (D. C.) 99 Fed. 699. The general statement made in the last-cited case by the writer of this opinion when District Judge, that the conveyance there under consideration contains such a reservation of an equity or such a condition of defeasance as made it a mortgage, instead of a general assignment, upon which counsel for petitioners now place some reliance, was, as a general proposition, independent of the facts of that case, ill-advised, and cannot be followed. The instrument in question does not contain any of the elements of a mortgage, as insisted upon by bankrupts' counsel. The idea that it was intended as a security for the ultimate payment of the debts of the vendor, or that a reservation of a right to redeem whenever the vendor should pay its debts was intended, is not remotely suggested by any of the terms of the instrument; in other words, there is no right of redemption reserved. The provision at the end of the instrument, requiring surplus, if any, to be paid to the vendor, cannot be regarded as such reservation. It is nothing more than an expression of what the law implies. If, after all the property had been disposed of, and all the creditors had been fully paid, and all the expenses satisfied, any surplus remained, it belonged as a matter of law to the debtor, and no formal statement to that effect can change the legal and obvious import of the instrument from a general assignment for the payment of debts to a provision for their security in the nature of a chattel mortgage." West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098; In re Gutwillig (D. C.) 90 Fed. 475; In re Sievers (D. C.) 91 Fed. 366; In re Hersey (D. C.) 171 Fed. 998; Abbott v. Summers, 116 Fed. 687; Davis v. Bohle, 92 Fed. 325, 34 C. C. A. 372.

Therefore, regardless of the defeasance clause found in the instrument involved herein, relied upon by the bankrupt to give the instrument the legal effect of a mortgage, and not that of an instrument of assignment, the effect of the instrument made by the bankrupt and of the entire transaction thereunder was to pass the legal title to all the property of the bankrupt to trustees named by it, and under which they took actual possession of its property, with full power of disposition and distribution of the proceeds to the creditors of the bankrupt, the writing and the entire transaction thereunder constituted a general assignment for the benefit of creditors as contemplated by the Bankruptcy Act, and in consequence was an act of bankruptcy.

It follows the motion to dismiss for want of equity or sufficient statement in the amended petition must be denied. It is so ordered, with leave to the maker of the motion to answer the petition within 10 days, if so advised by its solicitors.

UNITED STATES v. HAMBURGH-AMERICAN S. S. LINE et al.

(District Court, S. D. New York. October 13, 1914.)

MONOPOLIES (§ 16*)—COMBINATION BETWEEN STEAMSHIP COMPANIES—VIOLATION OF ANTI-TRUST ACT.

The employment by a combination of steamship companies engaged in the trans-Atlantic passenger business of so-called "fighting ships," or extra vessels, which, when a vessel not owned by a member of the combination, made lower rates than one which did, was placed at a berth near such vessel, and met or went below such rates, *held* to constitute an undue and unreasonable restraint of foreign trade and commerce, and an attempt to monopolize such commerce, in violation of Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200); but the exaction by the members of the combination of agreements by their agents to sell passage tickets for such members only, or the division of the business between the members in a predetermined proportion, *held* not a violation of the act.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.*]

In Equity. Suit by the United States against the Hamburg-American Steamship Line and others. Bill dismissed as to two defendants, and decree for complainant for part of the relief prayed for against the other defendants.

This is a proceeding in equity under the Anti-Trust Act to terminate and dissolve a combination of various trans-Atlantic steamships engaged in the transportation of passengers. The transactions complained of are concerned mainly with the transport of steerage passengers.

H. Snowden Marshall, U. S. Atty., and Henry A. Guiler, Asst. U. S. Atty.

Spooner & Cotton, of New York City (John C. Spooner, of New York City, of counsel), for Hamburg-American Line, Allan Line, and Canadian Pac. Ry. Co.

Choate & Larocque, of New York City (Joseph Larocque and Nelson Shipman, both of New York City, of counsel), for North-German Lloyd and defendants Schwab and others.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham, Norman B. Beecher, Charles Burlingham and Roscoe H. Hupper, all of New York City, of counsel), for American Line, Anchor Line, Dominion Line, Holland-America Line, Red Star Line, White Star Line, and defendants Franklin, Coverly, and Gips.

Lord, Day & Lord, of New York City (Lucius H. Beers and Allan B. A. Bradley, of New York City, of counsel), for Cunard S. S. Co., Limited, and defendant Sumner.

Ralph J. M. Bullowa, of New York City, for Russian-American Line and defendants Johnson and Strauss.

Before LACOMBE, COXE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The writer's opinion as to what, under prior decisions, was the construction to be given to the Sherman

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Anti-Trust Act, will be found fully set forth in *U. S. v. American Tobacco Co.* (C. C.) 164 Fed. 700. If that construction were followed in this case, there could be no doubt as to the conclusion to be reached upon the facts proved. It is practically not disputed that, by the various agreements and conferences which together constitute the combination complained of, that branch of trans-Atlantic commerce which is concerned with the transport of steerage passengers is arbitrarily interfered with, so that the proportions of it carried by the various lines, which have so combined, are not as they would be if full, free, and unrestricted competition were the sole controlling power to effect the distribution.

Since the decision above cited, however, there have been two exhaustive opinions of the Supreme Court dealing with this act. *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; *United States v. American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663. The effect of these would seem to be that contracts and methods of business, which do in fact restrain or interfere with competition, are not to be held obnoxious to the provisions of the act, unless such restraint or interference is "unreasonable" or "undue."

"Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs, which it was thought would flow from the undue limitation or competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy. * * * The statute * * * evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint." *Standard Oil Co. v. United States*, 221 U. S. 58, 59, 60, 31 Sup. Ct. 515, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734.

"Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil Case* that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose." *United States v. American Tobacco Co.*, 221 U. S. 179, 31 Sup. Ct. 648, 55 L. Ed. 663.

To determine whether any particular course of conduct is or is not "undue" or "unreasonable" involves, of course, a consideration of all the surrounding circumstances, which may be multifarious. Moreover, opinions will sometimes differ as to what should be the answer to such a question. Upon a given statement of facts 12 unprejudiced jurymen will sometimes unanimously reach the conclusion that the conduct of an individual evidenced "due" and "reasonable" care and prudence, when upon the same state of facts 12 other unprejudiced jurymen will unanimously reach a different conclusion. Courts have recognized this uncertainty, for it has been frequently held in actions for negligence that although a judge may direct an appropriate verdict, when all intelligent minds would agree as to the inference to be drawn from proved facts, he should send the cause to the jury whenever there might be an honest difference of opinion as to whether the conduct of an individual exhibited "due" and "reasonable" care and prudence. So, too, when a question arises in an equity court as to the "reasonableness" of certain transactions different chancellors may differ in their answers. Thus in *United States v. Periodical Clearing House*, a litigation arising under the Sherman Act and involving certain regulations made by what was known as the "Magazine" or "Periodical Trust," this court was evenly divided in opinion as to whether such regulations were reasonable or not.¹

Referring now to the facts in proof: One of the matters complained of is what is called in the testimony the providing of "fighting ships." Upon occasions when some steamship owner or charterer, not a member of the combination, has put a vessel on a berth adjoining one from which vessels of a member of the combination were about to sail, and has offered to carry passengers at a lower rate than that asked by such member, an extra vessel has been put on, ostensibly by one of the lines in the combination, but really by the combination itself, at the same or a lower rate, and all have co-operated to furnish such a "fighting ship" and thereby keep out the competitor. This seems clearly to be within the prohibition of the act; the case is analogous to that presented in *United States v. Eastern States Retail Lumber Dealers' Association*. In that case some wholesale lumber dealers, learning the names and addresses of the customers of retail dealers who bought from them, had taken away such customers by offering to sell them direct at wholesale prices. An individual retail dealer, who had thus lost customers, was of course free to give information of his experience to any of his business associates; but an association of retail dealers which gathered such information and circularized the retail trade with a list of the names of the wholesalers who had done so was held to be a combination to boycott or blacklist, and a decree was entered in this court enjoining the further preparation and issuance of such circulars, which decree was affirmed on appeal. 201 Fed. 581; 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490.

¹ Decided March 22, 1913, by dismissal of complaint, for the reason that the government had failed to satisfy a majority of the court that it was entitled to the relief prayed for; not reported, as no opinions were filed.

The testimony (which is voluminous) fails to satisfy us that the defendants, or any of them, have charged excessive or exorbitant rates for the transportation of passengers of any class, especially when it is considered that vastly more in the way of safety, speed, sanitary conditions, physical comfort, etc., is now given to the passenger than was given to him before these agreements and conferences were entered into.

Much is made in argument of the circumstance that members of the combination employ only agents who will agree to confine their business to selling passage tickets for such members. When the deplorable conditions which existed before this method of business was adopted are considered, it would seem that such an arrangement has greatly benefited the traveling public, especially the more ignorant class of many different nationalities which travels in the third class or steerage. Moreover, dealing as it does merely with the control of defendants' agents, who are free to accept or decline such agency, it is analogous to the case which was presented in *United States v. Periodical Clearing House*, supra, where, upon the question whether or not such control of agents was or was not within the act, this court was divided in opinion and dismissed the bill. No attempt was made to review that decision on appeal. It is thought, therefore, that complainant has not shown itself entitled to relief on this branch of the case.

The main subject-matter of the controversy, viz., the controlling of transportation so as to allot proportionate shares of it to the different defendants who are in the combination, has recently been most exhaustively considered by the standing committee on merchant marine and fisheries under resolutions of the House of Representatives in Congress. It is manifest from its report that the committee had before it substantially the same evidence which is contained in the record in this case. There is nothing to add to the elaborate presentation of all sides of the controversy which will be found in that report, and we find it most persuasive to the conclusion that, in view of the peculiarities of ocean transportation, the method adopted by the defendants—if purged of its obnoxious feature, the "fighting" ship—is a reasonable one, which, so far from restraining trade, really fosters and protects it, by giving it a stability which insures more satisfactory public service for all concerned. Without this method, or something like it, there would be, in the language of the committee, one or other of two results:

"The lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or to avoid a costly struggle they would consolidate through common ownership. Either would mean monopoly fully as effective, and it is believed more so, than can exist by virtue of [this] agreement."

It seems, therefore, that this particular combination comes fairly within the exception to a strictly literal construction of the statute, which is indicated in the *Standard Oil* and *Tobacco Cases*.

The *Allan Line* and *Canadian Pacific Line* withdrew from the fighting ship agreement before the bill was filed. As to both these defend-

ants the bill is dismissed. As to the other defendants injunction will issue against the continuance of the "fighting ships," and as to the other prayers for relief the bill is dismissed. Since the government has not prevailed on the main part of the case, the decree will be without costs.

WILSON v. SEYBOLD et al

(District Court, N. D. West Virginia. October 1, 1914.)

1. SPECIFIC PERFORMANCE (§ 57*)—OPTION—EXECUTORY CONTRACT.

Defendant's ancestor executed to complainant's grantor a written option to convey the timber on certain land, provided such grantor elected to purchase or make sale of the timber within four months. The option was under seal and acknowledged the receipt of one dollar paid as a consideration. The option was assigned to complainant, and within the time specified he gave notice to defendant's ancestor of his acceptance, etc. *Held*, that the option thereby became an executory contract of sale, and was therefore a proper subject of suit for specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 178; Dec. Dig. § 57.*]

2. ASSIGNMENTS (§ 18*)—OPTION TO SELL TIMBER—RIGHT TO ASSIGN.

Where the owner of certain timber executed an option to convey the timber at a specified price to complainant's grantor or his assigns, the option granting four months within which such grantor could elect to purchase "or make sale" of the timber, it was a proper subject of assignment, and could be accepted by the assignee.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 25-27; Dec. Dig. § 18.*]

3. LOGS AND LOGGING (§ 3*)—SALE OF TIMBER—FURNISHING TITLE—PAYMENT OF PRICE—CONCURRENT CONDITIONS.

Where a contract for the sale of timber obligated the vendor to furnish a good title and the vendee to pay a specified price, the conditions were concurrent; the primary obligation being on the vendee to tender the money and demand a deed, at which time the vendor was required to tender a good title.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.*]

4. SPECIFIC PERFORMANCE (§ 95*)—CONDITIONS PRECEDENT—TENDER OF TITLE—PAYMENT OF PRICE.

A purchaser, entitled to a good title, need not pay the purchase money until he gets a good title, and may in good faith dispute the title tendered and refuse to pay the purchase price, provided the objection is sufficiently plausible to cause a prudent man to hesitate; and specific performance will not be defeated thereby, though the objection subsequently turn out to be unsustainable.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 257-277; Dec. Dig. § 95.*]

5. SPECIFIC PERFORMANCE (§ 105*)—RIGHT TO RELIEF—LACHES.

Defendant's ancestor in January, 1906, contracted to convey the timber on 770 acres of land to complainant's grantor, and to deliver a good and sufficient title. Complainant expressed his readiness to pay the price, but demanded conveyance of a good title; and, the title then being seriously clouded, the seller instituted proceedings in which he ultimately established his title to only 540.5 acres. On the day this decision was rendered the vendor died, and five months after April 5, 1912, when the mandate on appeal in such proceeding was handed down and recorded, com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plaintain instituted suit for specific performance as to the 540.5 acres. *Held*, that the vendor's obligation to furnish a good title descended to his devisees, it being for complainant to determine whether he would take a smaller quantity, with abatement of the price, or insist on a cancellation of the contract, and that his right to enforce specific performance as to the smaller quantity was not barred by laches.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 325-341; Dec. Dig. § 105.*]

6. SPECIFIC PERFORMANCE (§ 91*)—RIGHT TO SUE—REQUISITES.

Where defendant's testator had contracted to convey the timber on certain land to complainant's assignor, and complainant had made demand on testator for performance, but he had failed to perform by furnishing a good title, and had sought to annul the contract, complainant was entitled to sue for specific performance without making a further demand on the devisees.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 230-232; Dec. Dig. § 91.*]

7. SPECIFIC PERFORMANCE (§ 91*)—REQUISITES—DEMAND.

It was not a condition precedent to complainant's right to sue for specific performance that he had failed to make a demand for performance, where defendants in their answer admitted that the demand, if made, would have been refused.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 230-232; Dec. Dig. § 91.*]

8. SPECIFIC PERFORMANCE (§ 97*)—REQUISITES—TENDER OF PRICE.

The holder of a contract to convey timber was not bound to tender the price simultaneously with the filing of a bill for specific performance, he being authorized to pay the price into court at any time before the cause was submitted for hearing.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 286-298; Dec. Dig. § 97.*]

9. SPECIFIC PERFORMANCE (§ 130*)—TITLE—CONVEYANCE—DELAY—INTEREST.

Defendants' testator contracted to convey the timber on 770 acres of land to complainant's assignor May 10, 1906, when an option was accepted; but testator was unable to convey a good title to any part of the land until April 5, 1912, when his title was finally quieted as to 540.5 acres. On the day of the decision testator died, and five months after complainant instituted suit against his devisees for specific performance, and on May 2, 1913, complainant paid into court the net purchase price at the contract rate. *Held*, that complainant was bound to pay interest from the date the title was finally quieted until he paid the purchase price into court.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 424, 425; Dec. Dig. § 130.*]

In Equity. Suit for specific performance by G. N. Wilson against F. H. Seybold and others. On final hearing. Decree for plaintiff.

Talbott & Hoover, of Elkins, W. Va., for plaintiff.

Ware & Viquesney, of Philippi, W. Va., and W. B. & E. L. Maxwell, of Elkins, W. Va., for defendants.

DAYTON, District Judge. These facts are undisputed: On January 12, 1906, Christian Seybold in his lifetime executed to "A. J. Crickard or his assigns" a written option whereby he agreed to convey "with good and sufficient title" the timber on 770 acres of land at the price of \$20 per acre therefor. This contract grants four months

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"within which said second party is to elect to purchase *or make sale* to the said timber"; if accepted within that period, Seybold was to immediately convey "good and sufficient title to the same upon the full consideration being paid in cash." The option is under seal and acknowledges the receipt of \$1 paid as a consideration. This option was assigned by Crickard to plaintiff, Wilson, on May 9, 1906, and on May 10, 1906, Wilson gave Seybold notice of acceptance, both by telegram and letter, which notice was received by Seybold within the four months optional period. In 1904, two years prior to the execution of this option, Seybold had instituted an action of ejectment in the circuit court of Randolph county against Henry G. Davis, alleging the latter to be in possession of the land (upon which this timber in controversy was standing), and with unlawfully withholding the possession thereof from him. This suit he subsequently dismissed without prejudice, and in September, 1907, instituted another ejectment suit against said Davis, the Upper Elk Coal Company, and Gaines Green in the then Circuit Court of the United States for this district, containing in its declaration like charges of unlawful possession and the withholding of the same from him of this land. This last action was tried, and resulted in a judgment in favor of Seybold for 540.5 acres of the 770 acres of land claimed by him. A writ of error was sued out to this judgment to the Circuit Court of Appeals of this circuit, and, on the 4th day of March, 1912, that court handed down an opinion to affirm the judgment of the lower court. *Davis v. Seybold*, 195 Fed. 402, 115 C. C. A. 304. On that same 4th day of March, 1912, Seybold died testate, and his will was probated and admitted to record in Randolph county on April 18, 1912, and on September 4, 1912, this suit was instituted in the circuit court of Randolph county by Wilson against Seybold's executors and heirs at law, for specific performance, which suit was subsequently removed to this court.

[1] An ordinary option is not in itself a contract subject to equity's power to compel specific performance, but only a continuing offer to contract in futuro upon acceptance and compliance with certain specified terms and conditions. If this offer is not based upon a valuable consideration, it can be withdrawn at any time; but if based upon such consideration, no matter how small, it cannot, under ordinary conditions, be withdrawn until the fixed time for it to run has expired. Whether specific performance can be granted by equity depends upon whether the terms and conditions of the offer are accepted and complied with, whereby an executory contract of sale is created. It is such executory contract of sale, so created, that can be specifically enforced. When a continuing offer is accepted, and its terms complied with, the executory contract, thereby created, is subject to the same rules, as regards specific performance, as any other ordinary executory contract made direct, without intervention of an option. The crucial question, therefore, arising here, is whether such executory contract was in fact created and now exists. I think it very clear that it was created and does now exist for these reasons: The continuing offer or option was based upon a \$1 consideration set forth under seal to have been paid. It could not, therefore, be withdrawn,

and in fact was not attempted to be withdrawn, before the four months for it to run had expired. Prior to such expiration notice of its acceptance in full, as regards its terms and conditions, was given by Wilson and received by Seybold.

[2] The position taken that Crickard, the original optionee, could not assign the offer, and could therefore alone accept it, is clearly untenable, under the authorities hereinafter cited, because the option or offer to sell was in express terms made "to grant and convey unto the said A. J. Crickard or his assigns," and four months was "granted within which said second party [Crickard] is to elect to purchase *or make sale* to the said timber"; in other words, to purchase on his own account *or to sell the timber and transfer his right to buy to another*. He did within these four months, sell, transfer, and assign his right to buy to Wilson. This assignment to Wilson, Wilson's notice of acceptance to Seybold, and Seybold's acknowledgment of having received it, created the executory contract of sale provided, Wilson stood ready in good faith, at the time and afterwards, to pay in cash the \$20 per acre, upon Seybold presenting to him "good and sufficient title" therefor.

[3] The obligations inter partes to furnish good title on one side and to pay the purchase money on the other are mutual and are to be performed simultaneously. Seybold could not be required to deliver title and then await the convenience of Wilson to pay; nor could Wilson be compelled to pay and await Seybold's convenience to furnish title. Seybold had to lay down his "good title" side by side with Wilson's money, so that Wilson could take delivery of the title deed at the moment that Seybold took possession of Wilson's money. The primary obligation, however, was upon Wilson to *tender* the money and demand the deed.

[4] To this general rule there is one exception, very pertinent here, and entirely in Wilson's favor. This exception is to the effect that a purchaser entitled to good title need not *pay* purchase money until he gets good title, and he may dispute the fact that the title tendered is good, and refuse to pay the purchase price, at the time, for that reason. But in so refusing he must act in entire good faith, and the existing grounds of objection to the title must be plausible enough to cause a prudent man to hesitate; and, if they be so, though turning out to constitute no defect, his right subsequently to specific performance will not be defeated.

[5] In this case, at the time the money was due to be paid by Wilson, he expressed his readiness to pay it, but demanded conveyance of good title. Seybold's title was at the time most seriously clouded. He had filed his declaration in ejectment against Davis, in which, technically, at least, he had admitted himself to be out of possession and Davis in possession of the land and the timber thereon. The proceedings to try out and match his right to the land as against Davis' right thereto pended in the courts (state and federal) for substantially six years before his was finally determined to be the better right. Such right, too, was only determined finally by the court of last resort upon writ of error, and then only established it to 540.5 acres of the 770

acres claimed by him, the timber upon the whole of which he had undertaken to sell. Under these circumstances Wilson had the soundest grounds for withholding payment of the purchase money until assured the "good title" could and would be forthcoming.

On the day the court decided finally that Seybold had good title to the 540.5-acre part of the 770 acres, Seybold died. The mandate was not handed down and recorded in this court until April 5, 1912. Wilson did not institute this suit until in September, five months thereafter. Can these executors and heirs of Seybold claim he was guilty of laches to their release from liability to perform the contract for that reason? No; because the obligation had descended to these devisees "to furnish good title" to the timber on the 540.5-acre part of the 770 acres their testator had undertaken to sell, and then it was for Wilson to determine whether he would take the smaller quantity, with abatement of the purchase price, or insist upon cancellation of the contract.

[6] Did Wilson have a right to institute this suit before making demand on these devisees for performance on their part? I think so, because demand had been made upon testator, and he had failed to perform by furnishing good title and had sought to withdraw his offer after its acceptance and to annul the contract.

[7] However, it seems to me this question becomes immaterial, because in their answer these devisees have voluntarily admitted that they would have refused to perform the contract if demand had been made upon them to do so.

[8] Finally, was it a condition precedent to maintaining this bill for Wilson to pay into court the purchase money tendered for the 540.5 acres of timber simultaneous with the filing of the bill? No. It is well settled that such payment into court could be made any time before the cause was submitted for hearing.

[9] One small, and in a sense trifling, question arising in the case, has given me more trouble than any other. It is this: Should Wilson be required to pay interest upon the purchase price? If so, from what time? Careful consideration of this question has led me to the conclusion that he should be required to pay such interest at 6 per centum per annum from the date of the Circuit Court of Appeals mandate, which finally determined the soundness of Seybold's title, up to the 2d day of May, 1913, when he paid into court \$10,810, the net purchase price at \$20 per acre for the 540.5 acres of timber. This sum was by consent loaned to a trust company at 4 per cent. interest. It, and such interest so earned at 4 per cent. and the interest due at 6 per cent. for the period above referred to from Wilson, should be, in my judgment, the gross amount payable to the defendants, and should be subject to deductions for plaintiff's costs of suit and the registrar's commission for loaning.

The legal principles enunciated herein are, in my judgment, fully sustained by the following authorities: *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403, and especially the note thereto; *Fulton v. Messenger*, 61 W. Va. 477, 56 S. E. 830; *John v. Elkins*, 63 W. Va. 158, 59 S. E. 961; *Armstrong v. Md. Coal Co.*,

67 W. Va. 589, 69 S. E. 195; Rease v. Kittle, 56 W. Va. 269, 49 S. E. 150; Turner v. McCormick, 56 W. Va. 161, 49 S. E. 28, 67 L. R. A. 853, 107 Am. St. Rep. 904; Tibbs v. Zirkle, 55 W. Va. 49, 46 S. E. 701, 104 Am. St. Rep. 977, 2 Ann. Cas. 421; Watson v. Coast, 35 W. Va. 463, 14 S. E. 249; Clark v. Gordon, 35 W. Va. 735, 14 S. E. 255; Barrett v. McAllister, 33 W. Va. 103, 12 S. E. 1106; Wheeling Creek G. C. & C. Co. v. Elder (C. C.) 170 Fed. 215; Standiford v. Thompson, 135 Fed. 991, 68 C. C. A. 425; McCullough v. Sutherland (C. C.) 153 Fed. 418, and especially bottom of page 425 and top of page 426, and authorities there cited; Bensel v. Gray, 80 N. Y. 517; Roberts v. Lovejoy, 60 Tex. 253; Warvelle on Vendors, vol. 2, p. 886.

Decree for specific performance in favor of plaintiff will be entered.

EDWARD F. GERBER CO. v. TITLE GUARANTY & SURETY CO.

(District Court, M. D. Pennsylvania. October 1, 1914.)

No. 610.

1. INSURANCE (§ 640*)—ACTION ON FIDELITY BOND—AFFIDAVIT OF DEFENSE—NECESSITY.

Practice Act Pa. May 25, 1887, § 1 (P. L. 271), provides that all demands previously recoverable in debt, assumpsit, or covenant shall be sued for and recovered in an action of assumpsit, and that it shall be the duty of the defendant in assumpsit to file an affidavit of defense. *Held* that, where plaintiff brought suit on a fidelity bond for misappropriations by one of its employés, the bond containing a definite promise to pay plaintiff a sum of money to be measured by the amount of loss sustained through the conduct of the employé up to the maximum provided in the bond, which amount was set forth in plaintiff's statement and was easy of liquidation, the action was not in tort to recover a penalty, but was within the statute, and defendant was bound to file a proper affidavit of defense.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1609-1612, 1614-1624; Dec. Dig. § 640.*]

2. JUDGMENT (§ 143*)—ENTRY—AFFIDAVIT OF DEFENSE—FAILURE TO FILE—VACATION.

Plaintiff having sued defendant surety company on a fidelity bond for an employé's defalcation, defendant, erroneously believing that the action was not one in which an affidavit of defense should be filed, replied in proper time, filing an affidavit that the cause of action was founded on alleged malfeasance or misfeasance of the employé amounting to a misdemeanor, and that defendant was not required by law to file an affidavit of defense to the action, with submission to the court, reserving the right to file an affidavit of defense if the court should decide that the action was one in which such an affidavit was required. *Held*, that such affidavit was sufficient to preserve defendant's right to a determination of such question, and, the clerk having entered judgment at plaintiff's instance for want of an affidavit of defense, the court, on holding that an affidavit was required, would set aside the judgment and permit defendant to file a proper affidavit to the merits.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272-291; Dec. Dig. § 143.*]

At Law. Action by the Edward F. Gerber Company against the Title Guaranty & Surety Company. On rule to show cause why a judgment in favor of plaintiff, entered for want of an affidavit of defense, should not be stricken off. Rule absolute. Judgment set aside, and permission accorded defendant to answer.

Geo. E. Reynolds, of Pittsburgh, Pa., for plaintiff.

Warren, Knapp, O'Malley & Hill, of Scranton, Pa., for defendant.

WITMER, District Judge. Suit is brought in assumpsit to recover several sums of money, aggregating \$4,998.81, with interest, alleged to be due upon a bond given by the defendant, Title Guaranty & Surety Company, to the plaintiff, guaranteeing and insuring the plaintiff against loss as the result of dishonesty of certain of its employes, among whom was one A. F. Jenkins. A copy of the bond is attached to the plaintiff's statement, wherein it is provided:

"That for the consideration of the premises the company shall, during the term above mentioned, or any subsequent renewal of such term, * * * make good and reimburse to the said employer such pecuniary loss as may be sustained by the employer by reason of the fraud or dishonesty of any or either of the employes named upon said schedule, or added thereto as hereinafter provided, in connection with his duties as specified on said schedule amounting to embezzlement or larceny and which shall be committed during the continuance of said term. * * *"

The plaintiff's statement alleges that the said Jenkins has defrauded the plaintiff of the several itemized sums claimed, by embezzling at specified times the money which he had received from the sale of certain automobiles, or from the improper sales of such.

After service of the writ and copy of plaintiff's statement, the defendant, within the time for filing an affidavit of defense, replied by filing an affidavit setting forth that the cause of action was founded upon an alleged malfeasance or misfeasance of the said A. F. Jenkins amounting to a misdemeanor, and that the defendant ought not to be, and is not, required by law to file any affidavit of defense to the action, with submission to the court, reserving the right later to file an affidavit of defense in case the court should decide that the cause of action is one in which an affidavit is required.

[1] On June 3, 1914, upon plaintiff's præcipe to enter judgment in favor of the plaintiff and against the defendant for want of an affidavit of defense, the clerk entered judgment as requested for the sum of \$5,078.79, with interest from June 1, 1914. The matter is here on petition of defendant requesting the court to strike off this judgment as improperly entered, before hearing defendant upon the necessity of filing an affidavit of defense, and without the opportunity of filing one, if required to do so. The important question presented is the necessity of an affidavit of defense; and this must be met and determined in the light of the Pennsylvania Practice Act of 1887 (P. L. 271), regulating the procedure in actions of assumpsit. Section 1 says:

"So far as relates to procedure, the distinctions heretofore existing between actions *ex contractu* be abolished, and that all demands heretofore recoverable in debt, assumpsit or covenant shall hereafter be sued for and recovered in one form of action, to be called an action of assumpsit."

Section 4 provides that:

"It shall be the duty of the defendant in the action of assumpsit to file an affidavit of defense."

And section 5 provides that:

"In the action of assumpsit, judgment may be moved for for want of an affidavit of defense, or, for want of a sufficient affidavit, for the whole or part of the plaintiff's claim, as the case may be, in accordance with the present practice in actions of debt and assumpsit."

But it is contended that, while the action is in form assumpsit, it is in reality not *ex contractu*, because it is said to be based on a penal bond for the misfeasance, fraud, and dishonesty of the agent of the plaintiff, and in its very nature *ex delicto*, and that therefore no affidavit is required.

That the proper remedy has been invoked by action of assumpsit to effect recovery is not doubted, and an affidavit is therefore required, unless the case is brought within the suggested exception to the general law, as, for instance, in cases where it is necessary to determine the amount due by evidence aliunde the contract, or where the liability depends upon a collateral condition, or where the proof sounds in tort or crime, rather than in contract, as appears in cases cited by defendant's counsel: *Calhoun v. Monongahela B. & L. Ass'n*, 104 Pa. 392; *Corry v. Pa. R. R. Co.*, 194 Pa. 516, 45 Atl. 341; *Commonwealth v. Milnor*, 23 Pa. Super. Ct. 1; *Commonwealth ex rel. v. Harvey et al.*, 11 Luz. Leg. Reg. 139; *Marcus et al. v. Mostovitz*, 12 Lack. Jur. (Pa.) 195; *Bartoe v. Guckert et al.*, 158 Pa. 124, 27 Atl. 845; *Osborn v. First National Bank of Athens*, 154 Pa. 134, 26 Atl. 289; *Commercial National Bank v. Kirk*, 222 Pa. 567, 71 Atl. 1085, 128 Am. St. Rep. 823; *Union Glass Co., Ltd., v. First National Bank of New Castle*, 10 Pa. Co. Ct. R. 565; *Naylor & Co. v. Lehigh Valley R. R. Co.* (C. C.) 188 Fed. 860.

In the case of *Kinney v. Mitchell*, 136 Fed. 773, 69 C. C. A. 493, the Court of Appeals of this circuit have clearly enunciated the principle that judgment may be taken for want of an affidavit of defense only in those cases which are founded on contract alone, and not in such where the cause of action is *ex delicto*, or of a mixed character of contract and tort, and that the mere form of the action has nothing to do with determining the question as to whether an affidavit of defense is required.

The controlling feature of the case presented, it will be noticed, resolves itself down to a question as to whether recovery is dependent solely upon the contract in suit. That no recovery can be maintained without it will be conceded, and upon it alone, it is equally certain, rests the plaintiff's cause of action. It is not misappropriation or embezzlement of moneys by the defendant that gives rise to the suit, nor is it even hinted that the defendant has been guilty of wrongdoing, but because of the defendant's contract with plaintiff to make good and reimburse the latter for all such moneys as may be wrongfully retained by plaintiff's employé. We have here a definite promise to pay a sum of money to the employer, to be measured only by the amount of loss sus-

tained through the conduct of the employé, up to the maximum provided in the bond, and this amount is specifically set forth in the plaintiff's statement and is as easy of liquidation as in an action for moneys had and received. And so it was held:

"That where a surety is sued, and the statement sets forth the cause of action, and has attached thereto a copy of the agreement sued on and a copy of the book entries of the plaintiff, showing the indebtedness of the principal, the defendant must file a sufficient affidavit of defense to prevent judgment." *Railroad Co. v. Snowden*, 166 Pa. 236, 30 Atl. 1129; *Byrne v. Hayden*, 124 Pa. 170, 16 Atl. 750; *Barr v. McGary*, 131 Pa. 401, 19 Atl. 45; *Hebb v. Insurance Co.*, 138 Pa. 174, 20 Atl. 837; *Heller v. Insurance Co.*, 151 Pa. 101, 25 Atl. 83.

In the case of *Rathfon v. City Trust Co.*, 24 *Lanc. Law Rev.* (Pa.) 113, where the principal on the bond was the president of a trust company, in a suit upon the bond, very similar to the one in suit here, on motion for judgment for want of a sufficient affidavit of defense, it was held that an affidavit of defense was required, and what was there said by the court is adopted as the law governing in the present case:

"The action is on a bond under seal, upon which defendant is a surety. The form of action for the breach of said bond, under the common law before the act of 1887, would have been covenant, and is therefore within the class of actions to be called actions of assumpsit, in which an affidavit of defense must be filed to prevent judgment. That the act of the principal in the bond, in not faithfully performing the duties of his office, amounts to a tort, does not take the case out of the provisions of the act of assembly. In *Commonwealth v. Hershey et al.*, 20 *Lanc. Law Rev.* 209, and *Township of Hazel v. Markle*, 175 Pa. 405, 34 Atl. 734, where the same conditions existed as here, it was held that the defendants would have to file sufficient affidavits of defense to prevent judgment under the act of 1887. See, also, *Barr v. McGary*, 131 Pa. 401, 19 Atl. 45; *Mantua Hall v. Brooks*, 163 Pa. 40, 29 Atl. 744. The cases relied on by defendant do not support him in his contention. In *Corry v. P. R. R.*, 194 Pa. 516, 45 Atl. 341, the action would have been an action on the case under the common law, and was therefore not such as is embraced in an action of assumpsit under the law of 1887. In *Osborn v. First National Bank of Athens*, 154 Pa. 134, 26 Atl. 289, the action was against the bank to recover a penalty under the act of Congress for taking usurious interest. It was held, even though the form of action was debt, that it was action *ex delicto*, and not an action *ex contractu*, as it was for a penalty provided in an act of Congress; that the act of 1887 only included actions of debt under the common law, that is, actions *ex contractu*, in the action of assumpsit; and that where the action was *ex delicto*, even though one under the name of debt, an affidavit of defense was not necessary. The action here, however, is clearly an action *ex contractu*, as it is upon the defendant's undertaking to pay to the trust company a certain amount of money upon the failure of the principal in the bond to do or not to do certain things."

Having reached the conclusion that the case is one requiring an affidavit of defense, it must be determined whether such may yet be filed.

[2] Judgment was entered by the clerk notwithstanding the defendant's affidavit of the belief that no affidavit of defense was required, submitting the matter to the court for determination, and reserving the right to file an affidavit of defense in case the court should decide that the cause of action is one in which an affidavit of defense is required. The question submitted is one of law in the nature of a demurrer requiring judicial decision, and while not in the usual form of an affidavit of defense going to the merits of the case, it was sufficient for the time being to prevent the entry of judgment until the same was

put aside, on motion, by the court. It is not contended that the clerk attempted to pass upon this question. All he did was to enter judgment peremptorily as demanded, and, had he attempted to do so, he would have been without authority.

The matters here presented are peculiar to our Pennsylvania practice, and governed by the local law as interpreted by the highest judicial tribunal, and to it we turn and find authority for the practice adopted by counsel for defendant. In *Clarion, etc., Co. v. Hamilton*, 127 Pa. 1, at page 3, 17 Atl. 752, at page 753, the court said:

"The judgment in this case is not a void judgment. The court below had jurisdiction of the person and the subject-matter. It was entered for want of an affidavit of defense, and we must assume that the court below regarded the case as coming within the rule of court. The defendant thought it did not, and filed no affidavit. This is neither a good nor a safe practice. If a defendant thinks the statement or copy filed does not come within the rule requiring him to file an affidavit, it is the better practice to suggest such fact upon the record. He can then have a decision of the court upon the point. When he decides this question of law for himself, he takes the risk of it being incorrect."

In the affidavit filed the defendant reserved the right later to file an affidavit of defense, if the court should decide that the cause of action was one requiring it, which is paramount to stating that a good defense exists. Counsel have also stated in their brief submitted that they have a defense upon the merits. This is a substantial compliance with the practice pursued in the state courts. Then, again, there is no apparent good reason why this judgment should be allowed to stand and the defendant deprived of a defense. If the plaintiff has a just cause of action, he will not be prejudiced; whereas great wrong might result to defendant, were it denied the privilege of interposing its defense.

The judgment is set aside, and the defendant permitted to file an affidavit of defense within 20 days.

In re GREENBLATT.

(District Court, E. D. Pennsylvania. October 2, 1914.)

No. 4728.

BANKRUPTCY (§ 136*)—WITHHELD ASSETS—VALUE—FINDINGS—EVIDENCE.

On an application for attachment to compel a bankrupt to pay over the value of assets alleged to have been withheld, evidence *held* to show that \$2,502, the amount of such withheld assets, was excessive, and should be reduced to \$1,109.41.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

In Bankruptcy. In the matter of bankruptcy proceedings of David Greenblatt. On rule for attachment. Granted.

Joseph Sternberger, of Philadelphia, Pa., for trustee.

Bernard R. Cohn, of Philadelphia, Pa., for bankrupt.

DICKINSON, District Judge. The matters here involved were determined by the referee, from whose findings no appeal was taken. On these findings an order went out directing the bankrupt to turn over to the trustee the sum of \$2,502. The bankrupt has not complied with this order. The case regularly comes before us on a rule for an attachment. There has also been presented, or leave has been asked to file, a petition for a rule to show cause why the bankrupt should not be permitted to file a petition for a review *nunc pro tunc*.

The argument proceeded upon the basis that there was no occasion to disturb the findings of the referee unless they were erroneous. The case was therefore heard as if on a petition for a review. If the property rights of the bankrupt were alone concerned in the conclusions to be reached by the court in this case, the state of the record would be left as the bankrupt has permitted it to be made up. As, however, the personal liberty of the bankrupt may at least possibly depend upon the view the court takes of the whole case, we have felt called upon to review it with care. The disposition which would be made of the case ordinarily would be to send it back to the referee. As counsel, however, have asked us to dispose of the case upon its face as disclosed by the present record, we now do so to the extent which the state of the record permits.

A modification of the findings of the referee upon which he based the order for payment involves something of injustice to him, because he has not been given the opportunity to vindicate the correctness of his findings, as he doubtless could do. We have decided to make the modifications, however, because counsel for the trustee and for the creditors prefer that this should be done rather than to subject them to the delays which would follow the case going back to the referee.

We feel obliged to reduce the amount of the order, because the amount as found by the referee is inconsistent with the admissions of fact made at the argument. The basis of the order is the fact, as found by the referee, that the bankrupt had not turned over to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

trustee all the property belonging to him, or in his possession or under his control, at the time of the filing of the petition. There was no direct testimony of what these undisclosed assets consisted. The finding that there were such assets, however, is based upon the propositions that before the petition was filed the bankrupt was possessed of stock in trade valued to a certain amount, and that following this date he had made purchases of merchandise and added to his stock, out of which he had made certain sales and payments for expenses and to creditors, and that an account taken of these separate items, allowing for the difference between the wholesale and retail prices of the part of the stock sold, showed a balance, representing what the bankrupt had on hand at the time the petition was filed, and deducting from this balance the amount turned over to the trustee showed the undisclosed assets which the bankrupt had retained.

The pertinent dates are these: The petition was filed March 3, 1913, and a receiver was appointed four days later. The appraisal of the property, which came into the possession of the receiver and afterwards the trustee, showed a value of \$957.57. A date which is indefinitely fixed, sometimes as September, and sometimes as September 1, 1912, is the starting point of all the calculations made by the several parties. The trustee tabulated the claim made as follows:

Value of stock at wholesale prices on hand.....	\$ 659 00
Additions to time of bankruptcy.....	3,731 00
Total to be accounted for.....	<u>\$4,390 00</u>
Expenses paid.....	<u>1,420 00</u>
Balance unaccounted for.....	\$2,970 00

The referee adopted this method of reaching the amount for which the order should go out, changing it only in the respect that he found the expenses to have been \$1,888, instead of \$1,420. He therefore deducted \$468 from the balance struck, making the balance \$2,502, instead of \$2,970. He accordingly issued the order for the latter sum. On the face of this statement it would be clear that the referee had been misled in his calculation by the statement of the trustee. This statement ignores the fact that the bankrupt had turned over some property to the receiver. This must be deducted before we can find how much he did not turn over. In addition, certain goods were sold upon which the referee finds a profit, above wholesale prices, was received. A correct method of stating the account would, of course, add this profit. The referee finds the selling value of the stock on hand, with which the account starts, as \$500 or \$600. This is based upon the value given by the bankrupt himself. The daughter of the bankrupt puts it at \$500. The schedule of purchases after that date shows, as we understand the corrected amount to be, \$3,479.25. The goods sold were at an enhanced price of 25 per cent. The amount sold was \$2,639, and the gross profits, or amount received in excess of the wholesale price, was \$659. The referee finds the expenses to have been \$1,888. The debts paid are shown by the schedule to have been \$190.84. The value of the stock turned over to the receiver at

wholesale prices the referee finds to have been \$1,400. These figures, tabulated in the form of a statement, result in this:

Value of stock on hand at wholesale price.....	\$ 450 00
Additional purchases.....	3,479 25
Total stock.....	\$3,929 25
Stock turned over to the receiver.....	1,400 00
Stock unaccounted for.....	\$2,529 25
Profits on stock sold.....	659 00
Total to be accounted for.....	\$3,188 25
Expenses paid.....	\$1,888 00
Debts paid.....	190 84
	<hr/> 2,078 84
Balance to be accounted for.....	\$1,109 41

Delving into this record in search of the facts is too much of a leap in the dark to permit any one to be satisfied with the results, but the above would seem to be the best fruits of the effort to get at the facts. Its substantial correctness has some confirmation in the fact that it approximates the value of stock sold and thus accounts for it.

The only disposition we can make of the case without sending it back to the referee is that the order should be modified, by reducing the amount from \$2,502 to \$1,109.41. If this is acceptable to counsel, a formal order to this effect may be entered, and the petition for leave disposed of so as to make the record conform. If the modified figures are not acceptable to counsel, the case may be set down for a rehearing, and it will then be disposed of at bar.

IN RE TAUNTON.

(District Court, E. D. New York. September 24, 1914.)

BANKRUPTCY (§ 410*)—DISCHARGE—TIME FOR FILING APPLICATION.

A court of bankruptcy cannot, on a *nunc pro tunc* order, extend the statutory period for filing an application for discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 694; Dec. Dig. § 410.*]

In Bankruptcy. In the matter of Charles Taunton, bankrupt. On motion. Denied.

Arthur J. Westermayr, of New York City, for bankrupt.
Bruce R. Duncan, of Brooklyn, N. Y., for trustee.

CHATFIELD, District Judge. The action in equity resulted in a decree which, so long as it stands, makes *res adjudicata* the question as to whether the bankrupt has done an act which would prevent his discharge. He could, therefore, not obtain a discharge, even if application had been made, but must actually pay the debts in order to wipe them out.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

No application was ever made in the bankruptcy proceedings for a discharge within 18 months, and the court cannot, by a *nunc pro tunc* order, extend the statutory period, even though in the equity case the time within which to apply for discharge was considered. But, as it would be futile, no reason exists for any attempt to evade the statute.

Motion denied.

In re CONSUMERS' ALBANY BREWING CO.

(District Court, N. D. New York. October, 1914.)

BANKRUPTCY (§ 249*)—CORPORATION—ORDER AUTHORIZING RECEIVER TO BORROW MONEY TO CONTINUE BUSINESS—PETITION FOR MODIFICATION.

An application was made by one claiming to be a bondholder of a bankrupt brewing company for modification of an order authorizing the receiver to borrow money and continue the business, deemed necessary by practically all creditors, including bondholders, to preserve the value of the property. The ownership of any bonds by petitioner was denied. *Held*, that the court would not pass on the application until the question of such ownership was determined after a hearing.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 347; Dec. Dig. § 249.*]

In Bankruptcy. In the matter of the Consumers' Albany Brewing Company, bankrupt. On motion by Samuel Manges to modify order allowing the receiver herein to borrow money and issue certificates of indebtedness necessary to carry on and protect and preserve the property of the alleged bankrupt. Referred, for determination of preliminary question.

Leonard Bronner, of New York City (Muhlfelder & Ilch, of Albany, N. Y., of counsel), for the motion.

Leopold Minkin, of Albany, N. Y., and H. D. Bailey, of Troy, N. Y., for receiver.

Tracey, Cooper & Townsend, of Albany, N. Y., for First Nat. Bank.

Howard Hendrickson, of Albany, N. Y., for bankrupt.

W. E. Woollard, of Albany, N. Y., for certain bondholders.

R. J. Le Boeuf, of Albany, N. Y., for trustee under mortgage.

RAY, District Judge. The plant and real property of the bankrupt is mortgaged to secure an issue of bonds. The Albany Trust Company is the trustee under such mortgage. More than 90 per cent., or about that, of the bondholders consented to the order made, and desire it to remain in force, and at a meeting of creditors, including bondholders, duly called by the referee, it was unanimously voted to continue the business for nine months. The creditors have confidence in the receiver, who was selected by the court at the suggestion of a large number of them.

The order as made seems to be absolutely essential to the protection and preservation of the estate, and, while the trustee under the mortgage did not assent thereto, it did not, represented by counsel, oppose it, except formally, so as to protect the bondholders not represented

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

before the court at the time. The issue of bonds authorized was \$350,000. Of the bonds issued \$344,500 are now outstanding. Manges, who asks a modification of the order made by this court, claims to own about \$18,000 or \$20,000 of these outstanding bonds. The creditors, other bondholders, and the bankrupt, and also the receiver, deny that he owns such bonds, or any of them. If he does not, he has no interest herein or right to make this motion. Other questions are raised, but before taking action it seems to the court that it should be determined whether or not Manges owns the bonds which he claims to own. This the court will not determine on the affidavits and petitions presented.

There will be an order referring it to Hon. Edwin A. King, as special master for the purpose, to take evidence offered by the respective parties, on due notice to all concerned, and report same to the court with all convenient speed, together with his findings of fact and conclusions of law, subject to confirmation by this court, as to whether or not said Manges owns any of the bonds referred to and if so how many.

There will be an order accordingly.

In re SNYDER.

(District Court, M. D. Pennsylvania. June, 1914.)

BANKRUPTCY (§ 198*)—LIENS OBTAINED THROUGH LEGAL PROCEEDINGS—EX-EMPT PROPERTY.

Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), which makes null and void all levies or other liens obtained through legal proceedings against an insolvent within four months prior to his bankruptcy, is limited to property of the bankrupt estate, and does not apply to exempt property, which cannot be administered as a part of such estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 289, 296-316; Dec. Dig. § 198.*]

In Bankruptcy. In the matter of John Henry Snyder, bankrupt. On rule to show cause why the sheriff should not be enjoined from selling exempt property of the bankrupt. Rule discharged.

M. C. Rhone and J. Fred Katzmaier, both of Williamsport, Pa., for bankrupt.

H. G. Troxell, of Williamsport, Pa., for sheriff.

WITMER, District Judge. Bankrupt was adjudicated March 19, 1914, after levy on execution of all his personal property. A restraining order was also then obtained, and proceedings on execution stayed. On representation of plaintiff in the writ that in his judgment obtained bankrupt had waived the right to his exemption, the restraining order was modified April 13, 1914, permitting the sheriff to proceed against the property set aside for the bankrupt. On April 20, 1914, it appearing that the exemption was not to be confirmed until nine days there-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

after, and on the representation that plaintiff had acquired no lien upon such exempt property by reason of his execution, obtained through legal proceedings while petitioner was insolvent and within four months immediately prior to the filing of the petition in bankruptcy, the proceedings were stayed, and a rule was granted to show cause why the restraining order, as originally entered, should not be reinstated.

Upon argument it was submitted that the property set aside by the trustee, and attempted to be sold by the sheriff, as the bankrupt's exemption, was confirmed by the referee April 29, 1914. It is the opinion of the court that the provision of section 67f of the Bankruptcy Act, that levies, liens, etc., obtained through legal proceedings within four months prior to the filing of a petition in bankruptcy, shall be deemed null and void, is limited to the bankrupt estate. As to the exempt property, which is not administered as any portion of such bankrupt estate, the provision does not take effect. The bankruptcy court is, in any event, not concerned with it after the same is set aside for the bankrupt.

The injunction is vacated, and the rule is discharged.

MEMORANDUM DECISIONS

AMERICAN BONDING CO. OF BALTIMORE v. UNITED STATES, for Use of CHALLIS et al. (Circuit Court of Appeals, Third Circuit. October 9, 1914.) No. 1862. In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge. Action at law by the United States, for use of David W. Challis, David A. Challis, and Fred Challis, partners doing business as D. W. Challis & Sons, with Reuben Brewer, George R. McDonald, and others as interveners, against the American Bonding Company of Baltimore. Judgment for plaintiffs and interveners, and defendant brings error. Modified and affirmed, as per stipulation of parties. Gifford K. Wright, of Pittsburgh, Pa., for plaintiffs in error. J. M. Sherwin, of Erie, Pa., for defendants in error. Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of Pennsylvania, and was argued by counsel. On consideration whereof, and in conformity with the stipulation of counsel to-day filed, it is now here ordered and adjudged by this court that the judgment of the said District Court be and the same is hereby affirmed, except as to the claims of the Crane Company and the H. W. Johns-Manville Company, thus reducing the amount of the judgment entered in the said District Court to the sum of \$4,265.98; the costs in this court to be divided equally between the parties hereto.

BUCKSPORT NAT. BANK v. CONNERS. In re FREDERICK. (Circuit Court of Appeals, First Circuit. October 14, 1914.) No. 1072. Appeal from the District Court of the United States for the District of Maine; Clarence Hale, Judge. Suit in equity by Charles P. Connors, trustee of John I. Frederick, bankrupt, against the Bucksport National Bank. Decree for complainant, and defendant appeals. Affirmed. For opinion below, see 214 Fed. 847. Raymond Fellows, of Bangor, Me., and Frank Fellows, of Portland, Me.

(Oscar F. Fellows and Fellows & Fellows, all of Bangor, Me., on the brief), for appellant. Bertram L. Fletcher, of New York City (J. Richard Larkin, of Boston, Mass., on the brief), for appellee. Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PER CURIAM. The facts in this case are fully stated in the opinion of the learned judge of the District Court, and the law carefully applied therein to those facts. It is not necessary for us to reiterate what is there stated. We all think that the findings of the learned judge therein, and the reasoning upon which his conclusions are based, are correct. The decree of the District Court is affirmed, with costs for the appellee.

C. A. DUNHAM CO. v. WARREN WEBSTER & CO. (Circuit Court of Appeals, Third Circuit. September 14, 1914.) No. 1832. Appeal from the District Court of the United States for the District of New Jersey; Joseph Cross, Judge. Suit in equity by the C. A. Dunham Company against Warren Webster & Co. From a decree in favor of defendant, complainant appeals. Affirmed, on opinion of the District Judge. 206 Fed. 168. Robert W. Hardie, of New York City, for appellant. Francis T. Chambers, of Philadelphia, Pa., for appellee. Before BUFFINGTON and McPHERSON, Circuit Judges, and WITMER, District Judge.

PER CURIAM. The decree of the District Court is affirmed, upon the opinion of Judge Cross.

PADROSA v. SERRA OLIVEIRA & CO. (Circuit Court of Appeals, Fifth Circuit. October 29, 1914.) No. 2708. In Error to the District Court of the United States for the Southern District of Georgia; Wm. I. Grubb, Judge. Bolling Whitfield, of Brunswick, Ga., and Edw. S. Elliott, of Savannah, Ga., for plaintiff in error. Frederick T. Saussy, of Savannah, Ga., and Alexander Akerman, of Macon, Ga., for defendant in error. Before PARDEE, Circuit Judge, and NEWMAN and CALL, District Judges.

PER CURIAM. The trial judge was unquestionably right in holding that under the contract proved the delivery of the lumber contracted for was to be made at the ports of discharge in Cape de Verde Islands. The judgment of the District Court is affirmed.

WATTS v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. October 29, 1914.) No. 2709. In Error to the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge. Stiles Hopkins, of Atlanta, Ga., for plaintiff in error. John W. Henley, Asst. U. S. Atty., of Atlanta, Ga., for the United States. Before PARDEE, Circuit Judge, and GRUBB and CALL, District Judges.

PER CURIAM. As no bill of exceptions was taken and allowed in the trial court, the only question on this writ of error is whether the count of the indictment under which the plaintiff in error was convicted is sufficient, and as to that we find that the objections urged by the demurrer were not well founded. Judgment affirmed.

ACTIESELSKABET INGRID et al. v. CENTRAL R. CO. OF NEW JERSEY et al. (Circuit Court of Appeals, Second Circuit. October 8, 1914.) No. 168. On petition for rehearing. Denied. For former opinion, see 216 Fed. 72, 132 C. C. A. 316. Before COXE and ROGERS, Circuit Judges, and MAYER, District Judge.

PER CURIAM. The petition for rehearing of this case must be denied. It is based upon the assumption that the court failed to consider whether or not the railroad company had complied with the regulations of the Interstate Commerce Commission respecting the transportation of explosives. It is true

that the matter referred to was not commented upon in the opinion rendered. That is true also of some other matters suggested in argument. But we did not consider it necessary to discuss them because we did not regard them as seriously involved in the case or affecting the conclusion which we had reached. It is conceded that in certain particulars the railroad company failed to observe all the regulations which the Interstate Commerce Commission had laid down. This court does not question the correctness of the doctrine that, when a ship is in actual violation of a statutory rule intended to prevent collisions, the burden rests upon the ship of showing, not merely that her fault might not have been one of the causes or that it probably was not, but that it could not have been. This court has followed that rule and applied it in collision cases. We are aware, too, that state courts have applied the same principle in cases where vehicles violate statutory rules or municipal ordinances regarding the use of highways, and an injury occurs contemporaneously with the violation. In a proper case it may be that this court might apply the same principle to a railroad violating the regulations prescribed by the Interstate Commerce Commission in a case where an explosion occurred while an explosive was in the possession of the carrier at the time the violation of the regulations took place. That principle, however, is not involved in the case at bar. Before that principle could be applied to this case it would be necessary to show that the particular explosion which destroyed the Ingrid was the explosion of dynamite which at the time of the explosion was in the possession of the railroad company. That fact was not made satisfactorily to appear. As we stated in our opinion it was impossible to say whether the dynamite which exploded first and destroyed the Ingrid was the dynamite which had been removed from the car to the Katherine W. and therefore had ceased to be in the possession of the railroad company, or whether it was the dynamite which had not been removed. The burden of showing that the dynamite which exploded and caused the destruction of the Ingrid was in the possession of the railroad company rested upon the plaintiff. If the burden had been met, and it had been made out that the dynamite was that which was in the possession of the railroad company, then and not before would it have been the duty of the latter to have removed the presumption of negligence which arose from its failure to conform to the regulations prescribed. As the members of the court are not divided in opinion, we are without authority to certify the case to the Supreme Court.